

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

**Review Petition No. 03 of 2019 in
Petition No.52 of 2017**

Date of Order: 15.07.2019

In the matter of: Review petition under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 64 (Chapter XIII) of the PSERC (Conduct of Business) Regulations, 2005 for review of Order dated 03.01.2018 passed by the Commission in petition No. 52 of 2017

AND

In the matter of: Vardhman Special Steels Ltd., C-58, Focal Point, Phase- III, Ludhiana-141010.

...Non-Applicant/ Petitioner

Versus

Punjab State Power Corporation Limited, The Mall, Patiala.

... Respondent/ Applicant

Present: Ms. Kusumjit Sidhu, Chairperson
Sh. S.S. Sarna, Member
Ms. Anjuli Chandra, Member

For Vardhman Sh. Harish Anand

For PSPCL: Sh. Vaibhav Narang, Advocate
Sh. Bhupinder Sharma, CE/ARR&TR
Sh. V.P.S Kailay, SE/TR-2
Sh. Mukesh Kumar, ASE/TR-5
Sh. Harinder Singh, AEE(C), Focal Point, Ludhiana

ORDER

1. The Hon'ble Appellate Tribunal for Electricity vide Order dated 06.03.2019 in Appeal No. 121 of 2018 filed by Punjab State Power Corporation Ltd. (PSPCL) permitted the appellant (PSPCL) to file

Review Petition before the State Commission for reviewing the Order dated 03.01.2018 passed in petition No. 52 of 2017 and directed the Commission to dispose of the Review Petition within a period of three months from the date of filing the Review Petition. Vardhman Special Steels Ltd. had filed petition No. 52 of 2017 seeking directions to PSPCL for release of payment/refund of the cross subsidy surcharge paid alongwith due interest from FY 2011 onwards. The Commission vide Order dated 03.10.2018 held that the petitioner is entitled to the refund of the amount paid to PSPCL on account of cross subsidy surcharge for the period when PSPCL imposed mandatory power cuts due to non-availability of power from the year 2011 onwards and directed PSPCL to refund the amount due alongwith interest as per applicable bank rates.

2. PSPCL filed the present Review Petition vide memo No. 5027 dated 25.04.2019. The petition was fixed for hearing on admission on 08.05.2019 and vide Order dated 09.05.2019 Vardhman Special Steels Ltd. was directed to file reply to the Review Petition on admission. The Review Petition was admitted vide Order dated 28.05.2019. The matter was heard on 26.06.2019. PSPCL also submitted case law in support of its contentions.
3. PSPCL has submitted that Vardhman Special Steels Limited had been drawing power through open access in FY 2011, FY 2012 and FY 2013 in accordance with the provisions of the Open Access Regulations, which provided for payment of cross subsidy surcharge (CSS) irrespective of any power cut restriction. The same was amended by the Commission in compliance of the Order dated 01.08.2014 passed by the Hon'ble Tribunal in appeal No. 38 of 2013 and the PSERC (Terms and Conditions of Intra-state Open Access) (4th Amendment) Regulations,

2014, came into force from the date of their publication in the official gazette of the state i.e. 18.09.2014. Therefore, the amount of cross subsidy surcharge for the period 05.06.2011 to 07.07.2013 is not refundable. It has been submitted that the Hon'ble Supreme Court in case of State of Madhya Pradesh Vs. Tikam Das (1975) (2), SCC 100 has held that subordinate legislation made by a delegate cannot have retrospective effect unless the rule making power in the concerned statute expressly or by necessary implication confers powers in this behalf. The Hon'ble Tribunal in its Order dated 12.07.2010 in Appeal No. 179 of 2009 titled as North Eastern Electric Power Corporation Ltd. Vs Tripura State Electricity Corporation Ltd has taken the view that the Electricity Act, 2003 under which regulations are framed by the respective Commission does not permit the Commission to make Regulations which may apply retrospectively. The Hon'ble Tribunal vide Order dated 23.09.2013 in appeal No. 52 of 2012 titled as M/s Ferro Alloys Corporation Ltd. Vs Odisha Electricity Regulatory Commission & Ors. has observed that it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. In view of the above facts and circumstances PSPCL has prayed to Review the Order dated 03.01.2018, and allow the Review Petition.

4. Vardhman Special Steels Ltd. has submitted that PSPCL is barred from seeking general review of the Order dated 03.01.2018 and the scope of the Review Petition is restricted to seeking clarification from the Commission that the order is case specific and would not be applicable in general to all PSPCL consumers. The Review Petition does not fulfill the conditions given in Regulation 64 of The Punjab State Electricity

Regulatory Commission (Conduct of Business) Regulations, 2005, and no new information or fact has been brought in the Review Petition which is not taken into consideration while deciding the petition no. 52/2017 earlier. PSPCL has only reiterated the fact that the amendment in the Open Access Regulations came into force in 2014 which was prospective in nature and cannot be implemented with retrospective effect. This argument was placed before the Commission at the time of hearing of petition No. 52 of 2017 and the same cannot be a ground of review as sought in the present review petition. The refund of Cross Subsidy Surcharge was made in compliance of the specific order of the Hon'ble Tribunal and the Review on the ground of applicability of amended regulations is not warranted in the facts of the present case. The Hon'ble Appellate Tribunal in its Order dated 01.08.2014 in Appeal No. 38 of 2013 unambiguously stated that collecting cross subsidy surcharge on open access when power cuts are imposed is in contravention of the provisions of the Electricity Act, 2003. The collection of Cross Subsidy Surcharge on open access power on the days of power cuts is *Void ab Initio* and is ineffective from the beginning and not from the date when it is acknowledged subsequently in amendment of the Open Access Regulations. The judgments quoted by PSPCL are not attracted to the facts of the present case.

5. Commission's Observations, Findings and Decision

The Commission has examined the submissions made in the petition, the reply filed by the respondent, case laws referred by the parties as well as documents placed on record. The petitioner has filed the petition for review of the Commission's Order dated 03.01.2018 in the matter of

refund of amount paid by the consumer to PSPCL, on account of cross subsidy surcharge on power purchase under open access when PSPCL imposed mandatory power cuts due to non availability of power. The observations and findings of the Commission on the issues raised in the petition are as under:

- a) The Regulation 64 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 providing for “Review of the decisions, directions and orders of the Commission” specifies as under:

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

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.”

- b) The Commission notes that PSPCL in the instant Review Petition has only reiterated its submission made earlier under Petition No. 52 of 2017, that the amendment in the Open Access Regulations cannot be implemented with retrospective effect. The Commission in its Order dated 03.01.2018 has also observed as under:

“4(iii)....The amended Regulations came into force from the date of their publication in the official Gazette of the State i.e. 18.09.2014.”

As PSPCL has neither submitted any new matter or evidence which could not be produced by it at the time when the decision/order was passed by the Commission nor pointed out any mistake or error apparent on the face of record, hence, the review petition filed by PSPCL is not maintainable.

- c) Further, without prejudice to the above, it is clarified that in the instant case, the issue that cross subsidy surcharge should not be levied on power purchase under Open Access when PSPCL imposed mandatory power cuts due to non-availability of power was raised by the Steel Furnace Association of India (Punjab Chapter) of which Vardhman Special Steels Ltd. is also a member through the Petition No. 65 of 2011 filed before the Commission. This contention was upheld by Hon'ble APTEL vide its Order dated 01.08.2014 in Appeal No. 38 of 2013. While upholding the contention of the Steel Furnace Association of India the Hon'ble APTEL categorically held that the cross subsidy surcharge on open access during a period of mandatory power cuts due to non-availability of power was *void ab initio* and against the Electricity Act, 2003 and numerous judgments of the Hon'ble Supreme Court and APTEL, thus making that charge illegal. The Commission issued an amendment in the Regulations to ensure that this illegality does not continue in the future. Vardhman Special Steels Ltd. has come for a refund, that too, after PSPCL had refunded the money in the first instance and then taken it back. The Hon'ble APTEL had unequivocally held that the cross subsidy surcharge

was illegal and therefore a refund is due.

Accordingly, the review petition is devoid of any merit and is dismissed.

The Review Petition is disposed of accordingly.

Sd/-
(Anjuli Chandra)
Member

Sd/-
(S.S. Sarna)
Member

Sd/-
(Kusumjit Sidhu)
Chairperson

Chandigarh
Dated: 15.07.2019

