

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.155 of 2012

Dated: 31st May, 2013

**Present: HON'BLE MR.JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER**

In the Matter of:

**M/s. SAL Limited.,
5/1, Shreeji House, Opposite M.J. Library,
Ashram Road,
Ahmedabad-380 009**

...Appellant

Versus

- 1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower
Opposite Nehru Bridge,
Ashram Road,
Ahmedabad-380 009**
- 2. Gujarat Energy Transmission Corporation Ltd.,
Sardar Patel Vidyut Bhawan,
Race Course
Vadodara-390 007**
- 3. Madhya Gujarat Vij Company Ltd.,
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodara-390 007**
- 4. Dakshin Gujarat Vij Company Ltd.,
Nana Varachh Road,
Near Gajjar Petrol Pump,
Kapodra,
Surat-395 006**

5. **Uttar Gujarat Vij Company Limited.,
Corporate Office Vis Nagar Road,
Mehsana-384 001**

6. **Paschim Gujarat Vij Company Ltd.,
Laxmi Nagar,
Nana Mava Road,
Rajkot-360 004**

..... Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr Advocate
Ms. Shikha Ohri
Ms. Surbhi Sharma
Mr. Anurag Sharma

Counsel for the Respondent(s): Mr. M G Ramachandran,
Mr. Anand K Ganesan,
Ms. Swapna Seshadri for R-2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. M/s. SAL Steel Limited is the Appellant herein.

2. As against the orders dated 1.6.2011 and 9.2.2012 passed by the Gujarat State Commission directing the Appellant to pay the parallel operation charges to Paschim Gujarat Vij Company Limited (the Responent No.6), the Appellant has filed this Appeal.

3. The Short facts are as under:

(a) The Appellant is one of the Captive Power Generating Plants in the State of Gujarat. Erstwhile Gujarat Electricity Board filed a Petition on 8.9.2003 before the State Commission seeking levy of parallel operation charges on the captive power generating plants in the State of Gujarat running in parallel with the Gujarat Electricity Board's Grid.

(b) The State Commission after considering the Petition, passed the order dated 25.6.2004 holding that the parallel operation charges were leviable on the Captive Power Plants.

(c) Accordingly, the State Commission directed Gujarat State Electricity Board to conduct study through Consultants to verify and quantify the parallel operation charges to be levied on Captive Power Plants.

(d) Some of the Captive Power Plants challenged the said order dated 25.6.2004 passed by the State Commission by filing Petition before the High Court of Gujarat.

(e) While the matter was pending before the Gujarat High Court, the Transmission Licensee, the 2nd Respondent (Gujarat Energy Transmission Corporation Ltd.,) filed a Petition before the State Commission for determination of parallel operation charges to be levied

on the Captive Power Plants based on the results of the study conducted by the Consultants.

(f) In the meantime, the High Court of Gujarat disposed of the said Petitions by the order dated 21.10.2008 setting aside the order dated 25.6.2004 of the State Commission and remanded the matter to the State Commission directing it to take-up the Petition again for reconsideration of the issue and to pass the order after hearing all the parties. In this order dated 21.10.2008, High Court had also issued some interim directions.

(g) Some of the Captive Power Plants filed the Review Petition before the High Court of Gujarat, to review the interim directions passed in the above said order dated 21.10.2008. In that Review Petition, the High Court passed the orders allowing Captive Power Plants to enter into a settlement with the Gujarat Energy Transmission Corporation Ltd., (R-2) with two options viz (i) either to accept for the payment of parallel operation charges or (ii) to agree for installation of meter with three (3) minutes integration period for computing the demand charges.

(h) Pursuant to the remand from the High Court the State Commission through the dated 8.5.2009, directed

the Gujarat Energy Transmission Corporation Limited (R-2) to submit the list of Captive Power Plants operating in parallel with the State Grid. As directed by the Gujarat High Court in its order dated 28.4.2009, the State Commission also issued notices to all Captive Power Plants calling upon them to indicate within 8 weeks as to whether they wish to accept any of the options proposed by the Gujarat High Court in its order dated 28.4.2009.

(i) In pursuance of the order passed by the State Commission, the Distribution Companies submitted the list of captive power plants who have accepted the settlement proposals for exercising the option of parallel operation charges and for demand charges based on the meters with the three (3) minutes integration period. On receipt of the list, the State Commission in its order dated 13.11.2009 specifically recorded that the Appellant and three other Companies had objected to levy of parallel operation charges whereas other Captive Power Plants agreed for settlement proposal. Then the State Commission directed those parties, including the Appellant, who objected to the levy, to file their objections. Accordingly, the objections were filed.

(j) After considering the same, the State Commission passed the final order on 1.6.2011 holding that parallel operation charges leviable at Rs.26.50/KVA on all the Captive Power Plants operating parallel with the Grid.

(k) In pursuance of this order, the 2nd Respondent Company raised the bill on the Appellant for parallel operation charges on 30.9.2011 demanding Rs.35,11,250/-. After receipt of the bill, the Appellant filed the Review Petition on 19.10.2011 before the State Commission as against the impugned Order dated 1.6.2011 praying for the permission to enter into a settlement agreement with the Respondent as per the settlement proposal referred to in the High Court of Gujarat order even though they originally objected to the levy of parallel operation charges. However, this was dismissed by the State Commission by the order dated 9.2.2012.

(l) Aggrieved over the said orders dated 1.6.2011 (Main Order) and 9.2.2012 (Review Order), the Appellant has filed this present Appeal.

4. The learned Counsel for the Appellant has raised the following points assailing the impugned orders:

(a) The State Commission in the matter of other Captive Power Plants relaxed the period of eight weeks for exercising the settlement option and permitting them to opt for one of the two opinions as late as on 12.02.2011. Having once relaxed the time frame, it was not open to the State Commission to deny similar rights to the Appellant.

(b) Two Companies other namely M/s. Nirma Ltd., and M/s. Versana Ispat Ltd., along with the Appellant had originally objected to levy of parallel operation charges in the proceedings before the State Commission. However, M/s. Nirma Limited and Versana Ispat Ltd took a different stand during the proceedings and opted for settlement proposal. Accordingly, the said benefit was given to both these companies. However, the said benefit had been refused to be given to the Appellant without valid reason.

(c) The State Commission by offering the benefits of the High Court's order dated 28.4.2009 to other captive plants namely M/s. Nirma Limited and M/s.Vearsna Ispat Limited who were in a similar situation as that of the Appellant, refused to give the same benefit to the Appellant

(d) Once the State Commission by its order dated 1.6.2011 relaxed the eligibility criteria for availing the benefit of the order of the High Court dated 28.4.2009, to the other Companies, it was not open to the State Commission to deny the said benefit to the Appellant.

(e) There were 41 Captive Generating Plants operating in parallel with the Grid. Out of these 41 Plants, 36 Captive Power Plants had already executed agreements with the Respondent-2 (Gujarat Energy Transmission Corporation Limited). There were only five objectors including M/s. Nirma Limited and M/s. Varsana Ispat Limited. These two Companies alone were given the benefits through the order dated 1.6.2011, although they have executed the agreement with the Respondent-2 (Gujarat Energy Transmission Corporation Limited) only belatedly, much beyond the expiry of 8 weeks period stipulated in the Commission's order dated 8.5.2009.

(f) The State Commission, while passing the impugned order, has not adduced any reason for the classification between the Appellant and the other Captive Power Plants which exercised the option beyond the period of eight weeks even though they initially objected to levy the Appellant. This action of

the State Commission would amount to blatant discrimination as against the Appellant.

5. The learned Counsel for the 2nd Respondent while justifying the impugned orders had strenuously contended that the Appellant has taken a different stand at different times and the Appellant cannot be equated with other Companies who have offered for settlements before passing of the main impugned order dated 1.6.2011 but the Appellant throughout objected to the levy of the parallel operation charges till the final order dated 1.6.2011 and the Appellant offered for the settlement only in the Review and therefore, the question of discrimination does not arise.
6. The learned Counsel for the Respondent further pointed out that the Appellant, instead of filing an Appeal against the impugned order dated 1.6.2011, immediately thereafter before this Tribunal, had kept quiet for a long time and only after receipt of the bill raised by the Respondent, the Appellant filed Review Petition seeking the Review that too after 81 days delay with the prayer that the Appellant also be permitted to enter into settlement agreement with the Respondent Company and as such the dismissal of the Review Petition as there was no error on the face of the record, is perfectly valid in law.

7. In the light of the above contentions, the following question would arise for consideration:

“Whether the State Commission was justified in discriminating against the Appellant by refusing to allow the Appellant to enter into a settlement agreement with Respondent while other Captive Power Plants, who initially objected to the levy of parallel operation charges were permitted to exercise the option beyond the period of eight weeks as specified by the High Court?

8. Before dealing with this issue, it would be better to refer to some of the events which took place before filing of this Appeal.
9. The State Commission passed the main impugned order on 1.6.2011 holding that Parallel Operation Charges are leviable at Rs.26.50/KVA on all the Captive Power Plants (including Appellant) operating parallel with the Grid. In pursuance of this order, the Respondent raised the bills and served upon the Appellant. Thereupon, the Appellant filed Review Petition on 19.10.2011 as against the main order dated 1.6.2011. This review was dismissed on 9.2.2012 on two grounds:
- (a) Review Application was filed with a delay of 81 days which is not satisfactorily explained;

(b) No apparent error on the face of the record in the impugned order was pointed out so as to review the said order.

10. From the facts, it is clear that the Appellant did not chose to challenge the main order dated 1.6.2011 immediately by filing an Appeal before this Tribunal. Similarly, he did not file the Review before the State Commission within the period of limitation. Only after receipt of the bill raised by the Respondent, the Appellant filed a Review Petition on 19.10.2011 seeking for the Review of the order dated 1.6.2011 praying for permission to enter into a settlement agreement with the Respondent. The State Commission after hearing the parties dismissed the said Petition by the order dated 9.2.2012 on the grounds referred to above.

11. It is noticed that after the dismissal order that was passed on 9.2.2012, the Appellant earlier filed an Appeal before this Tribunal only as against the review order dated 9.2.2012 in Appeal No.73 of 2012. When the Appeal came up for admission on 27.4.2012, it was pointed out to the learned Counsel for the Appellant that this Tribunal already decided on various occasions that the Appeal against the Review order confirming the main order was not maintainable. Hence, the learned Counsel for the Appellant sought permission for withdrawing the Appeal. Accordingly, the Appeal was dismissed as withdrawn. Thereupon, the

Appellant has filed this present Appeal as against both the main order dated 1.6.2011 as well as the Review Order dated 9.2.2012. This Appeal has been filed along with an Application to condone the delay of 289 days. Considering the time taken for filing the earlier Appeal and its dismissal, this delay was condoned by this Tribunal by the order dated 6.8.2012 by imposing the cost of Rs.1 lac to be paid as a donation to a Charitable Organisation. Accordingly, the cost has been paid to the said Charitable Organisation. Thereupon, this Appeal has been numbered as Appeal No.155 of 2012. This was admitted on 27.8.2012. After serving notice to the Respondent, the learned Counsel for the Respondent as well as the Appellant were heard.

- 12.** At this stage, it was noticed from the perusal of the memorandum of Appeal in the first paragraph relating to the details of the Appeal, the Appellant has specifically mentioned that the Appeal has been filed both against the main order dated 1.6.2011 and the Review Order dated 9.2.2012 passed by the State Commission.
- 13.** In view of the fact that this Appeal has been filed as against the main order dated 1.6.2011 which would make the Appeal maintainable, the Appellant has to necessarily raise the grounds in the Appeal assailing the main order dated 1.6.2011. But, the perusal of the Appeal paper book would make it manifestly clear that the Appellant has not raised

any ground assailing the main impugned order dated 1.6.2011. The grounds of relief have been given in Para-9 of the Appeal. Totally 11 grounds have been raised. None of the grounds would relate to the legality or validity of the main impugned order dated 1.6.2011.

14. On the other hand, all the 11 grounds given in para-9 of the Appeal would merely question the legality and validity of the Review order dated 9.2.2012 and not against the main order dated 1.6.2011. To make the matters worse, the Appellant in the last paragraph at Para 21 has sought relief for setting aside the order dated 9.2.2012 which is claimed as impugned order. Thus, the Appellant has not chosen to seek for quashing of the main impugned order dated 1.6.2011. The main prayer sought for by the Appellant in this Appeal is given below:

“Relief Sought

“To set aside the impugned order dated 9.2.2012 passed by the Hon’ble Gujarat Electricity Regulatory Commission”.

15. Even though the Appellant sought for quashing of the demand letter and the bills issued by the Respondent, the Appellant has not chosen to specifically seek for quashing of the main impugned order dated 1.6.2011.
16. As indicated above, the Appellant has never pleaded nor raised any grounds assailing or attacking the main

impugned order dated 1.6.2011. Therefore, this Appeal cannot be considered to be an Appeal as against the main order whereas this Appeal can be considered to be the Appeal only as against the Review order dated 9.2.2012.

17. On this ground, we have to necessarily hold that the Appeal is not maintainable and as such it is liable to be dismissed.
18. However, we would like to go into the merits of the grounds of the Appeal raised assailing the order dated 9.2.2012 as we have heard the elaborate arguments of learned counsel for both the parties with regard to the merits of the matter.
19. While analysing the merits of the matter we may recall some relevant facts mentioned earlier to show the background of the case as well as the conduct of the Appellant. Those facts are as follows:

- (a) The erstwhile Gujarat Electricity Board filed a Petition before the State Commission seeking for levy of parallel operation charges on the Captive Power Plants which were running in parallel with the Electricity Board's Grid. The State Commission passed the order dated 25.6.2004 holding that the Petition was maintainable as parallel operation charges were leviable and directing the Electricity Board to conduct study to verify and quantify the parallel operation charges to be levied on Captive Power Plants.

(b) Some of the Captive Power Plants challenged the order dated 25.6.2014 of the State Commission before the Gujarat High Court. The Gujarat High Court by the order dated 21.10.2008 and Review Order dated 28.4.2009 set aside the State Commission's order dated 25.6.2004 by allowing the Captive Power Plants to enter into a settlement agreement with the Respondents either to accept for payment of parallel operation charges or to agree for installation of meters with three minutes integration period for computing the demand charges and directed the State Commission to reconsider the issue after hearing all the parties.

(c) Accordingly, the State Commission directed the Respondent Gujarat Energy Transmission Corporation Limited to submit the list of Captive Power Plants operating in parallel with the State Grid.

(d) In pursuance of the directions, notices were given to all the Captive Power Plants informing them about the above option. Accordingly, the Respondent submitted the list of Captive Power Plants who have accepted the settlement proposal. Some of the Captive Power Plants have not accepted the settlement proposals. The Appellant is one of them.

(e) On receipt of the report submitted by the Transmission Company, the 2nd Respondent, the State Commission recorded by the order dated 13.11.2009 that the Appellant and some other Captive Power Plants had objected to levy of parallel operation charges and directed them to file their objections for the review of the parallel operation charges within the time frame.

(f) Accordingly, objections were filed. After considering the same, the State Commission passed final order on 1.6.2011 holding that the parallel operation charges are leviable at Rs.26.50/kVA on all the Captive Power Plants operating parallel with the Grid. This would apply to the Captive Power Plants who have not opted for settlements. Therefore, the Appellant is also liable to pay parallel operation charges.

(g) Even though the main order that was passed on 1.6.2011 which would apply to the Appellant also, no steps have been taken either by filing the Appeal before this Tribunal or for filing the Review before the State Commission. In the meantime, the Respondent Company raised the bill in pursuance of the order dated 1.6.2011, raised the bill on the Appellant for Operation Charges.

(h) Only after receipt of the bill, the Appellant filed the Review Petition on 19.10.2011 after delay of 81 days praying for the permission to enter into settlement agreement with the Respondent as per the settlement proposal as referred to in the High Court of Gujarat's order.

(i) The State Commission in this Review Application called both the parties and heard the arguments. A preliminary objection was raised by the Respondent that Review was not maintainable since the Petition was filed beyond the period of limitation. Only thereafter, the Appellant filed a Petition to condone the delay of 81 days in filing the said Review Petition. Then the State Commission heard the matter and dismissed the said Petition by the order dated 9.2.2011 both on the grounds of delay not explained as well as on the grounds that there is no merit in the Review.

(j) Now the said order has been challenged in this Appeal by incidentally referring to the main order dated 1.6.2011 also to make the Appeal maintainable as mentioned earlier.

(k) The only point raised by the Appellant while attacking the Review Order dated 9.12.2012 that two other Companies namely M/s. Nirma Limited and M/s.

Varsana Ispat Limited too had originally objected to levy of parallel operation charges have been given the benefit to enter into a settlement with the Respondent but the said benefit has been denied to the Appellant who was similarly situated with the said Companies and thereby, the State Commission discriminated against the Appellant without adducing proper reasons.

- 20.** Even though as mentioned earlier, the Appeal against the order dated 9.2.2012 is not maintainable, we would like to go into the discrimination aspect projected by the Appellant which had been dealt with by the State Commission in the said order.
- 21.** Let us now quote the observations as well as the findings of the State Commission in the order dated 9.2.2012 on the issues raised by the Appellant through the Review Petition with reference to the aspect of discrimination:

“7.1 The Commission is guided by the principles envisaged for the Civil Courts in adjudicating review petitions as enunciated in Section 94 (1) (f) of the Electricity Act, 2003 read with the Regulation No 72 of the Gujarat Electricity Regulatory Commission (Conduct of Business) Regulations, 2004. According to provision of the Civil Procedure Code, 1908 and Regulations, 72 of the Conduct of Business Regulations, the review of the Judgment/ Order can be made on following grounds:

(i) 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

(ii) on account of some mistake or error apparent from the face of record, or for any other sufficient reason,

The above regulation further provides that any person aggrieved by a decision or order of the Commission, may apply for review of such order within 60 days of the date of decision/order to the Commission.

The above provision provides that the Commission has power to review the earlier order if it is found that error pointed out in the Review Petition was either a mistake or it is an apparent error, or if new and important evidence is discovered by the petitioner which was not available during the decision earlier taken by the Commission. It also stipulates that the petitioner shall require to file a review petition within 60 days and in case of delay, necessary condonation of delay application required to be filed by the petitioner. In the present case, the Commission has passed an order dated 1.6.2011 and the same was forwarded to the petitioner vide letter dated 4.06.2011 .The petitioner has filed a petition on 20thOctober,2011 i.e. after 141 days of the order of the Commission. It seems that the petition has been filed with a delay of 81 days. The petitioner and the petitioner has filed condonation of delay application on 2nd January,2010, i.e. after the respondents have raised issue regarding delay, stating that the petitioner came to know from the order of the Commission that two companies viz., M/s.Nirma Ltd. and Versana Ispat Ltd. were granted benefit of choosing the option of 3

Minutes integration meter installation later on from the Order of the Commission. Based on the same, the petitioner has requested respondent No.5 that the said option may be allowed to the petitioner which was denied by the respondent. Hence, the petitioner has sought legal opinion on this aspect and was advised that it is an error apparent on the face of record and the remedy was available through review of the order passed by the Commission. Hence, the present petition preferred by the petitioner and above reasons caused for delay which may be permitted. It is an admitted fact that the petition is filed with 81days delay by the petitioner. The petitioner has submitted that it has approached the respondent No.5 for granting an option for 3 minutes integration which was denied by the respondent No.5. However, there is no evidence on record submitted by the petitioner to substantiate his claim. Similarly, the petitioner has submitted that he has sought legal advice which is also one of the reasons for delay in filing the petition. The petitioner has not submitted any evidence on record to substantiate its claim. Thus, the condonation of delay sought by the petitioner is without any supporting documents and same is rejected.

7.2 The petitioner has sought review stating that there is an error on the face of record arising out of material facts that M/s.Nirma Limited and M/s.Verasana Limited were given option to opt for 3 Minutes integration of energy meters to be installed at their places against the levy of POC to decide the demand charges and the same option is to be given to the petitioner. It is a fact that the Commission has finally decided the petition No.256/2003 and 867/2006 to the effect that the parallel operation charges is leviable on the captive generating plants, who are operating the CGP in parallel with the grid. It is also a fact that

Hon'ble High Court had in its order dated 28.3.2009 in MCA No.2967 of 2009 decided and granted options to the captive generating plants to opt for any one of the options within 8 weeks as stated below:

“When the Review Applications came up for hearing I had suggested to the parties to explore possibility to resolve the dispute. I am informed that the parties met and pursuant to such meeting a broad consensus is reached which is to the following effect.

[A] The Power utilities and the Companies having Captive Power Plant(s) to agree, by way of a without prejudice settlement for 10 years, to either of the following options:

(a) Meters with the Three (3) minutes integration period for computing the Demand Charges and no POC would be levied on such CPP Units; or

(b) Adoption of Commercial Circular No.706, with condition no.2, therein, being substituted, by the following:

Whenever the power will be sold to GUVNL the parallel operation charges to be paid shall be compensated as part of the cost of generation and rate of sale of power shall be accordingly adjusted.

[B] Meter installation or Change in the meter programming for the purpose of Meters having agreed Integration period.

After the issue of settlement order by GERC, GEB will take necessary actions for the installation of meter or modification in the program of the meter, as the case

may be, for implementing the agreed integration period as suggested above. The cost of making such change for the first time viz. (i) change in setting or program of the meter or (ii) change of the meter to implement the desired integration period for computing the Demand Charges as agreed will be borne by GUVNL/GETCO.

CPP units can exercise change in the selected option mentioned above only once during the calendar year i.e. CPP unit can exercise its option from the two options mentioned above only once during the calendar year. The cost of implementation arising from the change in decision any time after exercising the first option will be borne by the CPP unit.”

7.3 According to the above directives of the Hon'ble High Court, the Commission had issued notices to every Captive Generating Plant owner including the petitioner whose CGPs were connected in parallel with the grid. Similarly, the respondent No.1 had also issued notices and provided agreement for choosing any one of the options as decided in MCA No.2967 of 2009 and directed by the Hon'ble High Court in its order dated 28.3.2009 within a stipulated time limit.

7.4 It is a fact that M/s.Nirma Ltd. and M/s.Varsana Ispat Ltd had earlier objected to levy of Parallel Operation Charges. However, during the hearing Learned Advocate Shri Gaurav Mathur, on behalf of M/s.Nirma Ltd., submitted that M/s.Nirma Ltd. wanted to opt for installation of 3 minutes integration energy meter for the entire period of 10 years which was allowed by the Commission. The relevant para 20 and 22 of the order dated 1.6.2011 in Petition No.256/2003 and 867/2006 passed by the Commission in this regard reads as under:

“20. Learned Advocate Shri Gaurav Mathur, on behalf of M/s Nirma Ltd., submitted that they had sought some amendment to the agreement sent by the petitioner GETCO. They have informed GETCO that they want to opt for installation of 3 minutes integration energy meter for Parallel Operation Charges for the entire period of 10 years and in this eventuality, the respondent shall not have to pay POC based on Commercial circular No.706. This option is objected to the petitioner, stating that as per the directives /orders of Hon’ble High Court, the respondent requires to give option on an annual basis. He submitted that the order of the Hon’ble High Court gives a chance to the CPPs to change their option once every year. However, their request to go for option of installation of 3 minutes integration energy meter for the entire period of 10 years, do not violate the court’s orders. ...

22. Responding to the arguments of learned Advocate Shri Gaurav Mathur, on behalf of M/s Nirma Ltd., learned Advocate Shri M.G.Ramachandran, submitted that if the respondent desires to opt for installation of energy meter of 3 minutes integration period for the entire period of 10 years, the petitioner has no objection. He further submitted that in such a case, the respondent need not pay charges as per Commercial Circular No.706 issued by the erstwhile GEB. He also submitted that the respondent has not at present executed any agreement with the petitioner viz. GETCO. Therefore, the statements of Learned Advocate Shri Gaurav Mathur and Learned Advocate Shri M.G.Ramachandran can be recorded on behalf of the respondent and petitioner respectively and the Commission may consider that

M/s Nirma Ltd. has opted for option of installation of 3 minutes integration meter in this case...”

7.5 As regards M/s.Versana Ispat Ltd., it had earlier objected to the levy of POC. However, prior to the decision of the Commission, M/s.Versana Ispat Ltd. has executed an agreement dated 12.1.2011 with GETCO wherein M/s.Versana Ispat Ltd. opted for installation of 3 minutes integration meter at their place and the same was communicated to the Commission vide its letter dated 19.1.2011. Thus, the option of 3 minutes integration meter installation was taken by M/s.Versana Ispat Ltd. prior to decision of the Commission in Petition No.256/2003 and 867/2006.

7.6 The petitioner had categorically objected to levy of Parallel Operation Charges which is recorded by the Commission in para 19 of the order dated 1.6.2011 in Petition No.256/2003 and 867/2006. Accordingly, the Commission has in para 24 of the order recorded that 37 CPPs have executed agreement with the respondents as per the directive of the High Court and selected one of the options allowed by the Hon'ble High Court which is recorded by the Commission. The Commission has also recorded that M/s.Nirma Ltd. and M/s.Varsana Ispat Ltd. have agreed to execute agreements under 3 minutes integration meter clause and the same was recorded by the Commission. The petitioner had not shown his willingness to opt for any of the options provided by the Hon'ble High Court in its order dated 28.3.2009 in MCA No.2967 of 2008 and objected levy of the Parallel Operation Charges. The Commission has passed an order dated 1.6.2011 in Petition Nos.256/2003 and 867/2006 after considering the above facts and legal submissions made by the parties including the petitioner. Thus, the submission

of the petitioner that he is discriminated against is incorrect because the petitioner has during the hearing as well as prior to decision of the Commission in Petition No.267/2003 and 867/2006 never asked the same treatment as in case of M/s.Nirma Ltd. and M/s.Varsana Ispat Ltd. Hence, the contention of the petitioner that he was given discriminatory treatment is not tenable and the same is rejected.

7.7 The petitioner had objected to levy of Parallel Operation Charges and not opted for any option given by the Hon'ble High Court of Gujarat till the order was passed by the Commission and supplementary bill dated 30th September,2011 for Rs.35,11,250/- issued by the respondent No.5 PGVCL as per the order dated 1.6.2011 of the Commission. Thus, the review of the order has been sought by the petitioner after objecting to the levy of the POC and decision of the Commission dated 1.6.2011 passed in Petition No.256/2003 and 67/2006 and decided levy of POC at the rate of 26.50 per KVA. Once the petitioner has objected to levy of the POC and not opted for any options till the final order passed by the Commission, it has to bear the consequences of the order passed by the Commission. It is not permissible to accept different stands to the petitioner at different times. Based on the above observation, we find that there is no merit for grant of review of order dated 1.6.2011 in Petition No.256/2003 and 867/2006 passed by the Commission.Hence, the relief sought by the petitioner to review the order dated 1.6.2011 in Petition No.256/2003 and 867/2006 is rejected”.

22. The crux of the discussion is as follows:

- (a) The Review Petitioner has sought the review of the main order on the ground that there is an error on

the face of the record since the other two Companies i.e. M/s. Nirma Limited and M/s. Varsana Ispat Limited were given option for three minutes integration for energy meters to be installed at their places against the levy of parallel operation charges to decide the demand charges whereas the said option has not been given to the Review Petitioner who is similarly situated.

(b) The High Court of Gujarat by its order dated 28.3.2009 granted option to the Captive Generation Plant to opt for any one of the options either to install the meters with three minutes integration period or to pay the parallel operation charges. According to this direction, the State Commission issued notice to all the Captive Power Plants. Most of the Captive Power Plants agreed for the proposal and some of the Captive Power Plants objected to the said levy. Even though M/s. Nirma Limited and M/s. Varsana Ispat Limited had initially objected to levy of parallel operation charges, however, during the final hearing, they accepted for the settlement proposals and accordingly the State Commission permitted them to execute the agreements with the Respondent. But, the Review Petitioner(Appellant herein) had objected the levy of parallel operation charges throughout and the same has been recorded in the main order dated 1.6.2011.

(c) The Review Petitioner has not shown his willingness to opt for any of the options suggested by the High Court. On the other hand, it specifically objected levy of parallel operation charges. On the basis of that, the State Commission passed the impugned order dated 1.6.2011. Therefore, the submissions of the Review Petitioner that he was discriminated as against the other Companies is not tenable because those other Companies finally agreed for settlement during the hearing i.e. before the proceedings were over. However, the Review Petitioner did not agree for the same throughout till the date of the final order dated 1.6.2011. Therefore, the contention of the Review Petitioner that he was given discriminatory treatment is misplaced.

(d) Once the Review Petitioner objected to levy of parallel operation charges and not opted for any option till the final order was passed by the State Commission, the Review Petitioner has to act in accordance with the said order he cannot be permitted to take a different stand after the final order was passed which cannot be the ground for Review.

23. The gist of the findings is as under:

(a) U/s 94 (f) of the Electricity Act read with Regulation 72 of the Conduct of Business Regulations, 2004 framed by the Gujarat State Electricity Commission the person concerned can file a Review only when the error apparent on the face of the record has been pointed out.

(b) In the impugned order dated 1.6.2011, two other Companies were granted benefit of choosing the operation of three minutes integration of meter installation because they agreed for the same during the hearing but the Petitioner had not agreed for the same. On that basis, the order had been passed by the Commission on 1.6.2011. The said order had attained finality. Now, the Petitioner can not claim that same benefit should be given to the Review Petitioner by filing Review Petition raising the point of discrimination by taking a different stand belatedly would not be construed to be an apparent error on the face of the record. Further, the delay of 81 days, in filing the Review, also has not been properly explained.

24. These findings with reasonings would clearly indicate that the discrimination aspect has been considered by the State Commission which ultimately found that there was no discrimination since the Review Petitioner did not chose to opt for the option to agree for the settlement and the main

order dated 1.6.2011 passed by the State Commission on the basis of the stand taken by the Review Petitioner, cannot be said to be an apparent error on the face of the record.

- 25.** One of the arguments made by the Appellant before this Tribunal that the time period of 8 weeks which has been prescribed by the High Court for deciding one of the two options cannot be said to be sacrosanct especially when it has been relaxed for the other two Companies. It is pointed out by the Appellant that the State Commission has actually relied in the case of Nirma Limited by the order dated 7.4.2012 and therefore, similar relaxation would have been made in the Appellant's case also. This argument is completely misconceived.
- 26.** As mentioned above, in so far as the case of Nirma Limited is concerned, though initially there was an objection to the levy of Parallel Operation Charges, in the final hearing before the State Commission, Nirma Limited had made submissions that it agreed to for taking three minutes integration option also. Thus, the case of Nirma Limited is totally different and distinguishable from the Appellant's case.
- 27.** The Appellant has contended that there is no intelligible differentia for classifying the Captive Power Plants into two categories namely: (1) those accepting the settlement within

8 weeks and (2) those accepting the settlement beyond 8 weeks. There is no merit in this contention since the Appellant did not choose one of the options when it was offered to the Appellant by the State Commission. In fact, the Appellant was put to notice by various daily orders of the State Commission in this regard. The said opportunity was equally given to all the Companies including the Appellant who objected to the levy earlier. The other Companies only though objected earlier, had given the option. The Appellant alone did not change his stand before the State Commission by continuing to object to the levy of the parallel operation charges.

- 28.** The State Commission thus, before passing the final order gave full opportunity to the Captive Power Plants to make their stand despite the expiry of 8 weeks period without any discrimination. The Appellant having taken a stand before the State Commission by objecting to the levy of parallel operation charges which led to the passing of final order dated 1.6.2011, cannot now be allowed to take a different stand to avoid paying the amount as per the order of the State Commission that too in the Review Petition.
- 29.** Thus, the Appellant having chosen to litigate the matter before the State Commission by taking a stand as against the levy of Parallel Operation Charges, has now taken a

contrary stand to avoid the charges liable to be paid to the Respondent.

- 30.** There is one more aspect to be noticed in this context as pointed out by the Respondent. There were five Captive Power Plants who had positively refused to accept one of the two options. Out of the five Captive Power Plants, two Companies namely Nirma and Versana subsequently agreed to the option for three minute integration. On this basis, the State Commission recorded the stand of these two Companies and gave an option to other three Captive Power Plants namely Shah Alloys Limited and Videcon Industries Limited including the Appellant for taking a chance before the State Commission but these Companies had categorically objected to the Parallel Operation Charges.
- 31.** After passing of the order dated 1.6.2011, the one other Company namely Shah Alloys Limited filed Application before the State Commission alleging that its Captive Power Plant had been delinked from the grid contending that the Parallel Operation Charges would not be imposed on the Shah Alloys Limited. This prayer made by the Shah Alloys Limited was rejected by the State Commission by the order dated 18.1.2012.

- 32.** As against this order, the Shah Alloys Limited filed Appeal before this Tribunal in Appeal No.65 of 2012 and the same was dismissed by this Tribunal by the judgment dated 5.11.2012. Similarly, the second Captive Power Plant namely Videocon Industries Limited also moved Review Petition before the state Commission seeking for the review of the order dated 1.6.2011 and praying for one of the two options to be made available to it. The said Petition was also dismissed by the State Commission on 3.4.2012. As against the said order dated 3.4.2012 read with the main order dated 1.6.2011, the said Company filed an Application to condone the delay. The said Application was dismissed by this Tribunal on 18.12.2012 thereby rejecting the Appeal.
- 33.** In these circumstances, the Respondents have validly implemented the order dated 1.6.2011 by raising the bills in respect of Captive Power Plants which positively refused to exercise one of the options.
- 34.** The Captive Power Plants who have given option during the pendency of the proceedings on the undertaking that Parallel Operation Charges would be payable upon determination were permitted to enter into settlement through the main order dated 01.6.2011. If the permission for option at this stage is given to the Appellant as claimed, it would amount to re-open the matter in which event all the other parties would start demanding one of the two options

on the grounds that no prejudice would be caused to the Respondent by giving such option to those parties also. This cannot be permitted at this belated stage.

35. To Sum-Up

“In view of the discussions made above, we hold that the contention of the Appellant that it is discriminated as against the other Companies is untenable as the aspect of discrimination has been dealt with by the State Commission in the Review Order in detail and valid reasonings have been given in the said order to reject the said contentions of the Appellant. Therefore, the Appeal has no merits besides the fact that the Appeal itself is not maintainable as there is neither prayer for quashing of the main order dated 1.6.2011 nor the grounds raised in the Appeal assailing the same.”

36. Accordingly, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:31st May, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~