

Before the Meghalaya State Electricity Regulatory Commission Shillong

Case Number 9A/2017 of 2018

In the matter of:

Petition for Separate Tariff Categorisation for Ferro Alloy Industries for FY 2018-19

AND

In the matter of Byrnihat Industries Association

Coram

Shri WMS Pariat, IAS (Retd), Chairman

Date of Order: 21/12/ 2018

ORDER

MePDCL in the matter of fixation of a separate tariff category for Ferro Alloy Industries, has filed an application on 11.10.2018 seeking an opportunity of being heard/review inter-alia on the grounds as under:

- a. That the Distribution Licensee was not afforded an opportunity of being heard on the proposal submitted by it prior to issue of the order dated 10.09.2018.
- b. That the Industry is a key consumer category of MePDCL and this Commission by fixing a tariff had impacted the revenue generation from this sector.
- c. That there was no clarity as to how this Commission had arrived at the approved rates of Rs. 4.36/- and Rs.4.46/-.
- d. That this Commission had not clarified the recovery mechanism which would be applied in case the load factor was less than 85%.
- e. That this Commission had erroneously examined the tariff for ferro alloy Industries of other states such as Bihar, Andhra Pradesh and Jharkhand without taking into account the various factors leading to the reduced tariff.

It was further stated that the order passed by this Commission dated 10.09.2018 was oversimplified, defective and arbitrary in nature.

This Commission thereafter vide order dated 22.10.2018 permitted BIA to file its objection to the application seeking review, and the same was accordingly filed by the BIA and taken on record vide order dated 14.11.2018.

The contentions raised by BIA in their submission may be summarized as under:

- a. That the application for review filed by MePDCL was not maintainable and petition seeking review can only be entertained when there is an error apparent on the face of the record and/ or some new evidence has been brought on record which was not before the Commission at the time of passing of the order. It was further submitted that no such case had been made out by MePDCL.
- b. That while denying the contention of MePDCL that it was not heard, it was pleaded that there was a public hearing 09.03.2018 with the MePDCL, and that while passing the retail tariff order dated 31.03.2018 this Commission had directed MePDCL to examine BIA proposal for a separate tariff category for Ferro Alloys Industries. Consequently, many correspondences were exchanged between the parties, and it was only after submission of a report by MePDCL supporting the BIA proposal was the separate tariff category and retail tariff notified.
- c. That it was further submitted that this Commission had passed the order after consideration of all submissions made by MePDCL, and that deviation by the Commission from the recommendation by the MePDCL, did not, per se, render the order bad. The BIA in its reply also brought on record that the Board of MePDCL had accorded its in principle approval for special tariff for Ferro Alloy Industrial consumers and the proposal further mentioned that the range for Ferro Alloy category should be between 4.36 per unit and 4.57 per unit.

In response to the same, MePDCL has also filed a rejoinder on 13/12/18 .

In the hearing on 19.12.2018 at the outset of the hearing this Commission had requested the officers representing the MeECL, whether there were any further submissions that MePDCL would like to put forward. It was stated that whatever they wanted to state has been already stated in the application filed by MePDCL before this Commission.

Mr. K. Paul, Advocate appearing for BIA while leading the arguments on behalf of BIA, at the outset submits that the application for review filed by the MePDCL was not maintainable, and to buttress his contention, the Ld. Advocate has drawn the attention of this Commission to Section 94 of the Electricity Act, 2003 which is reproduced herein below:

*94: "Powers of Appropriate Commission—(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested*

*in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-*

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) discovery and production of any document or other material object producible as evidence;*
- (c) receiving evidence on affidavits;*
- (d) requisitioning of any public record;*
- (e) issuing commission for the examination of witnesses;*
- (f) reviewing its decisions, directions and orders;*
- (g) any other matter which may be prescribed.*

*(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.*

*(3) The Appropriate Commission may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.”*

The Ld. Advocate has further placed reliance on Regulation 21 of the Meghalaya State Electricity Regulatory Commission (Conduct of Business) Regulations, 2007 which reads as under:

*“21. Review of the decisions and orders of the Commission*

- (1) A person aggrieved by a decision or order of the Commission from which no appeal is preferred, or is not allowed to be preferred, can seek a review of the order if **new and important facts which, after the exercise of due diligence were not within his knowledge or could not be produced** by him at the time when the order was passed or **on account of some mistake or error apparent on the face of record** or for any other sufficient reason, by making an application within 60 days of the date of the order.*
- (2) The procedure for filing a review application shall be the same as in case of filing of a petition.”*

Thereafter the Ld. Advocate has also brought to the notice of this Commission, the Order 47 Rule 1 of the Code of Civil Procedure, 1908 which is reproduced below:

*“ 1. Application for review of judgment- (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 or 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 of 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 the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for review of the Judgment to the Court which passed the decree or made the order.....”*

It is the submission of the Ld. Advocate that Section 94 (f) of the Electricity Act, 2003 vests powers of a Civil Court on this Commission while dealing with a review application and that Regulation 21 was parimateria with Order 47 Rule 1 of the Code of Civil Procedure, 1908. It is thus the contention of the Ld. Advocate that while dealing with an application seeking review, the jurisdiction of this Commission would be restricted to (a) an error apparent on the face of the record, (b) discovery of new evidence which wasn't in the possession of the party seeking review at the time of passing of the order and (c) miscarriage of justice resulting from an error apparent on the face of the record or discovery of new evidence. It has been submitted that no such case as afore-stated has been projected in the pleadings of MePDCL and quite shockingly the basic ground seeking review of the Order dated 10.09.2018 passed by this Commission by MePDCL is contained in Para 7 of their application dated 11.10.2018 which is reproduced herein below:

" 7. In view of the facts and circumstances stated above, it is observed that the Order dated 10.09.2018 passed by the Hon'ble Commission for the separate Tariff categorization for the Ferro Alloy industries for FY 2018-19 is **oversimplified, defective and arbitrary in nature** "

In support of his contention, the Ld. Advocate has placed reliance on two decisions of the Hon'ble Supreme Court of India, i.e., SmtiParsion Devi andOrs Versus SumitriDviandOrs reported in (1997) 8SCC 715, wherein it has been held that the scope of the review jurisdiction is restricted to an error apparent on the face of the record. The error is one which should be self-evident and does not require a process of reasoning. It is distinct from an erroneous decision and re-hearing the matter for detecting the error and correcting the same cannot be within the realm of review jurisdiction.

The other decision cited is in the case of ***M/s Northern India Caterers(India) Ltd versus Lt. Governor of Delhi reported in (1980) 2 SCC 167*** wherein it has been held that the review

*can be granted only in case of glaring omission, patent mistake or like grave error and not for re hearing of case.*

Mr. Paul as such submits that no case for exercise of review jurisdiction by this Commission has been made out and that the review application as such should be dismissed at the threshold itself.

It has been further urged on behalf of BIA by Mr. Paul, Advocate that in case this Commission would not want to non-suit MePDCL on technical grounds, it was easily discernible from the very own documents of MePDCL that the instant review application was nothing but an abuse of the process of law. To substantiate such submissions, the Ld. Advocate has drawn the attention of this Commission to the Agenda Note for the Board meeting of MePDCL and drew the attention of this Commission to Page 3 of the same wherein it is stated that “a cost benefit analysis (placed as Annexure-4) is attached herewith”. The Ld. Advocate had thereafter drawn the attention of this Commission to the Board resolution dated 13.08.2018 wherein the following resolution was taken by the Board:

*“Resolved that the Board accorded in-principle approval to submit the recommendation for special tariff for Ferro Alloys Industrial consumers of the Corporation in compliance with the direction of the MSERC.*

*Resolved further that the Board authorized Director (Distribution) to finalize a cost benefit analysis based on the average power purchase cost of the MePDCL to arrive at the minimum break event point to determine the tariff for the aforementioned consumers”.*

While laying stress on the second resolution, Mr. Paul has tried to impress upon this Commission that the Board of Directors of MePDCL after according in principle approval for special tariff for Ferro Alloy Industrial consumers had authorized the Director (Distribution) MePDCL to finalize a cost benefit analysis based on the average power purchase cost of MePDCL. Mr. Paul while placing on the rejoinder filed by MePDCL at Paragraph 26 which states “the discom received in principle approval from its board to propose a separate tariff category for HT and EHT Ferro Alloy consumers and the discom after thorough analysis of the consumer base and relevant regulatory provisions.....”, submits that the cost benefit analysis submitted by MePDCL allegedly under its Board resolution dated 13.08.2018 vide letter dated 20.08.2018 cannot be said to be a fall out of the Board resolution dated 13.08.2018 in as much that vide this Board Resolution, the Director (Distribution) , and only he alone , was authorized by the Board to prepare such analysis and that too on the basis of the average power purchase cost of MePDCL. From a bare perusal of the cost benefit

analysis submitted by MePDCL vide Annexure-1 of its letter dated 20.08.2018, it is seen that the same is signed by the Superintending Engineer, MePDCL and as per the statement made in the rejoinder, the basis of the said analysis is shown to be "**consumer base and relevant regulatory provisions**" which in the submission of the Ld. Advocate was of no substance as it was not in conformity with the specific resolutions of the Board of Directors. It was also opined that this had been essentially done by MePDCL to frustrate the Tariff order dated 10.09.2018 passed by this Commission. Moreover, the agenda note for the relevant Board meeting at serial no. 5, clearly states that "from the analysis it is found that the minimum range of tariff for Ferro Alloys shall be in the range of Rs. 4.36/ unit and 4.57/unit in different scenario, considering the existing demand charge remain the same."

The Ld. Advocate further would submit that MePDCL having not given its reasons for disputing the rates as provided for by this Commission vide its order dated 10.09.2018 and while suggesting separate rates for EHT/HT categories, has not placed anything on record to substantiate this stand, and just making mere averments de hors records is not permitted in law. To substantiate this submission, the judgment of the Hon'ble Supreme Court of India in the case Hindustan Petroleum Corporation Limited –versus- Darius Shapur Chennai & Others, reported in (2005) 7 SCC 627 and on the basis of the foregoing arguments submits that the review application of MePDCL is absolutely devoid of merit and as such be dismissed with costs. It is further submitted that in Para 25 of the rejoinder it is stated that "the average cost of supply of Rs. 7.65/Unit" It was pointed out by the Ld Advocate that with reference to the order dated 31.03.2018, mention of the ARR being Rs. 774.61 crore and approved unit for sale within state being 1015.62 million units is nowhere to be found in Chapter 5.6.1 which only relates to repair and maintenance expenses only.

Miss. Swagatika Sahoo, Advocate appearing for the BIA, while adopting the arguments advanced by Mr. K. Paul, Advocate would submit that as per the ARR order dated 31.03.2018 the cost of power purchase by MePDCL for the FY 2017-2018 is Rs. 4.08/ Unit and as such MePDCL could not ask for enhancement of the special tariff for Ferro Alloys Industries to be fixed at Rs. 7.65 per Unit, on the touchstone of the National Tariff Policy and the National Electricity Policy.

Mr. Shyam Sundar Agarwal, Secretary BIA, submitted that he is deeply saddened at averments made by MePDCL in Para 24 of the rejoinder, in as much as MePDCL without any rhyme or reasons has used expressions such as "Apple & Oranges" which in the facts and circumstance of the instant case are not called for and highly objectionable.

After due and thoughtful consideration to the rival submissions of the parties and their respective pleadings, it is the considered opinion of the Commission that since the issue of

maintainability of the review application filed by MePDCL has been challenged, this issue would need to be decided first.

Having perused Section 94 of the Electricity Act, 2003, Order 47 Rule 1 under Chapter XLVII of the Code of Civil Procedure, 1908 and Regulation 21 of the Meghalaya State Electricity Regulatory Commission (Conduct of Business) Regulations, 2007, as also the judgment of the Hon'ble Supreme Court of India in the case of Merrabhanja –versus- Nirmala Kumar Choudhury reported (1995) 1 SCC 170 wherein the Hon'ble Supreme Court has held **“the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1CPC. The review petition has to be entertained only on the ground of error apparent on the face of the record and not on any other ground. An error apparent on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.”** and the judgment of the Hon'ble Supreme Court in the case of Parison Devi & Others –versus- Sumitri Devi & Others, reported in (1997) 8 SCC 715 held that **“under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. 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.”**

In the present case, admittedly MePDCL has not preferred an appeal before the APTEL challenging the Orders of this Commission dated 10.09.2018 but rather chose to file the instant review application on the grounds as enumerated herein above. It is further seen that it is not the case of MePDCL that there has been an error, apparent or otherwise, in the orders of this Commission dated 10.09.2018 fixing a separate tariff category for Ferro Alloy industries. Nor it is the case of MePDCL that there has been discovery of any new evidence which if placed before this Commission would render the orders of this Commission dated 10.09.2018 invalid. All that is pleaded by MePDCL is that the order dated 10.09.2018 passed by this Commission in the matter of separate tariff category of Ferro Alloy Industries for FY 2018-2019 **is oversimplified, defective and arbitrary in nature.**

It is observed that the Hon'ble Supreme Court of India in the cases relied above, has made it clear that review jurisdiction is to be exercised only within the parameters of Order 47 Rule 1 of the Code of Civil Procedure and not otherwise. **In that view of the matter the instant application seeking review of the order dated 10.09.2018 passed by this Commission in the matter of fixation separate tariff category for Ferro Alloy Industries is not sustainable in law and is liable to be rejected.**

Even otherwise, it is observed that the foundation of the case projected by MePDCL was on the basis of a calculation data analysis allegedly done at the instance of a Board Resolution of the Distribution Licensee which had authorized the Director (Distribution) to make an assessment on the basis of the average power purchase cost of MePDCL. As is apparent from the records and which fact has not been disputed by the MePDCL in its pleadings or in the hearing, the said document has been signed/ authored by the Superintending Engineer MePDCL and not by the Director (Distribution) as had been authorized by the Board. Moreover, the cost benefit analysis admittedly has been made on the basis of "consumer **base and relevant regulatory provisions**" and not on the basis of average power purchase cost of MePDCL as was mandated by the Board. The same therefore, cannot be the basis of assailing the rates fixed by the Commission in respect of the special category of Ferro Alloy Industries.

It may also be pointed out herein that one of the basic grievances espoused by the MePDCL is the recovery mechanism on the issue of load factor of Ferro Alloy Industries being less than 85%. In this connection, this Commission would like to put on record that in the absence of quantifiable data from both the parties, as well as consideration of issues both by MePDCL as well as the BIA, of force majeure as well as other issues, this matter cannot be adjudicated at this stage, as it would be premature on the part of the Commission to take note of such submissions in the absence of any data. It is thought appropriate that when the tariff is fixed for the FY 2019-20 by the Commission, such data would by then have been generated and issues faced by both the parties also crystallized, and at that stage, it would be then appropriate for the Commission to consider whether, if at all, any order was required to be made concerning all issues. This Commission would like to place on record that the mention of 85% load factor and recovery in absence thereof was essentially to exhort and impress upon the Industry to take the benefit under the new tariff and to increase the load factor, which in turn would further compensate MePDCL on account of per unit cost. However, as mentioned above, the same has to be examined on the basis of clear data available before the Commission coupled with issues like force majeure or any act of God, issues of transmission and lack of infrastructure which may hamper steady supply of power to the Industries concerned as well as applications which may be received from existing, as well as new units, for power under the new tariff category.

Under the law , no orders can be passed on the basis of hypotheses or apprehension of the respective parties and as such it is premature for either parties to speculate and seek modification of the earlier order dated 10.09.2018 on this count.

As a result of the foregoing discussion, the review application of the MePDCL fails both on maintainability as well as facts and the pleadings of the review do not necessitate the exercise of such power by this Commission. Hence, the review application filed by MePDCL stands rejected.

Sd/-

WMS Pariat, IAS (Retd)  
Chairman,  
Meghalaya State Electricity Regulatory Commission