

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 167 OF 2014

Dated: 8th October, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF

HEG Limited

Mandideep (Near Bhopal), Distt. Raisen,
Madhya Pradesh,
India – 462046

..... Appellant/Petitioner

VERSUS

1. Madhya Pradesh Electricity Regulatory Commission

5th Floor, 'Metro Plaza', E-5, Arera Colony,
Bittan Market, Bhopal – 462016

2. Madhya Pradesh Power Transmission Co Limited

Shakti Bhawan, Rampur,
Jabalpur – 482008
Madhya Pradesh

..... Respondents

Counsel for the Appellant

...

Mr. M.G. Ramachandran
Mr. Deepak Biswas
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Arjun Minocha

Counsel for the Respondent(s)...

Mr. C.K. Rai
Mr. Paramhans for R-1

Mr. Aashish Bernard
Mr. G. Maheshwari
Mr. S.R. Sharma for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by HEG Limited (in short, the '**Appellant/Petitioner**'), against the Orders, dated 12.12.2013 passed by the Madhya Pradesh Electricity Regulatory Commission (in short, the '**State Commission**') in Petitions No. 52/2013, whereby, the learned State Commission has dismissed the petition filed by the Appellant/petitioner seeking clarification of the order, dated 31.12.2012, by which the Parallel Operation Charges (POC) were levied on all the Captive Power Plants (CPPs) in Madhya Pradesh connected to the utility grid. This petition no. 52 of 2013, seeking a clarification, filed by the Appellant before the State Commission, has been dismissed by the impugned order, dated 12.12.2013, holding that the said clarificatory petition is, in fact, a review petition which is barred by limitation and, further, holding that the said order, dated 31.12.2012, is applicable to all the CPPs connected to the grid.

2. The Appellant is a Captive Power Plant. Respondent No.1 is the State Commission which is authorized to discharge functions under various provisions of the Electricity Act, 2003. The Respondent No.2 is the State Transmission Utility of Madhya Pradesh.

3. The Respondent No.2, Madhya Pradesh Power Transmission Co Limited (MPPTCL), herein filed a petition, being petition no. 50 of 2010, for determination of parallel operation charges (POC) on intra-state power generating plants in the state of Madhya Pradesh. During the hearing of the said petition, the learned State Commission felt a need for getting some study conducted through some independent agency on this aspect on levy of POCs on intra-state power generating plants in Madhya Pradesh.

4. The State Commission, by an order, dated 10.9.2010, passed in Petition No. 50 of 2010, had directed that a study for determination of parallel operation charges on intra-state power generating plants be conducted through an independent agency and, thereafter, following the procedure, the process for determination of parallel operation charges to be levied in the state of Madhya Pradesh, be initiated. Accordingly, Electrical Research and Development Association (ERDA), was awarded the contract by the State Commission for providing consultancy services for evaluation of parallel operation charges.

5. Electrical Research and Development Association submitted its report on 21.2.2012, on the levy of POC to the State Commission. The State Commission, on 26.5.2012, issued a public notice inviting comments on the ERDA report. On 10.7.2012, the State Commission held public hearing on the said report including various parties. The Appellant/petitioner also participated in the said public hearing and raised various objections and concerns on the ERDA report. The State Commission registered suo-motu petition, being petition no. 73 of 2012, on the issue of determination of POC and passed the main order, dated 31.12.2012, whereby, it had determined the levy of POC on all the captive power plants (CPPs) connected to the grid. Thereafter, the Appellant filed the impugned petition, being petition no. 52 of 2013, before the State Commission seeking a clarification on the applicability of the order, dated 31.12.2012, on its Tawa Plant of the capacity 13.5 MW on the ground that its load is located at a distant place and is not co-located. It was also mentioned that while the CPP of the Appellant is connected to the grid, but because its load is not co-located, therefore, the POC should not be levied on it.

6. The main grievance of the Appellant/petitioner is that since, Tawa HEP does not have any captive load interconnected to the utility grid at a point of common coupling; it is not in parallel operation with the grid. In this respect, it is identical to an Independent Power Producer (IPP). Thus,

since, the total power generated by the Tawa plant at any given point exported completely to the grid and since, Tawa plant has no contracted demand, going by the formula of the Base MVA Support method, as suggested by ERDA, the POCs payable by the Appellant for its Tawa plant amount to zero. This is exactly the reasoning provided by the MPPTCL for exempting Madhya Pradesh Power Generating Companies Limited from power plants owned and operated by Madhya Pradesh Power Generating Companies Limited.

7. The relevant facts for the purpose of deciding this Appeal are as under:

- (a) that the Appellant is a company engaged inter-alia, in the manufacturing of graphite electrodes having its manufacturing unit at Mandideep since May, 1977. The Government of Madhya Pradesh had permitted it to establish captive hydro electric power plant on Tawa Dam at Tawa Nagar in District Hoshangabad. Thus, the Appellant is a power generator who was permitted to wheel up to the place of its use at Mandideep through licensee's transmission system on payment of wheeling charges(in terms of units) & losses.
- (b) that the Appellant had entered into a 15 years wheeling agreement with licensee which expired on 29.11.2011. After the expiry of the wheeling agreement, the plant of the Appellant was governed through Section 9 of the Electricity Act, 2003 which deals with captive generation.
- (c) that the State Commission had conducted a study for determination of parallel operation charges through ERDA. The recommendations and study report has been the basis of order, dated 31.12.2012, for levy of parallel operation charges. The technical considerations to levy charges were as under:
 - (i) absorption of harmonics and negative phase sequence current

- (ii) improvement in power factor
 - (iii) meeting fluctuations
 - (iv) providing reactive power support
- (d) that the electrical pollutant has been the major consideration for imposing parallel operation charges. The injection of such pollutant is feasible provided the CPP and bulk load have common point of interconnection. Such charges were not intended to be imposed where CPP is operating independently or away from load. Since, the Tawa Hydro Electric Power Plant (Tawa Plant) is not directly connected to the load (consumer) therefore; it does not contribute to injecting pollutant into the system.
- (e) that in the letter, dated 21.8.2012, the Respondent No.2 had clearly admitted that no charges could be levied if grid does not provide any support to CPP or there is no drawl of power. Tawa Hydro Electric Power Plant has an identical situation and, therefore, parallel operation charges should not be levied on it.
- (f) that Tawa Hydro Electric Power Plant was not considered for study of ERDA despite of its peculiar nature of operating conditions/parameters. The energy wheeled from Tawa gets adjusted against contract demand except for adjustment of wheeled energy and remaining charges are being paid as per tariff. This plant operates during irrigation period only and remains under shut down for a period of six months. Its base MVA varies with the depiction of reservoir level and ranges between 13.5 MW to 3.5 MW. The Tawa project is a small hydro power project and like wind power project, the parallel operation charges are not applicable to it.
- (g) that the Appellant, in its petition being petition no. 52 of 2013, has prayed to the State Commission to clarify:
- (i) whether order, dated 31.12.2012, would be applicable on captive plant not having common point of

interconnection between bulk load and generating unit like Tawa wherein the plant is located at distance and power is wheeled through open access.

- (ii) whether charges could be levied wherein base MVA changes with the passage of time and such type of plant which were not selected for study.
 - (iii) whether charges could be levied for the duration when the generating unit was under shut down.
- (h) that the State Commission, after hearing the parties and considering the matter, has passed the impugned order, dated 12.12.2013. The relevant paragraphs thereof is reproduced hereunder:

"7. Having heard both the parties and having considered carefully the written submissions made, the Commission is constrained to note that the present petition essentially seeks a review of the earlier order dated 31.12.2012, even though it has been presented in the garb of seeking clarification. The Commission also notes that the petitioner failed to raise the issues now agitated before the Commission during the two stage public hearings undertaken prior to the issue of the impugned order. This despite the fact that the petitioner had actively participated in the entire process. The Commission also would like to take note of the fact that the petitioner has a CPP and the order dated 31.12.2012 makes no distinction as among CPPs based on the location of the load. The Commission feels that adequate clarity is built into the order dated 31.12.2012 and no further initiative is required in this regard.

8. In view of the foregoing findings the petition is dismissed."

8. We have heard Mr. M.G. Ramachandran, the learned Counsel for the Appellant/petitioner, Mr. C.K. Rai, the learned counsel for the Respondent No.1 and Mr. Aashish Bernard, the learned counsel for the Respondent No.2 and gone through the written submissions filed by the rival parties.

We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission and written submissions.

9. The following issues arise for our consideration in the instant Appeal:
- (A) *Whether the impugned petition being petition no. 52/2013 seeking clarification of the State Commission's order, dated 31.12.2012, amounts to review petition and the same can be summarily dismissed as the review petition being time barred?*
 - (B) *Whether the parallel operation charges could only be levied on CPPs which were inter-alia interconnected with its load and the utility grid by a point of common coupling?*
 - (C) *Whether the State Commission's order, dated 31.12.2012, levying POCs to all CPPs connected to the grid in the state of Madhya Pradesh is applicable to the Appellant's Tawa project?*

10. Since, all the issues are inter-connected; we are taking-up and deciding them together.

11. The following contentions have been made on behalf of the Appellant on these issues:

- (a) that the scope of study by the ERDA was limited to captive power plants, wherein such CPPs and their respective captive loads were connected to grid through common point of interconnection and were being operated in parallel to the grid. The Tawa plant could not have been brought within the scope and ambit of the order, dated 31.12.2012, since, the Tawa plant is located at a distance from the Appellant's plant at Mandideep and, consequently, load & generating plant are not connected to grid through common coupling. Hence, no POCs can be levied on the Appellant's Tawa project since the said plant is not being operated in parallel with the grid.

- (b) that the impugned petition is not a review petition or the Appellant never intended to seek review of the State Commission's order, dated 31.12.2012. The Appellant, for the sake of abundant caution, has sought the clarification of the said order, dated 31.12.2012, by filing the impugned clarificatory petition. If the main order, dated 31.12.2012, of the State Commission is not clarified as being inapplicable to Tawa project of the Appellant, it would amount to grave injustice and cause severe irreparable damage to the Appellant.
- (c) that the intent of the study by the ERDA and consequent ERDA report as well as Parallel Operation Petition was to determine levy of POCs wherein load and generating plant is connected to grid through common coupling i.e. CPP is being operated in parallel to the grid and not otherwise.
- (d) that the Appellant is engaged in the business of manufacturing graphite electrodes. He developed and operates and maintains two CPPs, i.e. a 63 MW Thermal Power Plant at Mandideep and 13.5 MW Tawa HEP with a combined generation capacity of both the captive plants ranging from 68 MW to 76.5 MW.
- (e) that the Appellant/petitioner challenged the findings of the ERDA report whilst restricting its submissions with respect to its Mandideep CPP and captive load which are connected to the grid at a point of common coupling. No submission was made by the Appellant with respect to its Tawa plant because the ERDA report itself did not contemplate levy of parallel operation charges on power plants similarly placed as the Tawa plant since there was no point of common coupling between the captive user and the Tawa plant at the point of connection between the Tawa plant and the grid i.e. a CPP not being operated in parallel to the grid. However, the Appellant raised the issue of discrimination as other power plants like IPP such as the power plants operated and maintained by the Madhya

Pradesh Power Generating Companies Limited have been exempted from levy of POC.

- (f) that the case of CPPs, being connected to the grid but not through a point of common coupling along with the captive user on account of the CPP not being at the site of the captive user, had not been taken into account by the State Commission while passing of the order, dated 31.12.2012, hence, the Appellant sought clarification seeking exemption of such CPPs, amongst others, from payment of parallel operation charges by filing the aforesaid clarificatory petition.
- (g) that the learned State Commission has dismissed the clarificatory petition of the Appellant on the ground that the same was actually a petition for review of the order, dated 31.12.2012, passed by the State Commission and that such a petition for review was time barred.
- (h) that the Tawa plant is located on Multipurpose Irrigation Tawa Dam, therefore, its machine rating (machine MVA rating) varies as per the net head of the Dam. The Tawa plant's generation capacity is the highest i.e. 13.5 MW during monsoon and its MVA rating reduces correspondingly with release of water for irrigation. Hence, its MVA rating varies from a maximum of 13.5 MW to a minimum of 3 MW. Tawa plant remains non-operational during no irrigation period that is May to July. The Respondent No.2/Transmission Licensee continued to raise invoices at machine rating instead of actual generation capacity, even for shutdown period.
- (i) that the power plants run by Madhya Pradesh Power Generating Companies Limited had been specifically exempted from payment of parallel operation charges on the Base MVA Support method formula and that the Tawa Plant was an

identically placed power plant despite the fact that it was a CPP.

- (j) that the learned State Commission has failed to appreciate that POC could be levied on CPP only when the CPP and its load were in parallel operation with the grid i.e. where the CPP and its load were inter-connected with a grid at a point of common coupling.
- (k) that the very basis on which the State Commission passed its order holding that there was a need to conduct a study by an independent agency on determination of POCs payable by all intra-state power generating plants, has been ignored by the State Commission while passing the impugned order.
- (l) that the State Commission has failed to appreciate that the independent agency, ERDA, appointed by the State Commission in pursuant to the order, dated 10.9.2010, however, analysed and issued a report on the need to levy parallel operation charges on CPPs and not all intra-state power generating plants thereby excluding all independent power plants.
- (m) that the State Commission has failed to appreciate that IPPs and similarly placed power plants did not adversely affect the grid in the manner that the CPPs interconnected with the grid along with their respective captive users at a point of common coupling did.
- (n) that the State Commission has failed to appreciate that the Tawa project, although, a CPP as defined under the Electricity Act, 2003, is for all practical purposes, an independent power plant exporting all the power generated by it to the grid.
- (o) that the State Commission has further failed to appreciate that the ERDA, in selecting the sample size for carrying out its analysis, selected only 10 CPPs out of the 32 CPPs operating in

the state of Madhya Pradesh. Out of the 10 CPPs selected for the analysis, all of them were CPPs, which were interconnected with their captive user and the grid at a point of common coupling.

- (p) that the State Commission has also failed to appreciate that the case of the Appellant's Tawa project and similarly placed power plants was not studied by the ERDA and that such power plants were deliberately excluded from (i) the study/analysis for determination of payment of parallel operation charges; and (ii) the levy of parallel operation charges as suggested by the ERDA.
- (q) that the State Commission has also failed to appreciate that the ERDA, in its Report, which formed the basis of 31.12.2012 order, opined that the adverse effects on the grid by CPPs such as absorption of harmonics, absorption of negative phase sequence current as well as the beneficial effects on the captive user on account of the CPP being connected in parallel to the grid at a point of common coupling were solely on account of the load consumed by the captive user while being connected in parallel to the CPP and the grid at a point of common coupling.
- (r) that the State Commission has further failed to appreciate that the Appellant's Tawa project is not located at the site of the captive user and, hence, is not and cannot be connected in parallel to the grid along with its captive load and, therefore, there was no fluctuation in load. Consequently, there arose no question of absorption of harmonics and negative phase sequencing and other adverse effects on the grid on account of Tawa plant's connection to the grid.
- (s) that the State Commission has also failed to appreciate that Tawa plant since does not have any load is not required to maintain any demand. In this respect, it is identical to an IPP.

- (t) that the State Commission has also failed to appreciate that since the total power generated by the Tawa plant, at any given point, is exported completely to the grid and since, Tawa plant has no contracted demand, going by the formula of the Base MVA Support method as suggested by the ERDA, parallel operation charges payable by the Appellant for its Tawa plant amount to zero.
- (u) that the State Commission has failed to appreciate that even the explanation given by the Respondent No.2, a Transmission Licensee, in its letter, dated 21.8.2012, addressed to the State Commission as to why power plants run by Madhya Pradesh Power Generating Company Limited were excluded from the levy of parallel operation charges was identical to that of Tawa plant's case. That is, the parallel operation charges payable by such power plants amounted to zero as there was no contracted demand and the total power generated by such power plants was exported to the grid.
- (v) that the State Commission has further failed to appreciate that the ERDA Report clearly stated that the adverse effects on the grid were on account of the load (consumer) and the nature of industry of the load when such load along with the CPP was in parallel operation with the grid i.e. the said CPP and its load was interconnected with the grid at a point of common coupling and not otherwise.
- (w) that the State Commission has also failed to appreciate that the Tawa plant, on account of its distance from its captive load, could never have been in parallel operation with the grid along with its captive load.
- (x) that the basic condition for levy of Parallel Operation Charges is that the Captive Power Plant as well as the consuming units as co-located in the same place and the person derives grid

support for constant running of his co-located facilities to protect from sudden variations in generation from the captive power plant. The nature of Parallel Operation involved is best explained in the Gujarat State Commission's order, dated 1.6.2011, in Petition No. 256 of 2003 and 867 of 2006, as under:-

"23.14 Now we deal with the issue of applicability of parallel operation charges. The load connected with CPPs is situated in the following manner.

(1) CPPs are situated at different places and part load of the consumer is connected at the place of CPP and part load receiving power through open access from it is situated at a different place.

(2) CPPs and load connected with it are situated at the same place and connected with grid.

(3) CPPs and load connected with it are having reverse flow relay provided at their end and power flow is possible only from CPP to grid.

23.15 In case of the first situation, the part load which is situated at the CPP premises is only eligible for levy of parallel operation charges as they receive services from the grid as stated in earlier para No. 23.13 above. While the load which is situated at another place and getting power generated from CPP by wheeling/transmission through open access is equated with a consumer without CPP. Hence, for such quantity of power wheeled from CPP, no POC is leviable.

23.16 In case of the second situation, the load of the consumer connected with CPP at the same premises is fully receiving support from the grid as stated in para 23.13, shall have to pay POC as decided in this order.

23.17 In case of the third situation, whenever the load of the consumer connected with CPP falls instantaneously due to failure of equipment of the consumer's machine etc. in such a situation, the excess generation of CPP will affect CPP adversely. It might lead to tripping of the CPP, and a transient effect on it. In such eventuality, the excess power of the CPP will be injected to the grid and avoid tripping and other adverse effect on the CPP. Moreover, they are benefited by way of injecting harmonics into the grid, increase in fault level etc. Hence,

for the load of the consumer of CPP with reverse flow relay, it is desirable to apply POC as decided in this order."

- (y) that the pre condition for levy of Parallel Operation Charge is the co-location of the Captive Power Plant and load. If these are at different places there is no grid support and there is no parallel operation.
- (z) that the Appellant's Tawa plant is a CPP which is not co-located with the consuming facilities (load). The captive plant is at a distance of over 100 kms from the consuming facilities i.e. where the power is used. The electricity generated from Tawa plant is injected in the grid through open access and conveyed through the grid. In fact, even auxiliary power for start up of the Tawa plant is obtained from a separate connection from the grid and the charges for the same are paid separately. There is, therefore, no support taken from the grid for which parallel operation charges can be levied.
- (aa) that the State Commission itself had held that there was a need to conduct a study by an independent agency regarding determination of parallel operation charges payable by all intra-state power generating plants. The ERDA analyzed the entire matter considering co-located consuming units and not with reference to Captive Power Plant and consuming unit at different places such as in the case of Tawa plant and issued a report.
- (bb) that the methodology for computation of parallel operation charges suggested by the ERDA which is the Base MVA Method where,

$$\text{Base MVA} = \text{Installed Capacity} - \text{Contract Demand} - \text{Power Export to Grid.}$$

Tawa plant does not have any load and is not required to maintain any demand and is placed in an identical position as

Independent Power Plants, thereby making the parallel operation charges zero

- (cc) that since the order, dated 31.12.2012, passed by the State Commission, was not specifically clear on the aspect of the CPP not co-located, the Appellant had sought for clarification in regard to Tawa plant by filing the aforesaid clarificatory petition before the State Commission, while challenging the order, dated 31.12.2012, of the State Commission on other aspects in the Writ Petition No. 12545 of 2013 filed before the Hon'ble Madhya Pradesh High Court.

12. **Per contra**, the following submissions have been made on behalf of the contesting Respondents:

- (a) that the Appellant has challenged the order, dated 31.12.2012, before the Hon'ble Madhya Pradesh High Court in Writ Petition No. 12545/2013 invoking the extraordinary jurisdiction of the Hon'ble High Court under Article 226 of the Constitution of India.
- (b) that the Appellant has moved an amendment application before the Hon'ble Madhya Pradesh High Court to exclude the challenge pertaining to the Tawa plant from the writ petition and the Hon'ble High Court has, vide its order, dated 1.8.2014 allowed the said prayer but that does not *ipso-facto* make the instant appeal maintainable.
- (c) that once the State Commission has given clarification in the impugned order, dated 12.12.2013, of the main order, dated 31.12.2012, holding that the main order, dated 31.12.2012, is applicable to all the CPP's connected to the grid which, therefore, includes the Tawa plant, the issue pertaining to Tata plant is also directly and substantially in issue before the Hon'ble High Court.

- (d) that as per Section 111 of the Electricity Act, 2003, a person, aggrieved of an order, has the right to appeal before this Appellate Tribunal. In this case, the State Commission, vide impugned order, has clarified that the main order, dated 31.12.2012, makes no distinction between CPP plants based on their locations and, therefore, the order, dated 31.12.2012, is applicable to the Appellant's Tawa plant also. Hence, the Appellant is not the aggrieved person to file the instant appeal.
- (e) that the present appeal is barred by Section 10 of CPC as the same matter is pending in the aforesaid writ petition before the Hon'ble Madhya Pradesh High Court, where the appeal while challenging the main order, dated 31.12.2012, has challenged the legality of the levy of POCs on its three CPPs.
- (f) that the impugned order of the State Commission holding the petition seeking clarification filed by the Appellant as review petition legally correct because the Appellant, by way of seeking clarification indirectly has sought a review of the main order, dated 31.12.2012. Then the Appellant should have approached the Hon'ble High Court against the impugned order as the order rejecting a review petition is not appealable as per Order XLVII, Rule 7 of the of Civil Procedure Code, 1908. Apart from it, due to the 'doctrine of merger', the impugned order has got merged with the main order.
- (g) that as per regulation 40 of the Conduct of Business Regulations, 2004, the State Commission has the power to review its decisions and orders. The limitation for filing a review petition is 60 days and the Appellant was bound to file the said petition within the period of 60 days. Since, he has failed to file the petition within 60 days, the said petition is time barred and the State Commission's finding, in the impugned order, holding the said petition to be time barred is correct.

- (h) that since the Appellant had participated in the public hearing before passing of the main order and, he submitted his objections to the applicability of POCs on the ERDA report, he is estopped to raise the same issue again.
- (i) that the issue of payment of POCs has been decided by the State Commission in its main order, dated 31.12.2012. This Appellate Tribunal, in its judgment, dated 18.2.2011, passed in Appeal No. 120 of 2009, has also held that the parallel operation is the facility in the nature of a grid support to the Captive Power Plant.
- (j) That since the State Commission, in its main order, dated 31.12.2012, passed after considering the report of ERDA and objections/submissions of all parties, held that the POCs are applicable on the Captive Power Plants which are connected to the grid, the Appellant, being a CPP, which is connected to the grid, is also liable to pay the POCs. The POCs are not leviable on a CPP which is not connected to the grid and is operating in islanding mode. If the CPP of any entity is connected to the grid and its load co-located or fed through the grid, that CPP is liable to pay POC.
- (k) that the Chattisgarh State Electricity Regulatory Commission (CSERC) in its order, dated 13.10.2009, passed in petition No. 20 of 2009 (M) clearly held in para 4 as under:

“... Though the grid absorbs the pollution of the loads of the consumers who has agreement with the utility and utility charges to consumers as per the retail tariff fixed by the Commission, but the grid also used to absorb the pollution of the captive and non-captive loads of the CPP connected with the grid which is not the consumer of utility and, therefore, captive and non-captive load of CPP can be parameter for payment of POC. Such captive and non-captive load of CPP can either be co-located, supplied through the grid or may be supplied through dedicated system. We have thus come to the conclusion that the POC shall be calculated at the rate of Rs.21/- per KVA

per month (the rate as proposed by the ERDA) on the captive and non-captive load of CPP which may either be co-located, fed through the grid or through dedicated lines of CPP. The billing of parallel operation charges is therefore ordered....”.

- (l) that as per the order of the Chattisgarh State Electricity Regulatory Commission, the POCs are payable by a CPP on the captive or non-captive load of CPP which may either be co-located, fed through the grid (as in the case of the Appellant) or through dedicated lines.
- (m) that the purported clarificatory application being Petition No. 52 of 2013 was filed by the Appellant before the State Commission basically on the ground that since the Appellant's Tawa plant was not having common point of interconnection between bulk load & generating unit and the plant is located at a distance and power is wheeled through open access, the POC determined by the State Commission, vide main order, dated 31.12.2012, is not applicable upon it. The said clarification has been given by the impugned order that all the CPPs, who are connected to the grid, are liable to pay POCs and the order, dated 31.12.2012, is applicable to all of them.
- (n) that the main order, dated 31.12.2012, of the State Commission is a generic order applicable to all the CPPs with exemption only to those CPPs which are not connected to the grid.
- (o) that the Appellant in the said clarificatory petition simply wants to bring-forth a new distinction among CPPs based on location of the load which is not permissible in the light of the main order, dated 31.12.2012.
- (p) that the contention of the Appellant to the effect that ERDA report did not contemplate levy of parallel operation charges on power plants similarly placed as the Tawa plant on the ground

that there was not point of common coupling between the captive user and the Tawa plant at the point of connection between the Tawa plant and the grid is wrong and misplaced because the main order, dated 31.12.12, makes no distinction as among CPPs based on the location of the load.

13. **Our consideration and conclusion:**

13.1 In the upper part of the judgment, we have dealt in details with the submissions raised by the contesting parties and we do not find necessary to repeat the same here again.

13.2 Now, we proceed to decide whether the impugned petition, being Petition No. 52/2013, filed by the Appellant/petitioner before the State Commission seeking clarification whether the main order, dated 31.12.2012, passed by the State Commission, is applicable to Tawa Plant of the Appellant amounts to review petition in true sense or amounts to the clarificatory petition in letter and spirit.

13.3 Before dealing with this controversy, we narrate below the facts which are undisputed between the parties.

- (a) that the Respondent No.2, Madhya Pradesh Power Transmission Co Limited (MPPTCL), filed a petition, being Petition No. 50/2010, before the State Commission for determination of parallel operation charges on intra-state power generating plants in the state of Madhya Pradesh. During the hearing of the said petition, the learned State Commission felt a need for getting some study conducted through some independent agency on this aspect on levy of POCs on intra-state power generating plants in Madhya Pradesh. Then the State Commission, by an order, dated 10.9.2010, passed in Petition No. 50/2010, had directed that a study for determination of parallel operation charges on

intra-state power generating plants be conducted through an independent agency and, accordingly, Electrical Research and Development Association (ERDA) was awarded the contract by the State Commission for providing consultancy services for evaluation of parallel operation charges.

- (b) that the ERDA submitted its report on 21.2.2012, on the levy of POC to the State Commission. The State Commission, on 26.5.2012, issued a public notice inviting comments on the ERDA report and the State Commission held public hearing on the said report on 10.7.2012, in which the Appellant/petitioner also participated and raised various objections expressing his concerns on the said ERDA report.
- (c) that the State Commission, thereafter, registered suo-motu petition, being petition no. 73 of 2012, on the issue of determination of POC and passed the main order, dated 31.12.2012, having relied on the contents of the ERDA report whereby, the State Commission had determined the levy of POC on all the captive power plants (CPPs) connected to the grid.
- (d) that it was at that stage that the Appellant/petitioner filed the impugned petition, being petition no. 52 of 2013, before the State Commission seeking a clarification on the applicability of the order, dated 31.12.2012, passed by the State Commission on its Tawa Plant of the capacity 13.5 MW on the ground that its load is located at a distant place and is not co-located. The Appellant, further, made submission in the impugned petition that while the CPP of the Appellant is connected to the grid, but its load/consumption is not co-located, therefore, the POC should not be levied on the Tawa Plant of the Appellant.

13.4 Thus, by filing the impugned petition no. 52 of 2013, the Appellant prayed to the State Commission to clarify whether the State Commission's order, dated 31.12.2012, would be applicable on the CPP not having common point of interconnection between bulk load & generating unit like Tawa Plant of the Appellant wherein the CPP is located at a distance and power is wheeled through an open access and whether the parallel operation charges could be levied upon the Tawa Plant of the Appellant for a duration when the said CPP was under shutdown for more than three months in every year. Thus, the main question for our consideration is whether the main order, dated 31.12.2012, of the State Commission in the suo-motu petition, being petition no. 73 of 2012, by which the State Commission had determined the levy of POC on all the CPP connected to the grid would be applicable to the Tawa Hydro Electric Power Plant (Tawa Plant) of the Appellant where the Tawa Plant and its load is located at a distance and the same is not co-located.

13.5 As mentioned above, the learned State Commission, by the impugned order, dated 12.12.2013, in the said clarificatory petition no. 52 of 2013, had dismissed the said petition holding that the so-called clarificatory petition, filed by the Appellant/petitioner, is in fact a review petition which is barred by limitation. The limitation for filing a review petition is 60 days and the said petition having been filed beyond the period of limitation, is barred by limitation. Further, clarifying that the main order, dated 31.12.2012, passed by the State Commission, is applicable to all the CPP who are connected to the grid.

13.6 We may point out here that the State Commission has, by the impugned order, dated 12.12.2013, dismissed the clarificatory petition of the Appellant/petitioner treating the same as review petition and dismissing the said petition on the ground of limitation without considering the facts and circumstances of the aforementioned Tawa Plant of the Appellant. The State Commission, by the impugned order, dismissed the said petition, holding the same as review petition finding the

same time barred by period of limitation by writing a single clarificatory sentence that the order, dated 31.12.2012, is applicable to all the CPP connected to the grid. A perusal of the impugned order clearly indicates that the State Commission has not taken into consideration the facts and circumstances of the Tawa Plant of the Appellant and ignoring all the facts of the Appellant's case has dismissed the said petition.

13.7 The provisions regarding review given are enumerated in section 114 and order XLVII of The Code of Civil Procedure, 1908. Order XLVII Rule 1 of the CPC provides that a person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred 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 fact of record or any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of the same to the Court which passed the decree or made the order.

13.8 We have considered in depth the contents of the petition no. 52/2013 filed by the Appellant/petitioner before the State Commission and prayers made therein. The Appellant/petitioner in his clarificatory petition has narrated the facts and circumstances of his Tawa Plant and made the aforesaid prayer whether the State Commission's order, dated 31.12.2012, is applicable to the Appellant's Tawa Plant.

13.9 The main facts mentioned in the said petition by the Appellant are that since, Tawa Hydro Plant of the Appellant does not have any captive load interconnected to the utility grid at a point of common coupling and it is not in parallel operation with the grid and it is identical to an Independent Power Producer (IPP). Further, since the total power generated by the Tawa plant at any given point is exported completely to

the grid and since, Tawa plant has no contracted demand, the POC cannot be levied on the said Tawa Plant of the Appellant. The same reasoning was provided by the Respondent No.2/MPPTCL before the State Commission through a letter, dated 21.8.2012, addressed to the State Commission for exempting power plants owned and operated by Madhya Pradesh Power Generating Companies Limited from levy of POC. The Respondent No.2, in its communication, dated 21.8.2012, had clearly admitted that no POC could be levied if the grid does not provide any support to CPP or there is no drawal of power. The letter further stated that since Tawa Hydro Electric Power Plant has an identical situation and, therefore, parallel operation charges should not be levied on the Tawa Plant of the Appellant.

13.10 The material on record clearly makes it evident that Tawa Hydro Electric Power Plant of the Appellant was not considered for study of ERDA despite its peculiar nature of operating conditions/parameters. The energy wheeled from Tawa gets adjusted against contract demand except for adjustment of wheeled energy and remaining charges are being paid as per tariff. The Tawa Plant is a small Hydro Power Plant and is like wind power project, hence, the parallel operation charges are not applicable to it. In the case of Tawa Plant, which is a CPP of the Appellant, the power generated from the plant is injected into a grid and then wheeled through the lines through open access and, thereafter, the same is consumed by its load/consumer.

13.11 The main contention of the Appellant/petitioner is that he challenged the findings of the ERDA report during the hearing of the main petition while restricting his submission with respect to Mandideep CPP and captive load which are connected to the grid at a point of common coupling. No submission was made by the Appellant with respect to its Tawa Plant because the ERDA report itself did not contemplate levy of POC on the power plants similarly placed as the Tawa Plant. Since, there was no point of common coupling between the captive user and the Tawa plant at the point of connection between the Tawa plant and the grid i.e. if CPP

not being operated in parallel to the grid. According to the Appellant, he raised the issue of discrimination at that point of time before the State Commission as other power plants like IPPs such as the power plants operated and maintained by the Madhya Pradesh Power Generating Companies Limited have been exempted from levy of POC. The case of the Appellant is that the cases of CPPs, being connected to the grid but not through a point of common coupling along with the captive user, on account of the CPP not being at the site of the captive user had not been taken into account by the State Commission while passing the order, dated 31.12.2012, the Appellant sought clarification by filing the aforesaid clarificatory petition asking whether the order, dated 31.12.2012, of the State Commission would be applicable to Tawa Plant of the Appellant and would be exempted from payment of POCs. This fact is not disputed that the power plants run by Madhya Pradesh Power Generating Companies Limited had been specifically exempted from payment of parallel operation charges on the Base MVA Support method formula and that the Tawa Plant was an identically placed power plant despite the fact that it was a CPP.

13.12 According to the Appellant, POC could be levied on CPP only where the CPP and its load were inter-connected with a grid at a point of common coupling. One more contention of the Appellant is that the Tawa project, although, a CPP as defined under the Electricity Act, 2003, is for all practical purposes, an Independent Power Plant (IPP) exporting all the power generated by it to the grid subject to the condition that CPP is bound to consume 51% of the total capacity to its own use and the remaining generated power, it can sell through open access, after getting the open access permission from the State Commission as per Regulation 42(2) of the Electricity Act, 2003.

13.13 The evidence on record clearly establishes that Appellant's Tawa Plant is not located at the site of the captive user/load and, hence, does not and cannot be connected in parallel to the grid along with its

captive load and, therefore, there is no possibility of injecting the harmonics into the grid. Thus, there is no adverse effect on the grid on account of Tawa Plant's connection to the grid like any other generators of IPPs. Further, since, the Tawa plant does not have any load, it is not required to maintain any demand and in this respect, it is identical to an IPP. The material on record, further, clarifies the situation that since the total power generated by Tawa Plant, at any given point, is exported completely to the grid and since, the Tawa Plant has no contracted demand, the POCs, if any, payable by the Appellant for its Tawa Plant amounts to zero.

13.14 Further, it is clear from the record that the basic condition for levy of POC is that the Captive Power Plant as well as the power consuming units/load are co-located in the same place will create harmonics due to sudden fluctuation of load.

13.15 We have cautiously and carefully gone through the reasoning recorded by the Gujarat Electricity Regulatory Commission, in its order, dated 1.6.2011, in Petition No. 256 of 2003 and 867 of 2006 where the Gujarat Commission has dealt with the issue of applicability of POCs. According to the Gujarat Commission, if the CPPs are situated at different places and part load of the consumer is connected at the place of CPP and part load receiving power through open access from it is situated at a different place, the part load which is situated at the CPP premises is only eligible for levy of parallel operation charges as they receive services from the grid. While the load/consuming unit situated at another place and getting power generated from CPP by wheeling/transmission through open access is equated with a consumer without CPP. Hence, for such quantity of power wheeled from CPP, no POC is leviable.

13.16 Considering the aforementioned reasons and further considering the reasoning recorded by the Gujarat Commission in its order, dated 1.6.2011, and also considering the facts that pre-condition for

levy of POC is the co-location of the CPP and load and if the CPP and load are at different places, there is no grid support and hence, there is no question of levy of POC on such kind of CPP like Tawa Plant of the Appellant. The Appellant's Tawa Plant is a CPP which is not co-located with the consuming facilities/load. Further, the Tawa Power Plant is injecting its total power generated to the grid system and the open access consumer situated 100 Kms distance from the generating plant is drawing the power from the same grid system, like any other consumer and hence, creation of harmonics by Tawa Plant to disturb the grid does not arise. Hence, levying parallel operation charges is not justifiable. In fact, even auxiliary power for start-up of the Tawa plant is obtained from a separate connection from the distribution system of the licensee for which charges are paid separately by the Appellant. We find that in these circumstances, levying parallel operation charges to the Appellant/petitioner is not justifiable.

13.17 The main contention of the Respondent on the so-called clarificatory or review petition is that since the Appellant has challenged the main order, dated 31.12.2012, before the Hon'ble Madhya Pradesh High Court by filing a writ petition, the Appeal is not entertainable. We reject this contention of the Appellant simply on the ground that it is true that the Appellant had challenged the order, dated 31.12.2012, passed by the State Commission before the Hon'ble High Court but subsequently, the Appellant moved an amendment application before the Hon'ble Madhya Pradesh High Court to exclude the challenge pertaining to the Tawa plant from the writ petition which has been allowed by the Hon'ble High Court, vide its order, dated 1.8.2014. Thus, the writ petition filed by the Appellant before the Hon'ble Madhya Pradesh High Court against the order, dated 31.12.2012, is not with regard to Tawa Generating Plant of the Appellant but with regard to the two other CPPs.

13.18 The other contention of the Respondents are that the Appellant is not an aggrieved person hence, the instant appeal is not entertainable

and also the present appeal is barred by Section 10 of CPC as the same matter is pending before the Hon'ble Madhya Pradesh High Court in the aforesaid writ petition. We reject this contention of the Respondent also because the Appellant, being a CPP, where the load is not co-located, is naturally an aggrieved person and the instant appeal filed by him is legally competent. The aforementioned principles provided in Section 10 of the CPC are also not applicable to the Tawa Plant of the Appellant as the Appellant's amendment application seeking exclusion of its Tawa Plant from the writ petition has been allowed by the Hon'ble Madhya Pradesh High Court by its order, dated 1.8.2014.

13.19 We made several queries to the Respondent's counsel to throw light about the true nature of the impugned petition but, they are unable to satisfy us that the impugned petition is, in reality, a review petition. The contents of the impugned petition clearly indicate that the Appellant narrating the facts and circumstances of its Tawa Plant by filing the aforesaid petition has simply sought clarification whether the order, dated 31.12.2012, of the State Commission would be applicable to its Tawa Plant where CPP and its load are not co-located and when the whole power generated from the Tawa Plant is exported to the grid. The Appellant, in the said petition, has nowhere mentioned any fact or ground giving it the colour of a review petition. He simply stated the facts of its Tawa Plant simply seeking a clarification whether the State Commission's order, dated 31.12.2012, is applicable to its Tawa Plant or not. The learned State Commission, even without going into the facts of the clarificatory petition and also without going into the fact that Tawa CPP and its load are not co-located, has dismissed the clarificatory petition of the Appellant by merely observing that the said petition amounts to review petition and since the said petition having been filed beyond the period of 60 days a limitation fixed for filing a review petition before the State Commission, is barred by period of limitation and on this ground, has dismissed the clarificatory petition of the Appellant with a casual and cursory observation that its order, dated 31.12.2012, is applicable to all the CPPs which are connected

to the grid. The impugned order is patently absurd and illegal which cannot be allowed to be sustained. The approach of the State Commission is quite illegal and the same cannot be appreciated by any stretch of imagination. The State Commission was required to go into the facts of the Tawa Plant of the Appellant. After considering the facts of the Tawa Plant and also considering the fact that Tawa Plant and its load are not co-located, the State Commission should have decided the clarification filed by the Appellant on merits. Thus, the State Commission has committed gross illegality while passing the impugned order.

13.20 In view of the above discussion and the reasoning, we hold that the impugned petition, being Petition No. 52/2013, does not amount to a review petition from any angle as the contents provided for the review petition are absolutely lacking therefrom. The said petition is really a clarificatory petition as the same is evident from the perusal of the contents or facts mentioned in the aforesaid petition. The Appellant/petitioner had given the peculiar facts and circumstances of its Tawa Plant submitting that its Tawa Captive Power Plant and its load are not co-located at the same premises but are located at a distance of more than 100 Kms. Thus, the Tawa Captive Power Plant and its load are not co-located and the POCs on the said Tawa Plant of the Appellant are not leviable by any interpretation of legal juris prudence.

13.21 We further hold that the impugned petition, being Petition No. 52/2013, is in reality, and letter and spirit, a clarificatory petition which cannot be said to be time barred. We further hold that the POCs can only be levied on the CPPs which are inter-connected with their load and the utility grid by a point of common coupling. Since, the Tawa Plant of the Appellant/petitioner is not inter-connected with its load/consumer and the utility grid by a point of common coupling, and hence, the POCs cannot be levied on the Tawa Plant of the Appellant. We, further, clarify that the main order, dated 31.12.2012, passed by the State Commission levying POCs to all the CPPs connected to the grid in the state of Madhya Pradesh,

is not at all applicable to the Tawa Captive Power Plant of the Appellant/petitioner. **In this way, all these three issues are accordingly decided.**

ORDER

The present Appeal, being Appeal No. 167 of 2014, is allowed and the impugned order, dated 12.12.2013, passed by the State Commission, in Petition No. 52/2013, is hereby quashed/set-aside. It is clarified and ordered that the order, dated 31.12.2012, passed by the State Commission by which POCs were levied on all the CPPs in the state of Madhya Pradesh connected to the utility grid, is not at all applicable to the Tawa Captive Power Plant of the Appellant/petitioner. Consequently, the Appellant is not liable to pay any Parallel Operation Charges (POC) with regard to its Tawa Captive Power Plant. Thus, the clarificatory petition, being Petition No. 52/2013, filed by the Appellant/petitioner before the State Commission seeking aforesaid clarification is hereby allowed to the extent indicated above. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 8TH DAY OF OCTOBER, 2015.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

√ **REPORTABLE/NON-REPORTABLE**

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