

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

R.P. No. 1 of 2012 in Appeal No. 142 of 2009

&

R.P. No. 2 of 2012 in Appeal No. 147 of 2009

Dated 16th February, 2012

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

R.P. No. 1 of 2012 in Appeal No. 142 of 2009

In the matter of:

**BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place
New Delhi -110 019**

**.... Review Petitioner/
Appellant**

Versus

**1. Delhi Electricity Regulatory Commission
Viniyamak Bhawan, C-Bolck, Shivalik
Malviya Nagar, New Delhi -110 017**

**2. Government of National Capital Territory of Delhi
(Department of Power)
Delhi Secretariat, 8th Level, B-Wing
New Delhi -110 002**

.... Respondents

R.P. No. 2 of 2012 in Appeal No. 147 of 2009

In the matter of:

**BSES Yamuna Power Limited
Shakti Kiran Building
Karkardooma
Delhi-110 092**

**.... Review Petitioner/
Appellant**

Versus

**1. Delhi Electricity Regulatory Commission,
Viniyamak Bhawan, C- Block Shivalik
Malviya Nagar, New Delhi-110 017**

**2. Government of National Capital Territory of Delhi
(Department of Power)
Delhi Secretariat, 8th Level, B-Wing
New Delhi-110 002**

... Respondents

Counsel for Appellant(s)

Mr. Amit Kapur &
Mr. Vishal Anand

Counsel for the Respondent(s):

Mr. Meet Malhotra, Sr. Advocate with
Mr. T.S. Ranjan Mukherjee &
Mr. Ravi S.S. Chauhan
Mr. K.M. Varma, JD (Legal) &
Ms. Rinku Gautam, J.D. (T-F) (Rep.)

ORDER

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

The Review Petitioners/Appellants are seeking a review of the findings of this Tribunal on the issue relating to impact of increase in CPI/WPI on Operation & Maintenance expenses in true-up in its judgment

dated 12.7.2011 passed in Appeal nos. 142 and 147 of 2009.

2. In the above Appeals, the Review Petitioners/Appellants had challenged the order dated 28.05.2009 passed by the Delhi Electricity Regulatory Commission (“State Commission”) in the matter of true-up for the FY 2007-08 and determination of ARR and tariff for the FY 2009-10. One of the issues agitated by the Review Petitioners/Appellants was regarding the failure of the State Commission in truing up the impact of increase in CPI/WPI on O&M expenses. The Tribunal decided this issue on the basis of its earlier judgment dated 31.5.2011 in Appeal No. 52 of 2008 in the matter of North Delhi Power Limited vs. Delhi Electricity Regulatory Commission. Although the Tribunal agreed with the contention of the Review Petitioners/Appellants that for determining

the O&M expenses for the FY 2007-08, the indexation factor should be based on CPI and WPI figures for the period 2002-03 to 2006-07, it rejected their contention that the State Commission should have determined the inflation factor for each year of the control period on rolling basis.

3. The Review Petitioners/Appellants have urged in these Review Petitions that there was an error apparent on the face of the findings as the Tribunal had not considered the following:

- a) The Appeals filed by the Appellants related to the interpretation of Regulation 5.4 of the MYT Tariff Regulations. It is a fundamental principle of tariff fixation itself that tariff has to be revised on an annualized basis, in particular for uncontrollable factors and any elements within controllable factors

specifically so provided for and this principle pervades the MYT Regulations.

- b) The Regulations use the word “annual” in relation to various elements of tariff. Although a multi-year tariff is determined with the principle of truing up whereby the appropriate rate of return is made available on each year and not on a 4-year or a 5-year control period basis. In doing so, on a 4-year basis would lead to grave hardship to the consumers in a period where the 4 years reflected a decline in inflation and conversely lead to shortage of funds and losses in a period of growing inflation.
- c) Regulation 4.16 provides that the truing up has to be “every year” where it relates to variation in revenue/expenditure.

d) Regulation 5.4 provides the principle for determination of ARR which is to be determined as per Regulation 5.1, for “each year of the control period”.

4. The learned counsel for the Review Petitioners/Appellants argued extensively referring to clauses 4.16, 5.4, 11.2 of the MYT Regulations and para 1.20 of the Explanatory Note of the MYT Regulations, 2007 in support of his arguments. He further argued that the Tribunal relied on the CERC Regulations, 2009 while deciding the present issue in Appeal No. 52 of 2008. It is further contended that the Central Commission’s Tariff Regulations provide for a fixed escalation rate to be used for the entire control period but on the contrary the MYT Regulations of the Delhi State Commission provide for a formula to be used every year to determine the O&M expenses and

that therefore, Central Commission's Regulations is not para-materia with the State Commission's Regulations and accordingly, cannot be relied upon.

5. The learned Senior counsel for the State Commission argued that the Review Petition against the Judgment dated 12.7.2011 was not maintainable either on facts or in law. According to him, the Review Petitioners have not been able to point out any error apparent on the face of the records so as to justify the review particularly when the judgment of the Tribunal in Appeal No. 52 of 2008 has already been challenged by the Appellant namely North Delhi Power Limited before the Hon'ble Supreme Court in Civil Appeal no. 7910 of 2011 and the Hon'ble Supreme Court had admitted the case vide order dated 11.1.2011. It is pointed out that one of the issues involved in the said appeal is exactly the one which has been raised by the

Review petitioners in the present case and the grounds urged in support thereof are also similar and hence the present Review Petitions which involved the same question of law as well as similar grounds therefore, ought not to be entertained by this Tribunal in view of the principles contained in sub-rule 2 of rule 1 of Order 47 CPC. On merits, he referred to the Regulations 4.16 and 5.41, according to which the O&M, which is a controllable expense, would not be trued up in the ARR.

6. We have carefully examined the respective submissions made by the parties and considering documents furnished by them in support of their arguments before this Tribunal.

7. Before examining the issue on merit, we shall take up the issue of maintainability of the Review Petition

which has been raised by the learned Senior counsel for the State Commission.

8. Section 120(2)(f) of the Act, 2003 confers the same power upon the Tribunal as are vested in a civil court under the CPC to review its decisions. However, according to Section 120 (1) of the Act, the Tribunal is not bound by the procedure laid down by the Code of Civil Procedure, 1908 but is to be guided by the principles of natural justice and subject to the other provisions of the Act and the Tribunal has powers to regulate its own procedure. As the Tribunal has not laid down its own procedure in this regard, we have to examine the relevant provision contained in the CPC in the matter of Review as applicable to the present case.

9. The Civil Court's power to review its own decisions under the CPC is contained in Order 47 Rule 1. Sub-clause (2) of Order 47(1) reads as under:

“A party who is not appealing from a decree on order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review”.

10. As pointed out by the learned Senior counsel for the State Commission, Order 47 Rule 1 (2) of the CPC places a restriction on the right to file a review application by a party to the decree/proceedings where an Appeal has been filed by another party and the grounds of the appeal are common to the review application. However, in the present case the Review Petitioner was not a party to the proceedings in Appeal

No. 52 of 2008 in the matter of North Delhi Power Limited vs. Delhi Electricity Regulatory Commission, against which NDPL has filed an appeal before the Hon'ble Supreme Court.

11. Learned counsel for the Review Petitioners/ Appellants has referred to A.I.R. 1935 Rangoon 364 in the matter of V.S.T. Thamsa Thasin Tharaganar vs. Mohamed Haji Ganny & Anr. wherein the expression 'party' used in sub-rule (2) Order 47 of Rule 1 of CPC means a party to the decree. He further referred to AIR 1993 AP 209 in the matter of Kannegolla Naghabhushanam vs. the Land Acquisition Officer wherein it was held that Order 47, Rule 1, sub-clause (2) of CPC will apply only in cases where an Appeal is pending and a Review is sought to be filed against the original decree during the pendency of the appeal. The said provision will not be applicable in case there are

two different judgments even though the contents might be the same.

12. Admittedly, the Review Petitioners/Appellants were not the parties in Appeal no. 52 of 2008 which has now been challenged in the Hon'ble Supreme Court. Even though, the issue raised in these Review Petitions is the same as raised by NDPL in their Appeal in the Hon'ble Supreme Court as against the judgment of the Tribunal in Appeal no. 52 of 2008, we feel in the light of the above principles, the Review Petitions are maintainable.

13. Now let us examine the Review Petitions on merit.

14. We find that the Tribunal in its judgment on the issue regarding the impact of increase in CPI/WPI on O&M expenses in true-up has given detailed findings for not accepting the contentions of the Review

petitioners/Appellants to determine the inflation factor for each year of the control period on rolling basis. It has also been mentioned in the impugned judgment that the indexation factor based on the actual WPI and CPI indices for the control years of the present MYT tariff will be used while deciding the indexation factor for the next MYT period and, therefore, no prejudice will be caused either to the distribution company or the consumers. This Tribunal has also observed that there is no provision for true up of O&M expenses in the Regulations and for determination of indexation factor on rolling basis. The reference to the Central Commission's Regulations in the order are as a passing reference at the end of the relevant paragraph of the findings and in fact, the findings are based upon the Regulations of the State Commission only.

15. Learned counsel for the Appellants has again advanced the detailed arguments in support of his claim which were already made at the time of hearing of the main Appeal. The same have been duly considered by this Tribunal while deciding the main Appeal.

16. In view of the above reasoning, we do not find any error apparent on the face of the record in the impugned judgment. Accordingly, the Review Petitions are dismissed. No order as to costs.

17. Pronounced in the open court on this 16th of February, 2012.

(Rakesh Nath) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

REPORTABLE / NON-REPORTABLE

VS