Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.120 of 2012

Dated: 03rd July, 2013

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

In the Matter of:

Tata Power Delhi Distribution Company Limited.,
NDPL House,
Hudson Lines, Kingsway Camp
Delhi-110 009

…Appellant

Versus

1. **Delhi Electricity Regulatory Commission**
   Viniyamak Bhawan, C-Block
   Shivalik, Malviya Nagar,
   New Delhi-110 017
2. **Delhi Transco Limited.,**
   Shakti Sadan, Kotla Road,
   New Delhi-110 002

…… Respondent(s)

Counsel for the Appellant(s) : Mr. Sakya Singha Chaudhuri
Mr. Avijeet Kumar Lala
Mr. Anand K. Srivastava
Ms. Anusha Nagarajan
Ms. Mandakini Ghosh
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Counsel for the Respondent(s): Mr. Jayant Nath, Sr Adv.
Mr. Sachin Datta,
Ms. Niti Arora,
Mr. Ashok Kumar Singh,

Mr. Dinesh Sharma,
Ms. Kritika Mehra
Mr. Vineet Tayal for R-1
Mr. Vivek Narayan Sharma
Mr. Vishal Sharma for R-2

J U D G M E NT

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

1. Tata Power Delhi Distribution Company Limited earlier known as North Delhi Power Limited, New Delhi is the Appellant herein.

2. The Appellant filed a Petition before the Delhi Electricity Regulatory Commission (Delhi Commission) claiming for the refund of excess transmission charges collected from the Appellant by Delhi Transco Limited towards charges for wheeling of 62.5 MW power from the IP generating Station to licensees in the State of Haryana.

3. This Petition was dismissed by the Delhi Commission on 15.5.2012.

4. Aggrieved by this order, the Appellant has filed this Appeal.

5. The relevant facts are as follows:

(a) The Tata Power Delhi Distribution Company Limited, the Appellant is a Distribution Licensee. It

undertakes electricity distribution and in retail supply in North and North West Districts of NCT of Delhi.

(b) Delhi Commission is the First Respondent. The Delhi Transco Limited is the Second Respondent.

(c) The Appellant, being a Distribution Licensee is engaged in supply of Electricity to its consumers in North and North West areas of NCT of Delhi. The Delhi Transco Limited, the second Respondent is a Government Company which is presently entrusted with the business of transmission of electricity in National Capital Territory of Delhi and is also the State Transmission Utility of Delhi under Section 39 of the Electricity Act,2003.

(d) Indraprashtha Power Generation Company Limited, a generating Company in NCT of Delhi is fully owned by Government of National cpital Territory of Dehi(GNCTD). The GNCTD issued a policy direction w.e.f 1.4.2007 to the effect that the responsibility for arranging supply of power in the NCT of Delhi shall rest with Tata Power Delhi Distribution Company Limited(TPDDL) and other Discoms operating in Delhi.

(e) Pursuant to the said policy directions issued by the GNCTD, the Delhi Commission through the order dated 31.3.2007 reassigned all the existing PPAs with

Delhi Transco Ltd(DTL) amongst the Delhi Distribution licensees as per their Load profile.

(f) The Delhi Commission notified the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2007(Transmission Tariff Regulations).

(g) On 20.8.2007, the Delhi Transco Limited, the Second Respondent filed its Tariff Petition No.46 of 2007 for determination of its Annual Revenue Requirement under Multi Year Tariff Framework for the First Control Period namely the Financial Year 2007-08 to 2010-11 before the Delhi Commission for determination of Transmission Tariff.

(h) The State Commission by the order dated 20.12.2007 determined the transmission tariff payable by all the five Distribution Licensees operating within Delhi. In this tariff order, the Delhi Commission directed that the entire ARR of the Transmission Company shall be recovered every months on pro-rata basis and shall be shared by all the Distribution Licensees including the deemed licensees.

(i) Pursuant to the tariff order issued by the Delhi Commission, the Delhi Transco Limited (R-2) raised and recovered from time to time, the transmission

charges from the Appellant and other Distribution Licensees for its entire generating capacity of Indraprastha Generating Station without making any adjustments/deduction for the transmission of 62.5 MW of power to the State of Haryana during the year 2007-08.

(j) Indraprastha Generating Station was closed down in Oct,2009 as per the directions of Hon'ble Supreme Court.

(k) The Appellant, realising that collection of those charges for transmission of entire power from the distribution licensees of Delhi ignoring the fact that 1/3 of power from Unit No.2,3&4 was transmitted to Haryana by the second Respondent was not proper, wrote to the Delhi Commission by the letter dated 15.3.2010 bringing to the notice of the State Commission that the Transmission Company (R-2) failed to bring on record the fact of transmitting 62.5 MW of power from the Indraprashta Station to the State of Haryana in its Annual Revenue Requirements.

(l) In reply to this, the Delhi Commission directed the Appellant to file an appropriate Petition before the Delhi Commission. Accordingly, the Appellant filed a Petition before the State Commission in Petition No.14

of 2010 seeking for the refund of excess transmission charges collected from the Appellant by the Transmission Company (R-2) towards charges for wheeling 62.5 MW of power from IP Station to the licensees in the State of Haryana.

(m) After hearing the parties, the Delhi Commission passed the impugned order dated 15.5.2012 and dismissed the Petition of the Appellant on the basis of following reasonings:

(i) Since 1963, there was an understanding between the Haryana State Electricity Board and erstwhile Delhi Electricity Supply Undertaking (DESU) with reference to the power supply from IP Station to Haryana State Electricity Board. According to this understanding, the Haryana State Electricity Board had no liability to pay transmission charges for 62.5 MW power supplied from IP Station as it was required to pay only the operation and maintenance charges for the plant in the ratio of its share of power in Unit No.2,3&4.

(ii) The Petitioner (Appellant) as successor entity of Delhi Vidyut Board (DVB) should honour the understanding between the erstwhile DVB and State of Haryana and should pay for the

transmission charges on behalf of Haryana Utilities.

(iii) The present dispute deals with the inter State transmission. Therefore, this question should be raised only before the Central Electricity Regulatory Commission and not before the Delhi Commission.

6. Challenging this order dated 15.5.2012; the Appellant has filed this Appeal.

7. The following grounds have been urged by the Appellant in this Appeal:

(a) Regulation 6.6 of the Tariff Regulations, 2007 provides that Annual Transmission Service charges shall be divided between the beneficiaries of the transmission system on monthly basis on allotted transmission capacity or contracted capacity as the case may be. The Delhi Transco Limited (DTL) in its Annual Revenue Requirements Petition distributed its ARR proportionately among various Distribution Licensees namely BRPL, BYYPL, NDPL (the Appellant), NDMC and MES. In the ARR, the Transmission Company (R-2) did not mention that 62.5 MW power was transmitted by the Transmission

Company (DTL) from the IP Station to the State of Haryana as its share in Unit NO.2,3&4.

(b) The Transmission Tariff of the Transmission Company (R-2) on the basis of the said ARR Petition was determined by the Delhi Commission which was payable by all the Distribution Licensees within the NCT of Delhi. The said tariff order provides that the entire ARR of the Transmission Company shall be recovered every month on pro-rata basis and shall be shared by all the Distribution Licensees including the deemed licensees and other beneficiaries in proportion to the Generating Capacity allocated within Delhi and contracted power on bilateral basis.

(c) The Transmission Company (R-2) from time to time raised and recovered transmission charges from the Appellant and other Distribution Licensees for its entire capacity without making any adjustments for the transmission of 62.5 MW power to Government of Haryana from IP Station. In fact, the Appellant in compliance of the said tariff order, paid the charges to the Transmission Company (R-2).

(d) Despite this, the Transmission Company had omitted to include in its ARR, the Transmission charges recoverable by it towards part of generation capacity

from IP Station which was supplied to Government of Haryana by the Transmission Company. Thus, the Appellant along with other Distribution Licensees have been unnecessarily burdened with transmission charges for the capacity allocated from IP Station to Government of Haryana.

(e) The Appellant alone has paid additional amount of Rs.1, 68,90,065 (Rupees One Crore, Sixty Eight Lacs, Ninety Thousand and Sixty Five) to the Transmission Company and Rs.8,04,271 (Rupees Eight Lacs Four Thousand and Two Hundred Seventy One)/- to the State Load Despatch Centre. However, the Transmission Company (R-2) did not bring to the notice of the Delhi Commission the fact of transmitting 62.5 MW of power from IP Station to the Government of Haryana.

(f) Under those circumstances, the Delhi Commission had apportioned the transmission charges recoverable towards transmission of power from IP Station to Government of Haryana among the Distribution Licensees operating in the Government of NCT.

(g) This is a dispute between the Appellant Distribution Licensee for Delhi and the Transmission

Company (DTL) of Delhi. Therefore, it is the Delhi Commission which has the jurisdiction to adjudicate on the dispute raised by the Appellant.

8. In reply to the grounds urged by the Appellant, the learned Counsel for the Transmission Licensee (DTL) has made the following submissions:

(a) The Delhi Commission in its Tariff Order dated 14.12.2007 observed that it expects the IPGCL to ensure proper allocation of costs, so that neither the consumers of Delhi nor of Haryana cross subsidize the other. The Delhi Commission in the said order observed that IPGCL in its Multi Year Tariff Petition considering the Delhi share of total capacity has appropriated all costs associated with the generation on the consumption basis to determine generation cost to remain applicable for the power sold to Delhi. The Appellant was fully aware of the fact that 62.5 MW of power generated by the IP Power station was being transferred to Haryana and only 185 MW out of the installed capacity of 247.5 MW is considered for supply to Delhi consumers. The Appellant could have approached at the appropriate stage to the Central Commission for recovery of transmission tariff for the Haryana's share of IP Station wheeled through PGCIL's system.

(b) The Appellant had actively participated during the hearing of ARR petition in 46/2007 filed by the Transmission Licensee (R-2) in respect of Financial Year 2007-08 to 2010-11. The Appellant, at that stage, had not objected to the methodology of levy of charges proposed by the Transmission Licensee.

(c) The Appellant had the knowledge of non sharing of Central Transmission Utility Charges and State Utility Charges for other Joint projects in the region which is available in the Regional Energy Accounts issued by NRPC.

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

"Whether the Appellant can be made to bear the Transmission Charges in excess and the Transmission Services utilised by it by passing on the transmission charges of another beneficiary of the Transmission Licensee?

10. Before dealing with the question framed above, let us quote the findings of the State Commission in the impugned order which is as under:

"18. The Commission observes that since 1963 there was a clear understanding between Haryana State Electricity Board (HSEB) and Delhi Electricity Supply Undertaking (DESU) in respect of power supply from IP Station to HSEB. According

to the said understanding between these utilities IP Station extension project comprising three units of 62.5MW (Unit 2, 3 & 4) was undertaken as a joint venture. The Capital cost of these units was shared by DESU and HSEB in the ratio of 2:1. HSEB was entitled to draw power to the extent of 1/3rd share of generation of these units. Further, both the parties were to share the operation and maintenance cost including fuel in the same ratio. The amount of O&M charges consist of fuel charges, operation and maintenance, salaries and wages of O&M staff and Generation establishment and Administration expenses only. It appears from the above that as per the said understanding, HSEB was not paying any transmission charges for 62.5MW power supplied from IP Station. Further, it is noticed that the said understanding between DESU and HSEB continued till October, 2009 i.e. the closure of IP Station.

19. The Commission further observes that the NDPL participated in the public hearing for determination of the Tariff of IPGCL, PPCL and DTL but no objections were raised regarding recovery of transmission charges for entire 247.5 MW power from IPGCL Station from DISCOMs operating in the NCT of Delhi. The said Tariff Order dated 14.12.2007 of IPGCL and DTL was not assailed before the ATE by the NDPL. Thus, the said Tariff Order of IPGCL & DTL has attained finality.

20. The Commission has considered the arguments raised on behalf of the NDPL. The Commission is of the view that the understanding between DESU and HSEB since 1963 that no transmission charges were to be recovered from HSEB carries forward to all successors entities till the closure of IP Station in October, 2009. The Commission is of the view that by virtue of being a successor entity of the erstwhile DESU/DVB, NDPL should honour and abide by the understanding reached between DESU/DVB and HSEB. The Commission also notes that HSEB is not a regulated entity before the Commission therefore, it would not be appropriate to pass any direction to HSEB. This matter, if at all, should have been raised by NDPL in a Petition before the Central Commission, which is the concerned Commission in respect of matters relating to inter-state transmission of Electricity".

11. The crux of the findings in the impugned order as quoted above, is as follows:

(a) Since 1963, there was understanding between the State Electricity Board and Delhi Electricity Supply Undertaking (DESU) in respect of power supply from I P Station to the Electricity Board. As per this understanding, the IP Station Extension Project was undertaken as a joint venture. The Capital Cost of this project was shared by DESU and Electricity Board in the ratio of 2:1. The Electricity Board was entitled to draw power to the extent of 1/3rd share of generation of these units. Both the parties were to share only the operation and maintenance charges and the fuel charges in the same ratio. As per the said understanding, the Electricity Board was not required to pay any charges for transmission of power from the IP Station. The said understanding between the DESU and Electricity Board continued till October, 2009 i.e. till the closure of the Generating Station.

(b) The Petitioner is the successor entity of erstwhile DESU/DVB. Therefore, the Petitioner should honour the understanding reached between the parties.

(c) The Petitioner NDPL participated in the public hearing for determination of tariff of IPGCL, PPCL and DTL. In that public hearing, the Appellant did not raise any objection regarding recovery of transmission charges for the entire power from IPGCL's Station to Discoms operating in the NCT of Delhi. The Tariff Order was passed on 14.12.2007. This order was not challenged before the Appellate Forum by the Petitioner.

(d) Admittedly, the State Electricity Board of Haryana is not a regulated entity before the Delhi Commission. Therefore, the Delhi Commission cannot give any direction to the Haryana Electricity Board. Since the issue relates to the inter-State transmission of electricity, the Central Commission would be the appropriate authority to deal with the same and not the Delhi Commission.

12. In the light of the above findings in the impugned order dated 15.5.2012, let us now deal with the points urged by the Appellant in this Appeal.

13. As mentioned in the impugned order, since 1963, there was an understanding between the Haryana Electricity Board and the then Delhi Electricity Supply Undertaking (DESU) in respect of IP Power Station, Delhi. As per the

understanding, the capital cost of the unit No.2 to 4 was shared by DESU and Electricity Board, Haryana in the ratio of 2:1. The parties shared the operation and maintenance cost and fuel charges in the same ratio. Admittedly, no transmission charges were being paid by the Electricity Board.

14. At this stage, the Delhi Transco Limited (R-2) which is a successor of DESU filed its ARR Petition for the Year 2007-08 to 2010-11.

15. In those proceedings, the public hearing was held. The Appellant also participated in those proceedings. Ultimately, the Delhi Commission passed the tariff order on 20.12.2007. Based on the said tariff order, the bills were raised on the Appellant which have been duly paid by the Appellant.

16. Around May, 2010 i.e. After 2 ½ years after passing of the tariff order dated 20.12.2007 by the Delhi Commission, the Appellant approached the Delhi Commission with a Petition seeking for the review of the tariff order claiming the refund of Rs.1,68,90,065/- as the amount paid as additional amount and another sum of Rs.8,04,271/- on account of SLDC charges. One of the grounds urged by the Delhi Transco Limited (Respondent) raised before the Delhi Commission is that the Review Petition was not maintainable especially when there are no grounds for Review on merits.

17. Let us first deal with the question of maintainability of the Petition filed before the Delhi Commission.

18. The perusal of the Petition filed before the Delhi Commission would show that the Petition was filed by the Appellant u/s 61(d)(c) (d)(i) read with Section 86(1)(f) of the Electricity Act. However, the perusal of the grounds referred to in the Petition filed before the Delhi Commission would clearly show that the Appellant was seeking Review of the order dated 20.12.2007 determining the tariff based on the ARR filed by the Delhi Transco Limited for the period 2007-08 to 2010-11. The prayer for review in the Petition was made by the Appellant in terms of Section 94(1) (f) of the Electricity Act.

19. Section 94 of the Electricity Act stipulates that the powers of review conferred under Section u/s 94 to the Appropriate Commission are the same, as are vested in the civil court under the Code of Civil Procedure. The grounds of review have been referred to in the order 47 Rule-1 of the Code of Civil Procedure. The powers of review as per this clause, can be exercised either on the discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced before the Court by the Applicant or on account of some mistake or error apparent on the face of the record or for any other sufficient reasons.

20. So, in view of the limited grounds, as referred to in the above clause, the Appellant as a Petitioner would have to show before the State Commission that it has complied with the requirements of order 47, Rule-1 of the Code of Civil Procedure.

21. As a matter of fact, the Appellant in the Petition filed before the Delhi Commission neither pleaded nor argued any of the above grounds which are essential for exercise of the powers for the Delhi Commission for Review of the Tariff Order. As such, there was no ground made out by the Appellant before the Delhi Commission for exercising the power of review in the present petition.

22. Consequently, it has to be held that the Petition filed by the Appellant before the Delhi Commission was not maintainable. However, we are not inclined to straightaway dismiss the Appeal on the mere ground that it was not maintainable. On the other hand, we would like to go into the merits of the matter also since the State Commission had gone into the merits of the matter and passed the impugned order dismissing the Petition filed by the Appellant. That apart, both the Appellant and the Respondent made elaborate submissions before this Tribunal on merit also. Therefore, we would like to go into the merits as well.

23. Admittedly, there was no concept of transmission charges under the old regime i.e. 1910 Act. The assets and liabilities of DESU were transferred by Delhi Vidyut Board created under the Electricity Supply Act, 1948.

24. On 1.7.2002, the rights and liabilities were transferred to successor entities of Delhi Vidyut Board. As per the agreement between the DESU and State Electricity Board, only fuel charges and O&M charges for IP Station Extension were to be shared in the ratio of 2:1. Thus, the Haryana share was being transmitted over DESU's transmission system without payment of transmission charges to DESU. The Appellant being one of the successor entities of Delhi Vidyut Board, is bound by the arrangements worked out by DESU in 1963. All along, as stated above, no transmission charges were paid by the Haryana State Electricity Board and its successor entities. The tariff for the consumers in Delhi was determined all along keeping in view of the fact that Haryana State Electricity Board was not paying any transmission charges. The consumers of Delhi were bearing all the costs of DESU as part of retail tariff. The same system continued during the transition period and further until the complete closure of IP Station.

25. In fact, all the transmission charges paid by the Appellant to the Delhi Transco Limited (R-2) have been allowed by the State Commission in the Appellant's ARR for all these years. The same had also been recovered by the Appellant from time to time from its consumers in the retail tariff for the relevant years.

26. The tariff order was passed on 20.12.2007. The Delhi Transco Limited in pursuance of the said order, was sending bills to the Appellant based on the said tariff order. The Appellant acting upon the said tariff order had been paying the said bills to the Delhi Transco Limited through out. In view of the fact that both the parties have accepted the tariff order dated 20.12.2007 and have acted upon the said order, the Appellant could not be permitted to seek for revision of the order dated 20.12.2007.

27. Any refund of transmission charges to the Appellant would have to be adjusted in its ARR and passed on to the consumers. Thus, the Appellant has not lost anything due to established system and would not gain anything on getting refund which had to be passed on to the consumers.

28. The Haryana had share in IP Station which is an asset of the generation company IPGCL. Its share was transmitted over the transmission system of Delhi Transco Limited, the Transmission Licensee. Thus, the usage of DTL's system

would qualify to be intervening transmission system in terms of Section 35 and 36 of the Act, 2003. The term used in these Sections is “charges” and not “transmission charges”.

29. According to these Sections, the charges for usage of intervening transmission system would be first decided by the parties mutually. In case no mutual agreement is reached, then the appropriate Commission would decide the charges for intervening system. In this case, the parties involved were Delhi Vidyut Board, the successor of DESU and Haryana Utilities. When the agreement had been reached between these parties to the effect that there would be no transmission charges then the same has to be followed as it alone would prevail. As such, the Appellant as a successor of the DVB shall have to honour the same.

30. If there were no mutually agreed charges, then the charges for usage of intervening system would be decided by the appropriate Commission as provided under Section 34 and 35 of the Electricity Act, 2003.

31. In this case, the appropriate Commission would be the Central Commission. If the Central Commission had been approached, it would have decided the charges on “Contract Path” method.

32. In fact, this method was used by the Central Commission to decide the charges for usage of Gujarat Transmission system by Union Territory of Daman and Diu.

33. The order of the Central Commission was challenged by the GETCO before this Tribunal contending that the Central Commission should have used the "Postage Stamp" method instead of "Contract Path". This Tribunal rejected the said contention and confirmed the findings of the Central Commission in the judgment dated 15th July, 2011 in Appeal No.198 of 2009. The same is as follows:

> "69. *Summary of Our Findings*
>
> *I. We do not agree with the contention of the Appellant and we accept the submission made by the Respondent No. 2 & 3 that the Central Commission's order dated 3.2.2009 was final order in regard to adoption of contract path method".*

34. The above finding has attained the finality since it is noticed that this has been up-held by the Hon'ble Supreme Court while dismissing the Appeal of GETCO.

35. Accordingly, the amount of refund demanded by the Appellant would have to be determined on 'contract path' method and not on 'Postage Stamp' method as claimed by the Appellant. In this case a 220 kv D/C line between I.P. Station and Narella would be the Contract Path. Thus, the

charges payable by Haryana would be restricted to annual fix charges of this line in proportion to contracted power and SIL of the double circuit line. The Appellant would be entitled only for proportional share of those annual fixed charges worked out under contracted path method.

36. The Appellant has argued that the tariff order dated 20.12.2007 is contrary to Regulation 6.6 of the Transmission Tariff Regulations which provides that the transmission service charges will be divided between the beneficiaries of the transmission system based on allotted transmission capacity or contracted capacity. This submission of the Appellant is misconceived.

37. The reading of the Regulations 6.6. would reveal that there is nothing in the said Regulation which bars the Delhi Commission from honouring the arrangements earlier worked out in 1963 between DESU and State Electricity Board. Even otherwise, under the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001, the assets and liabilities of erstwhile Delhi Vidyut Board have been passed on to successor entities as stated in the scheme. Hence, the obligation of DESU is not overridden as claimed by the Appellant. Further, Regulation 6.6 would have no application in the present case as transfer of power to Haryana is over intervening system.

38. On the other hand, if refund is ordered as claimed by the Appellant, it will have much larger implications. They are as follows:

(a) The Delhi Transco Limited (R-2) would have to get the refunded amount from the Haryana Utilities invoking the jurisdiction of the Central Commission as the matter would relate to the inter State Transmission.

(b) There are large numbers of joint projects having shares of more than one State and the shares of the participating State are transmitted utilising the transmission network of the host State. The shares of the States are transmitted to participating State utilising the transmission system of host State without payment of transmission charges.

(c) In all such matters the sharing of transmission charges by the participant States would have to be settled by the Central Commission since the issue involves the Inter-State matter by nature.

39. <u>To Sum-up</u>

i) The petition filed by the Appellant before the Delhi Commission was not maintainable.

ii) All the transmission charges paid by the Appellant to Delhi Transco Ltd(R-2) have been allowed in the

Appellant's ARR for the relevant years and the same would have been recovered by the Appellant from its consumers. Refund of transmission charges, as claimed by the Appellant , if ordered, it would have to be adjusted in the ARR of the Appellant and passed on to the consumers. Thus, the Appellant would not lose anything due to established system and would not gain anything on getting the refund which had to be passed on to the consumers.

iii) Determination of charges for usage of intervening transmission system has to be done in accordance with the provisions of Sections 35 and 36 of the Act as per "Contract Path Method' as decided by this Tribunal in Appeal No.198 of 2009.

40. In view of the above, we do not find any infirmity in the impugned order. Therefore, 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: 03rd July, 2013

√REPORTABLE/~~NON-REPORTABALE~~