

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

Date of Order: 03.05.2016

Present: Shri D.S. Bains, Chairman
Shri S.S. Sarna, Member

**Review Petition No. 2 of 2016
in Petition No. 76 of 2015**

In the matter of: Review Petition in Petition No. 76 of 2015 against the Commission's Order dated 03.02.2016 filed by Garg Acrylics and others regarding restraining the respondents from issuing any demand of PLEC on the electricity purchased under Open Access during 6 P.M. to 10 P.M. in the TOD period i.e. from October 2016 onward.

AND

In the matter of: Punjab State Power Corporation Limited, The Mall,
Patiala-147001

....Petitioner

**Review Petition No. 3 of 2016
in Petition No. 77 of 2015**

In the matter of: Review Petition in Petition No. 77 of 2015 against the Commission's Order dated 03.02.2016 filed by Nahar Spinning Mills Limited regarding restraining PSPCL from issuing any demand of PLEC on the electricity purchased under Open Access during 6 P.M. to 10 P.M. in the TOD period.

AND

In the matter of: Punjab State Power Corporation Limited, The Mall,
Patiala-147001

....Petitioner

ORDER

1.0 The present review petitions have been filed by the Punjab State Power Corporation Ltd., Patiala seeking review of the Commission's separate Orders, both dated 03.02.2016 in petition No.76 of 2015 and petition no. 77 of 2015. As the pleadings & question of law in both the review petitions are common and same relief has been sought so this common Order will dispose of both the review petitions. The facts from review petition no. 2 of 2016 has been taken in this Order which are summarised as under:

- 1.1 While passing the Order in petition no. 1/2015 and petition no. 3/2015 restraining PSPCL for not charging ₹3/- per kVAh on power consumed under Open Access, the Commission has stated that there is no provision of ToD charges to be levied upon power consumed through Open Access during peak load hours as per Open Access Regulation. Further, the Commission also stated that there is no provision in the General Conditions of Tariff approved by the Commission for charging any additional charge/surcharge of ₹3/- per kVAh on the power purchased through open Access during peak load hours. However, contrary to this, in the staff paper issued on ToD tariff, Commission tried to achieve revenue neutrality by considering PLEC being recovered by PSPCL and replacement of PLEC with ToD Tariff.
- 1.2 The Commission in its Order dated 03.02.2016 in petition No.76 of 2015 has held that

“As per clause 15 of the General Conditions of Tariff read with para 7.3.3 of Tariff Order for FY 2014-15 and para 5.3.3 of Tariff Order for FY 2015-16, the peak load hours restrictions including PLEC, are not applicable to the consumers who have opted for ToD tariff as per the terms and conditions approved by the Commission. As such, there is no occasion to levy peak load hour exemption charges on such consumers even if such consumers bring open access power during this period. No differentiation between consumers using power exclusively from PSPCL and those availing open access also, has been made in the Tariff Orders for FY 2014-15 and FY 2015-16.

Since, no peak load hours restrictions are applicable for the consumers who have opted for ToD tariff from 1st October to 31st March of relevant financial year, as such, these consumers can draw power including open access power up to its sanctioned contract demand. The provision in the NOC being issued by PSTCL allowing open access consumers, who have opted for ToD tariff, to restrict its total drawl within sanctioned contract demand is perfectly in order and is in accordance with the provisions of ToD tariff regime as approved by the Commission, in the Tariff Orders for FY 2014-15 and FY 2015-16.”

The Commission accordingly set aside Memo No. 4983/87/DB-36 dated 08.12.2015 of PSPCL to the extent of levying of charges as prescribed in PR Circular No. 05/2013 from the petitioners and all other similarly placed consumers

who have opted for ToD tariff and brought open access power during peak load hours for the period from October, 2014 to March, 2015 and from October, 2015 onwards. PSPCL was further directed that in case, any amount on this account has been charged / recovered from any Open Access Consumer, the same shall be refunded by PSPCL along with interest as per section 62(6) of the Electricity Act, 2003, in the next bill of such consumer.

- 1.3 PSPCL sought review of the Orders passed against petition no. 76/2015 because the Commission has overlooked certain basic provisions of the Tariff Orders for FY of 2014-15, FY 2015-16 and Open Access Regulations, 2011. The Orders passed by the Commission have adversely altered the revenue neutrality of the Tariff Orders of the respective years and thereby caused revenue loss to PSPCL besides violating section 62(3) of the Electricity Act, 2003 by showing undue preference to a section of LS consumers as far as tariff to be paid during peak load hours is concerned.
- 1.4 Tariff Orders for FY 2014-15 and FY 2015-16 have given choice to the LS category of Industrial consumers to either pay peak load exemption charges (PLEC) or ToD charges during peak load hours. Those LS consumers who opt for ToD tariff have been allowed night rebate of ₹1.5 per kVAh during the year 2014-15 and ₹1.0 per kVAh during the year 2015-16.

- 1.5 The Commission has approved peak load hours restrictions to be imposed on LS category of industrial consumers during the FY 2014-15 and FY 2015-16 which restrict these consumers to use only part of their sanctioned load without payment of any additional charges. However, a consumer shall be entitled to use additional load during peak load hours by paying peak load exemption charges as approved by the Commission.
- 1.6 The peak load hours restrictions are also applicable on drawl of Open Access power as per Clause No. 18.2(g) of Open Access Regulation which states as under:
- “18.2(g):- During peak load hour restrictions, the open access customers shall restrict their total drawl including open access power to the extent of the peak load exemption allowed”.*
- 1.7 The LS category consumers are paying peak load exemption charges on Open Access consumption since the year 2011 and even during Non ToD period from 1st April to 30th September during the FY 2014-15 and FY 2015-16. The para 7.3.15 of Tariff Order for the FY 2014-15 and para 5.3.3 of the Tariff Order for FY 2015-16 have replaced peak load exemption charges with ToD charges. The Commission has not approved separate terms and conditions for LS consumers who opt for ToD tariff except for ToD charges as mentioned above.

- 1.8 The Commission has imposed peak load hours restrictions during the FY 2014-15 and FY 2015-16 including restrictions on drawl of Open Access power during peak load hours as per clause No. 18.2(g) of Open Access Regulations, 2011. Nowhere, it has been provided that peak load hour restrictions shall not be applicable on consumers who have opted ToD Tariff. Therefore, the NOC being issued by SLDC to Open Access consumers, who have opted for ToD tariff allowing them to use load up to contract demand, is the violation of provisions of Tariff Orders for FY 2014-15 and FY 2015-16 and open Access Regulations. The Commission has taken NOC issued by SLDC as one of the reason to decide the matter in the absence of detailed terms and conditions regarding regulatory measures for Open Access consumers opting for ToD Tariff.
- 1.9 The Order passed in petition no. 76 of 2015 has created two categories of LS consumers with respect to Tariff to be charged during peak load hours. The letter and spirit of section 62(3) of Electricity Act, 2003 has been violated by showing undue preference in respect of tariff to be charged during peak load hours for Open Access LS consumers who have opted ToD tariff vis-a-vis other LS consumers who have not opted for ToD tariff and also non Open Access LS consumers who have opted for ToD tariff since these consumers pay either PLEC or ToD on total consumption during peak load hours.

Further undue preference has been shown to Open Access LS consumers who have opted ToD tariff by not restricting their drawl during peak load hours including Open Access drawl and allowing them to draw load up to sanctioned contract demand in spite of the fact that the Commission has approved peak load restrictions during FY 2014-15 and FY 2015-16. Moreover these peak load hour restrictions do not differentiate between PSPCL or Open Access drawls instead are applicable on total drawls during peak load hours.

1.10 A large number of Open Access Consumers are continuous process consumers and are obtaining continuous process status as per the policy approved by the Commission and have submitted self declaration form with the undertaking that they will maintain certain minimum load during peak load restriction hours and accordingly based upon their commitments they are required to be charged for committed minimum PLEC during peak load hours. The consumer wise detail depicts that continuous process consumers who are availing Open Access shall not pay PLEC on the committed continuous process load allowed during peak load hours as per Orders passed by the Commission in petition No. 76 of 2015.

1.11 PSPCL has prayed that:

(a) The NOC being issued by SLDC allowing Open Access Consumers to draw power up to sanctioned contract demand be set aside.

- (b) To approve either PLEC as contained in PSPCL Memo No. 4983/87 dated 08.12.2015 or ToD charges to be levied on Open Access draws during peak load hours to maintain parity among LS consumers and to ensure recovery of full tariff as provided in Tariff Orders for FY 2014-15 and FY 2015-16.
- (c) Allow recovery of PLEC charges from continuous process consumers for total draws including Open Access during peak load hours.

2.0 The Review Petition was taken up for admission on 11.04.2016. After hearing the learned Counsel and officers on behalf of PSPCL, the Commission vide Order dated 18.04.2016 decided to reserve the Order on admission of the petition.

3.0 Findings and Order of the Commission:

- 3.1 The brief facts giving rise to this review petition are as under:
- i. The Commission in the Tariff Order for FY 2014-15 allowed the Large Supply consumers to either continue under Peak Load Exemption Charges (PLEC) regime or opt for ToD tariff regime from 1st October, 2014 to 31st March, 2015 as per the terms and conditions approved by the Commission in the Tariff Order. Similar provision was also made in the Tariff Order for FY 2015-16. Clause 15.2 of the General Conditions of Tariff annexed with the Tariff Order provides that consumers can opt for ToD tariff instead of peak load hour restrictions which implies that if a consumer opt for ToD tariff as per terms and conditions approved by the

Commission then peak load hour restrictions including PLEC shall not be applicable to such consumers.

- ii. The Commission also determined various charges which are payable by consumers buying power through Open Access in accordance with PSERC (Terms and Conditions for Intra-State Open Access) Regulations 2011, as amended from time to time. PSPCL of its own started charging ₹3 per unit extra on power drawn during peak load hours through open access from those consumers who have opted for ToD tariff regime instead of PLEC from Oct. 2014 onwards.
- iii. The Commission in separate Orders dated 20.05.2015 in petition no.1 of 2015 filed by SIEL Chemical Complex and petition no. 3 of 2015 filed by Nahar Spinning Mills Ltd. has held that ₹3/- per unit charged by the PSPCL on the Open Access power drawn during peak load hours, is not permissible and extra ₹3/- per unit under ToD tariff regime is applicable only on the power drawn from the PSPCL. It was further held that as per the Open Access Regulations, the Open Access consumers are liable to pay only the transmission charges, scheduling and system operation charges, wheeling charges, cross subsidy surcharge and additional surcharge on the power drawn through Open Access. Thus there is no provision for ToD charges on power purchased through Open Access during peak load hours and accordingly PSPCL was directed to refund the amount charged from the Open Access consumers in the subsequent energy bills. PSPCL filed Review Petitions No.3

of 2015 and 4 of 2015, which were dismissed by the Commission vide separate Orders both dated 24.08.2015. However, PSPCL failed to refund the amount as directed by the Commission. Aggrieved from non-compliance of the Orders of the Commission, Nahar Spinning Mills Ltd. filed petition no.63 of 2015 under Section 142 and 146 of the Electricity Act, 2003. During proceedings, PSPCL filed a letter dated 10.12.2015 wherein it was confirmed that PSPCL has decided to refund the amount charged from the Open Access Consumers from 1st October, 2014 to 31st March, 2015 and as nothing survived in the petition so the same was disposed of.

- iv. However, Garg Acrylics Ltd. and others through petition No.76 of 2015 and Nahar Spinning Mills Ltd. through petition no. 77 of 2015 brought out that PSPCL has issued an internal communication dated 08.12.2015 to levy PLEC as per PR Circular No.5/2013 on the consumers who have opted for ToD tariff regime during FY 2014-15 and FY 2015-16 and brought power through open access during peak load hours. The same was challenged with the prayer to set aside the letter dated 08.12.2015 being illegal, unjustified and arbitrary in the eyes of law and against the Tariff Orders passed by the Commission for FY 2014-15 and FY 2015-16.
- v. The Commission in separate Orders both dated 03.02.2016 in petition No. 76 & 77 of 2015 set aside the Memo No.4983/87/DB-36 dated 08.12.2015 of PSPCL to the extent of levying of PLEC on the consumers who have opted for

ToD tariff and bought Open Access power during peak load hours for the period 1st October, 2014 to 31st March, 2015 and from 1st October, 2015 onwards and directed PSPCL that in case any amount on this account has been charged/recovered to/from any Open Access consumer, the same shall be refunded by the PSPCL along with interest as per Section 62(6) of the Electricity Act, 2003, in the next bill of such consumers.

- 3.2 PSPCL has filed the present review petition against Commission's Order dated 03.02.2016 in petition No. 76 of 2015 on the following grounds:
- i. The Commission has overlooked the various provisions of the Tariff Orders of FY 2014-15 and FY 2015-16 and Open Access Regulations, 2011 while passing the Order dated 03.02.2016 in petition no.76 of 2015.
 - ii. The Commission has not appreciated the provisions of regulations 18(2)(g) and 26(1) of the PSERC (Open Access) Regulations, 2011 read with Clause 15 of the General Conditions of Tariff, and has violated Section 62(3) of the Electricity Act, 2003.
 - iii. The Large Supply consumers drawing power through Open Access should either pay ToD Tariff or PLEC during peak load hours and not levying either ToD Tariff or PLEC on Open Access power will unjustifiably enrich the Open Access consumers at the cost of other PSPCL consumers.

- iv. The Order passed by the Commission have adversely altered the revenue neutrality to the Tariff Orders for the respective years and thereby caused revenue loss to PSPCL.
- v. The continuous process consumers who were required to be charged PLEC during peak load hours for certain minimum load committed by such consumers during peak load restrictions but such consumers under ToD regime may not pay PLEC on the committed continuous process load allowed during peak load hours as per Order passed by the Commission in petition no.76 of 2015.
- vi. PSPCL in the review petition made the following prayers
 - a. The NOC being issued by SLDC allowing Open Access Consumers to draw power up to sanctioned contract demand be set aside.
 - b. To approve either PLEC or ToD charges to be levied on Open Access draws during peak load hours
 - c. Allow recovery of PLEC charges from continuous process consumers for total draws including open access during peak load hours.

3.3 Let us first examine the provisions relating to powers of the Commissions to review its own Order and grounds on which such review is permissible under law. The power to review the decisions, directions and orders by the Commission has been provided in Regulation 64 of PSERC (Conduct of Business) Regulations, 2005 which reads as under:

“ 64. Review of the decisions, directions and orders:-

- (1) Any person aggrieved by a decision or order of the Commission, from which no appeal is preferred or allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decision/order was passed by the Commission or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, may apply for review of such order within 60 days of the date of decision/ order of the Commission.
- (2) An application for review shall be filed in the same manner as a petition under Chapter II of these Regulations.
- (3) The application for review shall be accompanied by such fee as may be specified by Commission.
- (4) When it appears to the Commission that there is no sufficient ground for review, the Commission shall reject such review application.
- (5) When the Commission is of the opinion that application for review should be granted, it shall admit the same and direct to issue notice to the concerned party (ies).
- (6) The review application / petition filed before the Commission shall be dealt with as expeditiously as possible and endeavour shall be made to dispose of the Review finally within One Hundred twenty days (120 days) from the date of receipt of the Review in the Registry and 90 days from the date of admission of the review, whichever is later. In case of any delay in disposal of Review Petition, the reasons for the same shall be recorded.
- (7) No application for review shall be entertained unless it is supported by an affidavit as per Regulation 10.

(8) The quorum for the meeting of the Commission to review any previous decision taken by the Commission shall be Chairperson and all Members.

(9) When an application for review of any judgment or order has been made and disposed of, no further application for review shall be entertained in the same matter.”

Regulation 64(1) specifies the grounds on which review can be sought by a person aggrieved by the decision or the Order of the Commission and the grounds are:

- i. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the person or could not be produced by him at the time when the decision or order was passed by the Commission or
- ii. Mistake or error apparent on the face of record or
- iii. For any other sufficient reason.

Thus the scope of an application for review is restricted and can be exercised only within the limits prescribed above. The grounds mentioned in regulation 64 (1) of Conduct of Business Regulations extracted above are akin to the powers of the Civil Court to review its order/decision under Section 144 CPC read with Order 47 rule 1 of the CPC, which provides that:

Order 47 Rule 1

(1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which, no appeal has been preferred.

(b) By a decree of order from which no appeal is allowed or

*(c) By a decision on a reference from a court of Small Causes, and who, **from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of record, or for any other sufficient reason,** desires to obtain a review of the decree passed of order made against him, may apply for a review for judgment to the court which passed the decree or made the order. [Emphasis Supplied]*

The Hon'ble Supreme Court has held in many cases that the power to review can be exercised only to correct a patent error which strike one on mere looking at the record and does not require any elaborate argument. So, a Commission can review its Order on discovery of new or important matters or evidence or if it is shown that Orders sought to be reviewed suffer from some mistake/error apparent on face of record or other reasons which in the opinion of the Commission is sufficient for reviewing the earlier Order/decision.

The Hon'ble Supreme Court of India in case of State of West Bengal V/s Kamal Sengupta & others (2008) 8 SCC612, has held that:

14. *Where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court earlier.*

15. *The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law. In any case, while exercising the power of review, the concerned Court/Tribunal cannot sit in appeal over its judgment/decision.*

The words "any other sufficient reasons" must mean "a reason sufficient on grounds, or at least analogous to those specified in

the rule". In *Thungabhadra Industries vs Govt. of AP* [AIR 1964 SC 1372}, it was held by Hon'ble Supreme Court that a review is by no means an appeal in disguise whereof an erroneous decision can be corrected.

In *Parsion Devi and Others vs. Sumitri Devi and others* [1987 (8) SCC 715], it was held by Hon'ble Supreme Court that *"An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".*

The Hon'ble Supreme Court of India in case of *State of West Bengal V/s Kamal Sengupta & others* (2008) 8 SCC612 laid down following principles regarding review jurisdiction in para 28 of the judgement:

28. *The principles which can be culled out from the above noted judgments are:*
 - i. *The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a*

Civil Court under Section 114 read with Order 47 Rule 1 of CPC.

- ii. The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.*
- iii. The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.*
- iv. An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).*
- v. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
- vi. A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger bench of the Tribunal or of a superior Court.*
- vii. While considering an application for review, the Tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
- viii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The part seeking review has also to show that such matter or evidence was not within its*

knowledge and even after the exercise of due diligence, the same could not be produced before the Court/Tribunal earlier.

- 3.4 Now in the light of the regulation 64(1) of PSERC (Conduct of Business) Regulations, 2005 and the above mentioned principles of law laid down by Hon'ble Supreme Court for invoking review jurisdiction of the Commission, let us examine the grounds raised in the review petition for seeking review of the Orders of the Commission both dated 03.02.2016 in petition no. 76 of 2015 and petition no. 77 of 2015.

At the risk of repetition, it needs to be mentioned here that the petitioners in petition no. 76 & 77 of 2015 and petition no. 77 of 2015 challenged the Memo No. 4983/87/DB-36 dated 08.12.2015 of PSPCL vide which the distribution licensee unilaterally imposed PLEC on the open access power brought by the consumers who have opted for ToD tariff regime from back date i.e From FY 2014-15 and prayed to set it aside being illegal, arbitrary, against the Act and the Open Access Regulations. The Commission not only examined the legality of the instructions issued by PSPCL without the approval of the Commission but also the merits of the case after detailed examination of law. In para 13 of the Order dated 03.02.2016, the Commission discussed all the arguments advanced by the licensee for levying PLEC on the consumers who have opted for ToD tariff and brought Open Access power during peak load hours. The review petitioner has only reiterated its pleadings and arguments for reconsideration of the settled issues

which can actually be taken in Appeal before the appropriate Tribunal/court and not in review as explained hereinafter.

The review petitioner mentioned that the Commission has overlooked certain basic provisions of the Tariff Orders for FY 2014-15 and FY 2015-16 and Open Access Regulations, 2011 resulting in revenue loss to PSPCL. The review petitioner then goes on to buttress his claim by relying on regulation 18.2(g) of Open Access Regulations read with clause 15 of the General Conditions of Tariff, para 7.3.5 of the Tariff Order for FY 2014-15 and para 5.3.3 of Tariff Order for FY 2015-16. These issues have been thoroughly discussed from page 49 to 59 under para 13 of the Commission's Order dated 03.02.2016 and relevant portion of the same is reproduced below:

“The regulation 18(2)(g) starts with the words ‘During peak load hour restrictions’, which implies that the ibid regulation shall become operative only if there are peak load hours restrictions. The regulation then proceeds further to lay down that in case of peak load hours restrictions, the Open Access customer shall restrict his drawal including open access power to the extent of peak load exemption allowed. It means that in case there is no peak load hours restriction during any period of the year, there will be no restriction for drawal of power including open access power up to sanctioned contract demand.

Now peak load hours restrictions shall be as may be approved by the Commission. The terms and conditions for imposition of peak load hour restrictions/PLEC or Time of the Day (ToD) tariff are governed by General Conditions of Tariff and the Tariff Order for

the relevant year. Clause 15 of the General Conditions of Tariff annexed to Tariff Order for FY 2014-15 as well to Tariff Order for FY 2015-16 reads as under:

“15. Levy of Peak Load Exemption Charges/ToD Tariff

15.1 All Large Supply consumers and Medium Supply consumers (except essential services) having sanctioned load of 50 kW or more, **may be** subjected to Peak Load Hours Restrictions, as declared by the distribution licensee from time to time **with the approval of the Commission**. During peak load hours restrictions, the consumers shall be allowed to use only part of their sanctioned load without payment of any additional charges. However, a consumer shall be entitled to use additional load during peak load hours restrictions, which will be governed by **such conditions and payment of Peak Load Exemption Charges (PLEC) as approved by the Commission**. PLEC shall not be adjustable against MMC and will also be exclusive of electricity duty, cesses, taxes and other charges levied by the Government or other competent authority.

15.2 The consumers covered under Peak Load Hours instructions as per 15.1 above may opt to be covered under ToD Tariff **on such terms and conditions as specified by the Commission instead of Peak Load Hours instructions.**”[Emphasis supplied]

Thus, clause 15.1 of the General Conditions of Tariff is clear that Large Supply & Medium Supply industrial consumers may be subjected to peak load hour restrictions as approved by the Commission. The word ‘**may**’ in the opening sentence clearly

*indicate that it is not necessary and mandatory that these industrial consumers shall be subjected to peak load hour restrictions throughout the year. The opening sentence ends with the words “with the approval of the Commission” which means that the policy regarding imposition of peak load hours restrictions for a particular year is to be decided and approved by the Commission, which inter-alia depends on various factors viz demand-supply gap, availability of adequate transmission & distribution capacity for transfer of power during different periods of the year and also on techno-economic considerations after examination of the data submitted by the licensee. In case, the Commission decides to impose peak load hours restrictions, then clause 15.1 of the General Conditions of Tariff further provides that in such a case, the consumers shall be entitled to use additional load during this period on payment of PLEC and as per the conditions approved by the Commission. So, PLEC shall be payable only if peak load hours restrictions are imposed by the Commission on a class of consumers during a particular period of the year. Further, clause 15.2 of the General Conditions of Tariff provides that consumers can opt for ToD tariff **instead of** peak load hours restrictions on such terms and conditions as approved by the Commission. The word ‘**instead of**’ makes it abundantly clear that if a consumer opts for ToD tariff as per the terms & conditions approved by the Commission then the peak load hours restrictions, which include payment of PLEC, shall not be applicable to such consumers.*

*The terms and conditions for imposition of ToD tariff or PLEC have been provided in the Tariff Orders for the relevant years. The Commission in para 7.3.15 of the Tariff Order for FY 2014-15 approved the Time of Day (ToD) tariff on payment of PLEC for Large Supply and Medium Supply industrial consumers-----
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It is evident from the tables under para 7.3.15 (i)(b) that during FY 2014-15, the applicable tariff for Large Supply industrial consumers who opted for ToD tariff during the time period of 06.00 PM to 10.00 PM is normal tariff plus ₹3/- per kVAh, whereas for consumers who do not opt for ToD tariff, the applicable tariff during the same period is normal tariff plus PLEC during peak load hours as existed prior to FY 2013-14. So, it is very much clear that during peak load hours, only ₹3/- per kVAh over and above the normal Tariff is to be charged from the consumers who opted for ToD tariff, whereas for consumers who did not opt for ToD tariff, PLEC instead of ₹3/- per kVAh is chargeable, from 1st October, 2014 to 31st March, 2015. The Tariff Order nowhere provides that PLEC can be imposed on consumers who have opted for ToD tariff and also brought open access power during peak load hours. PSPCL by issuing the instructions vide letter dated 08.12.2015 has amended the Tariff Order at their own level, which is illegal and incorrect.

Similarly, the Commission laid down the terms and conditions for ToD tariff and levy of PLEC in para 5.3.3 of the Tariff Order for FY 2015-16. The Commission approved the ToD

tariff for the period 1st October, 2015 to 31st March 2016, on optional basis-----

Again, during 1st Oct. 2015 to 31st March 2016, the consumers who opted for ToD Tariff are required to pay normal tariff for FY 2015-16 plus ₹3/- per kVAh during peak load hours from 06.00 PM to 10.00 PM, whereas the consumers who did not opt for ToD tariff are required to pay normal tariff for FY 2015-16 plus PLEC as existed prior to FY 2013-14. From April, 2015 to September, 2015, all the consumers are required to pay normal tariff plus PLEC, as approved for FY 2013-14 during the peak load hours falling between 06.00 PM to 10.00 PM.

Thus, from the above, we conclude that since as per clause 15 of the General Conditions of Tariff read with para 7.3.3 of Tariff Order for FY 2014-15 and para 5.3.3 of Tariff Order for FY 2015-16, the peak load hours restrictions including PLEC, are not applicable to the consumers who have opted for ToD tariff as per the terms and conditions approved by the Commission. As such, there is no occasion to levy peak load hour exemption charges on such consumers even if such consumers bring open access power during this period. No differentiation between consumers using power exclusively from PSPCL and those availing open access also, has been made in the Tariff Orders for FY 2014-15 and FY 2015-16.

The review petitioner further argued that not levying either the ToD tariff or PLEC on the open access power will unjustifiably enrich the open access consumers at the cost of other consumers and

thus section 67(6) of the Act has been violated. This issue has also been discussed from page 61 to 63 of the Order and reads as under:

“PSPCL has also repeatedly asserted that LS consumers have to pay either PLEC or ToD tariff for the power consumed during peak load hours including open access power since PLEC or ToD tariff serve the same purpose. PSPCL argued that not levying either PLEC or ToD tariff on open access power, according to PSPCL, shall unjustifiably enrich the open access consumers at the cost of other consumers. It appears that PSPCL at their own level had decided to either impose ToD tariff on open access power purchased by the consumers or levy PLEC. Since the Commission in its Order dated 20.05.2015 in Petition No. 01 of 2015 declared the levy of ₹3/- per kVAh on the power purchased through open access during peak load hours as wrong and directed PSPCL to refund the amount so recovered from the consumers so as to block the implementation of Commission’s Order, PSPCL imposed PLEC charges on such consumers. The Commission observes that PSPCL through its internal communication dated 08.12.2015 has created a new category of consumers in the Tariff Orders for FY 2014-15 and FY 2015-16 and imposed additional charges which have not been approved by the Commission in these Tariff Orders as explained above. PSPCL letter dated 08.12.2015 states that “ it has been decided to levy following charges---- on the consumers who opted for ToD tariff and brought open access power during peak load hours”. The Commission in the Tariff Orders for FY 2014-15 & FY 2015-16 has approved the tariff structure for the

period from 1st Oct to 31st March for LS industrial consumers who opt for ToD tariff and those who do not opt for ToD tariff. However, PSPCL at their own level created a new category of consumers who opt for ToD tariff and brought open access power and imposed additional charges. Neither such category was approved by the Commission in the Tariff Orders for FY 2014-15 or FY 2015-16 nor approved the PLEC charges on such consumers. Only on this account, the PSPCL letter dated 08.12.2015 can be struck down. In case the licensee requires any review of the Orders of the Commission, it should have approached the Commission rather than imposing any charges at its own level causing avoidable harassment to the consumers. The Commission has been advising the licensee to submit proposal for levy of “additional surcharge” on the Open Access consumers to meet the fixed cost arising out of obligation to supply as per section 42(2) of the Act and regulation 27 of the Open Access Regulations, 2011, but instead of pursuing the case for levy of charges which are admissible under the law, PSPCL seems to be pleading for charges which are not in accordance with the law.”

PSPCL has further mentioned in the review petition that the Commission has made NOC issued by SLDC to open Access consumers, who have opted for ToD tariff, allowing them to use load up to contract demand, as one reason to decide the matter, which is incorrect. The Commission has held that if a consumer opts for ToD tariff as per the terms & conditions approved by the Commission then the peak load hours restrictions, which include payment of PLEC, shall not be applicable to such consumers and

is legible to use power up to its sanctioned contract demand. The relevant part on page 59 & 60 of the Order reads as under:

“Since, no peak load hours restrictions are applicable for the consumers who have opted for ToD tariff from 1st Oct. to 31st March of relevant financial year, as such, these consumers can draw power including open access power up to its sanctioned contract demand. The provision in the NOC being issued by PSTCL allowing open access consumers, who have opted for ToD tariff, to restrict its total drawal within sanctioned contract demand is perfectly in order and is in accordance with the provisions of ToD tariff regime as approved by the Commission, in the Tariff Orders for FY 2014-15 and FY 2015-16.”

PSPCL in the review petition made new prayers viz

- I. that the NOC being issued by SLDC allowing Open Access Consumers to draw power up to sanctioned contract demand be set aside
- II. to approve either PLEC or ToD charges to be levied on Open Access drawls during peak load hours
- III. allow recovery of PLEC from continuous process consumers for total drawls including open access on the committed continuous process load during peak load hours during the period ToD tariff is applicable.

The first two prayers have already been answered by the Commission with detailed reasoning in the Order dated 03.02.2016 and can only be challenged in Appeal before the appropriate Tribunal/Court. It is a settled law that while exercising the powers

of review, the court cannot sit in Appeal over its judgment/order. The third prayer is irrelevant whereas levy of PLEC on Open Access power in case of continuous process industry is concerned. In case the distribution licensee needs any review or amendment in the existing instructions relating to continuous process industry, a separate petition can be filed, which will be decided on merit after following the procedure laid in law. However, it cannot become a ground to seek review of the earlier Order setting aside illegal and arbitrary instructions of the licensee for recovery of charges not approved by the Commission.

From the above it is evident that the review petitioner has failed to point out any error apparent on the face of the record which warrants review of the Order dated 03.02.2016 in petition no. 76 of 2015. Also all the arguments and pleadings mentioned in the review petition have already been discussed in detail and after considering all these pleas and facts on record, the Commission passed the Order dated 03.02.2016 in petition no. 76 of 2015. Thus it is not the case of the petitioner that he has discovered any new and important matter which after the exercise of due diligence was not within his knowledge or could not be brought to the notice of the Commission. We have not found any mistake or error apparent on the face of the record which warrants review of the earlier Order. The Hon'ble Supreme Court has held that error must be apparent on the face of record and not an error which has to be searched out. The words "any other sufficient reasons" has been interpreted by the Hon'ble Supreme Court as a reason sufficient on grounds atleast analogous to those specified in the rule. It is

clearly an “appeal in disguise’ which cannot be entertained as per the principles laid down by the Hon’ble Supreme Court.

The review petitions are dismissed accordingly.

Sd/-
(S.S. Sarna)
Member

Sd/-
(D.S. Bains)
Chairman

Chandigarh
Dated: 03.05.2016