Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Review Petition No. 5 of 2012 in
Appeal No. 102 of 2011

Dated: 16th October, 2012

Present: **HON'BLE MR. JUSTICE P S DATTA, JUDICIAL MEMBER**
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Haryana Vidyut Prasaran Nigam Limited.
Shakti Bhawan, Sector 6
Panchkula -134112

...Appellant

Versus

1 Haryana Electricity Regulatory Commission
Bays 33-36, Sector 4
Punchkula-134112

2 Uttar Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, C-16 Sector 6
Panchkula – 134112

3 Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar
Hissar - 125005

…Respondent(s)

Counsel for the Appellant : Mr Neeraj Kumar Jain Sr. Adv
Mr Pradeep Dahiya
Mr Paratham Kant

Counsel for the Respondent : None

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. This Review Petition has been filed by the Haryana Vidyut Prasaran Nigam Limited against the judgment dated 18.4.2012 of this Tribunal in Appeal No. 102 of 2011 relating to determination of Annual Revenue Requirement for the year 2010-11.

2. In this Review Petition the Petitioner/Appellant has raised the issue relating to (i) Interest on Capital Expenditure and (ii) Income from Short term Open Access Customers.

3. Before we proceed further and consider the issues raised by the Review Petitioner/ Appellant, we would like to set out the settled law underlying the principles under which the review is permitted.

4. The powers available to the Courts to review its own orders have been defined in Section 114 and Order 47 of the CPC. Under the said provisions, review of the Order is permitted on three specific grounds only, namely:

    a) Discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time of passing of the Order.

    b) Mistake or error apparent on the face of the record; or

    c) Any other sufficient reasons.

5. The application for review has to be considered with great caution to necessarily fulfill one of the above requirements to be maintainable under law.

6. On the discovery of new evidence, the application should conclusively demonstrate that (1) such evidence was available and of undoubted character; (2) that it was so material that its absence might cause miscarriage of justice; (3) that it could not be without reasonable care and diligence brought forward at the time of proceedings/passing of Order. It is well settled that new evidence discovered, if any, must be one, relevant, and second, of such character that had it been given, it might possibly have altered the judgment.

7. With regard to mistake or error apparent on the face of the record, the error should be apparent enough to be noticed and presented before the Court to take cognizance. However, if it is a case that the Petitioner was not able to properly explain a legal position at the time of proceedings, it does not make a ground for a review (Hem Narayan Singh v. Ganesh Singh, AIR 1995 Patna).

8. With regard to any other sufficient reason, the courts have interpreted these words that such reasons should be at least analogous to those specified immediately above the Clause. The courts have interpreted this phrase on the facts and circumstances of each case.

9. It is a well-settled law that a review of the Orders of the Court should be used sparingly after examining the facts placed before the Court. An erroneous view or erroneous judgement is not a ground for

review, but if the judgement or order completely ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in the review. [Nathu Yeshwantrao Bhusari v. Sona wd/o Jaganath Ganar, 1994 Mah LJ 1829).

10. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for a patent error (Tungbhadra & C v. Govtt., 1964 SCC 1372). A review can only lie if one of the grounds listed above is made out.

11. The above legal position emerges out of various judgements of Supreme Court, notably, Smt. Meera Bhanja Vs. Smt. Nirmala Kr. Chaudhary [(1995) 1 SSC 170], Ajit Kumar Rath Vs. State of Orissa and others [(1999) 9 SSC 596] and Devendra Pal Singh Vs. State and another [(2003) 2 SSC 501].

12. In the present case before us the Review Petitioner/ Appellant in its review petition has not indicated as to whether the decision of this Tribunal suffers from any apparent error on face of record or there has been any new material fact which was not in the knowledge of the Review Petitioner/ Appellant. It has simply prayed for review of Judgment dated 18.4.2012 and suitable modify and allow the appeal bearing Appeal No. 102 of 2011.

13. With the above back round, we shall now consider each of the two issues raised by the Review Petitioner/Appellant. Although the review Petitioner has not stated that there is error apparent on the face of the record in respect of the above issues, still we would like to

examine if there is any error on the face of the record in our judgment in the light of the submissions made by the learned counsel for the Review Petitioner.

14. The first issue is related to Interest on Capital Expenditure. The Review Petitioner/Appellant has stated that the Tribunal has examined the issue from the point of view of quantum of interest and the claim of the Review Petitioner / Appellant in the Appeal sought to be reviewed was that the Commission has been allowing the Review Petitioner/ Appellant to capitalise the interest part of the Capital Expenditure at the end of the year while the Review Petitioner/ Appellant has claiming half yearly capitalisation.

15. This issue was decided by this Tribunal with the following reasoning which we quote herein below:-

> *"47 The sixth issue before us is related to* ***Interest on Capital works.*** *The issue is related to capital works in progress (CWIP) which were likely to be commissioned during the current financial year i.e. 2010-11. The Appellant has alleged that the Commission did not allow interest on these works on the assumption that these works would have deemed to be commissioned on the last day of the year i.e. on 31st March 2011. The Appellant has submitted that it is entitled to interest on CWIP for six months. In other words, the Appellant has made a claim for interest on average of opening balance and closing balance of the loan component of Gross Fixed Asset. This proposition can be better understood by the following example:*
>
> *48 It is an admitted fact that the interest liability on the licensee would accrue from the day it has taken loan. Interest*

liabilities accrued during the construction phase of the project (IDC) is included in the capital cost of such project and once the project is declared under commercial operation, interest accrued thereon is considered in the ARR of the licensee. The capital cost of the Project including IDC is added to the GFA of the licensee.

49 In real practice some of the loans are returned in instalments and some fresh loans are taken against new projects during the financial year. Thus, while calculating interest payable during the year for the purpose of determining ARR of the licensee, both the deduction and additions in the loan liabilities have to be taken into account. Ideally, each element of the transmission system should be treated separately and interest liability is worked out accordingly. However, in most of the states, where transmission charges are determined for the whole network, the practice is to adopt the average of the loan at the beginning of the year and at the end of the year.

50 With this background let us examine the findings of the Commission in the impugned order dated 16.4.2010 related to interest costs which read as under:

2.6 Interest on Loans

2.6.1 Interest on borrowings for capital works

The Commission has restricted the additional investment on Capital works for FY 2010-11 to Rs. 17000 million based on the revised filings made by HVPNL. The licensee has also revised the Capital investment plan for FY 2009-10 from Rs. 19000 million (approved by the Commission) to Rs. 13874.41 millions against which the Commission estimates a probable expenditure of Rs. 11785.28 million. Keeping in view the capital expenditure approved by the Commission, the borrowings are estimated to Rs. 9697.18 million for FY 2009-10 and

Rs11773.50 million for FY 2010-11 respectively and interest is calculated accordingly.

The interest on borrowings related to generation business of IP Station and BBMB (Rs. 20.91 million) and SLDC business (Rs. 20.78 million) are excluded from interest for transmission business. The Commission has already allowed funds for repayment of market committee loans in FY 2008-09 and therefore interest (Rs. 44.97 million) on these borrowings is also excluded. In case the licensee is able to get the interest accrued on this loan waived off as claimed by it in the public hearing, the same will be adjusted in the relevant ARR. The licensee is directed to keep the Commission informed of the latest status on this issue.

*The total interest cost for transmission business is further reduced by amount of interest capitalized i.e. Rs. 1732.51 million as against Rs.1455.74 million projected by HVPNL**. On the new capital works started during 2010-11, interest is capitalized for a period of six months only as the loans are assumed to be received evenly during the entire year.** The Commission allows Rs. 768.17 million as interest on borrowings for capital works for FY 2010-11 as worked out accordingly.*

…

2.6.3 Other interest costs: For calculation of interest on pension bonds, the Commission has taken into account the profit on sale of land as shown in the audited balance sheet for FY 2008-09 in accordance with our order on the ARR for FY 2009-10. Consequently, the interest on pension bonds is allowed as Rs. 612.40 million as against Rs. 673 million proposed by HVPNL. Interest on PF bonds is allowed as proposed by HVPNL. The computations of interest expenses are presented in table 2.3 & 2.4 below.

Particulars	***HVPNL Proposal***	***HERC Approval***
Interest on Loans for Capital Expenditure		
Total interest on Borrowings for CAPEX	*3147.33*	*3147.33*
Less interest on loan from market committee		*44.97*

Less interest on borrowings related to generation		*20.91*
Less interest on borrowings for disallowed capital works for FY 2009-10		*234.41*
Less interest on borrowings for disallowed capital works for FY 2010-11		*346.36*
Gross Interest for Transmission works	***3147.33***	***2500.68***
Less interest capitalized		*1732.51*
Interest cost net of capitalization(1)		***768.17***
Interest on loan for working capital (2)	***156.10***	***101.68***
Interest on Pension bonds (3)	*673.00*	*612.40*
PF Bonds (4)	*168.40*	*168.40*

51 Perusal of the above would disclose that the Commission has approved the interest as claimed by the Appellant after disallowing certain interests. With regard to FY 2009-10 and FY 2010-11, the Commission has deducted interest on borrowings for disallowed capital works. Since works itself had not been allowed, interest on such works cannot be permitted.

52 Thus the Commission has allowed the interest for six months of CWIP and had approved the interest as demanded by the Appellant after carrying out some deductions. The Appellant has not challenged these deductions. Therefore, we do not find any basis for the claim made by the Appellant. The issue is accordingly decided against the Appellant."

16. The Review Petitioner/Appellant has submitted that the Tribunal has examined the issue from the point of view of quantum of interest and the claim of the Review Petitioner / Appellant in the Appeal sought to be reviewed was that the Commission has been allowing the Review

Petitioner/ Appellant to capitalise the interest part of the Capital Expenditure at the end of the year while the Review Petitioner/ Appellant has claiming half yearly capitalisation. The Review Petitioner/Appellant has further stated that while approving an amount of Rs 2500.68 Millions towards interest on capital expenditure for the year 2010-11, the Commission has capitalised and amount of Rs 1732.51 Millions towards Interest during Construction (IDC) for the financial year. Due to higher amount of interest capitalisation, the net interest on CapEx loan has been reduced resulting in lesser amount of Annual Revenue Requirement approved by the Commission. The Commission has rejected the claim of the Review Petitioner/ Appellant for mid-year capitalisation only on the ground that last date of the year has been considered as commissioning date of the assets for the purpose of computing the depreciation and there ought not be any inconsistency in approach for the purpose of calculating two expenditures namely depreciation and interest.

17. In this connection it would desirable to examine the relevant portion of the Commission' order dated 26.9.2007 quoted by the Review Petitioner/ Appellant in review petition:

> *"the Commission has considered that assets are commissioned on the last day of each financial year for calculation of interest capitalised which is the same date as is used for calculation of depreciation. The licensee has proposed that the date of commissioning of the assets for purpose of calculation of interest to be capitalised should be taken mid-year whereas for the purpose of calculating depreciation, it is to be taken as last day of the year. The Commission since first ARR order has adopted a consistent approach of considering last date of*

commissioning of assets as originally proposed by the licensee in its first ARR filing for FY 1999-2000.

The licensee has for the first time proposed to change the date of commissioning to mid-year for the purpose of calculating IDC. Though the rational behind this has some merit, there ought not be any inconsistency in approach for the purpose of calculating two expenditures namely depreciation and interest. The commission is not convinced with the arguments and hence rejects the review sought on this issue."

18. Thus, the Commission has been following the policy of considering the asset to be commissioned on the last day of the financial year and accordingly cost of the asset is worked out on the last day of financial year. This would mean that the IDC is capitalised up to last day of financial year and thereafter the depreciation is allowed with effect from the first day of next financial year. In terms of the Accounting Standards, the interest costs can be capitalised up to the date of its commissioning and not thereafter. Thus, in terms of Accounting Standard 6, there cannot be two different dates for interest capitalisation and for commissioning of the Asset.

19. The Review Petitioner/ Appellant has accepted the above proposition and has submitted in the Appeal bearing Appeal No. 102 of 2011 and also in its Review Petition that till FY 2008-09 it was not charging depreciation on assets commissioned during the year on pro-rata basis. However, from financial year 2009-10 onwards, it has started charging depreciation on fixed assets on pro-rata basis by changing its accounting policy in compliance with CERC and State Commission's notifications.

20. Pro-rata basis of charging would mean that if an asset is commissioned during a particular year; say on 30th June, depreciation for the said asset would be charged for balance period of the year i.e. 9 months only. Thus, the Review Petitioner/ Appellant has submitted that it has considered the target date of commissioning of an asset as commissioning date and had charged depreciation accordingly in its ARR filing for the FY 2010-11. The Review Petitioner/ Appellant has claimed that since it has charged depreciation on pro-rata basis for the FY 2010-11, it is entitled for capitalisation of interest on the same basis.

21. However, perusal of the Impugned Order dated 16.4.2010 would reveal that claim of the Review Petitioner/ Appellant is incorrect. Para 2.7 of the Commission's Order dated 16.4.2010 deals with depreciation and is reproduced below:

> ***"2.7 Depreciation***
> *HVPNL has estimated its depreciation amount as per CERC norms (notification issued in the year 2009) for FY 2010-11 at Rs. 1518.75 million. The Commission's estimate of GFA as on 1.4.2010 is lower; the rate of depreciation as per audited accounts for FY 2008-09 (3.07%) when applied yields a reduced depreciation amount of Rs. 877.80 million which is approved by the Commission. This is after excluding Rs. 22.19 million on account of depreciation on SLDC assets as proposed by HVPNL. It is observed that HVPNL has been projecting high volume of capital works without being able to provide adequate justification for the same. Resultantly, the high capital investment plan inflates the allowable depreciation. A perusal of audited accounts of HVPNL reveals excessive recovery in FY 2007-08 and FY 2008-09 i.e. as against Rs. 558.46 million approved for FY 2007-08 the actual as per the audited account was Rs. 514.88 million. Similarly as against Rs. 630.08 millions*

approved for FY 2008-09 the actual as per the audited accounts was Rs. 619.54 millions. Thus it is evident that the consumers end up paying for the system which has not been made available / erected for the purpose of transmission service.

Table 2.5 Depreciation for FY 2010-11 (Rs. Millions)

Particulars	HVPNL (Proposal)	HERC (approval)
Gross fixed assets at the beginning of the year	32533.37	30082.67
Depreciation Rate (%)	4.83%	3.07%
Depreciation for FY 2010-11	1572.03	923.54
Less depreciation against Capital reserve	23.55	23.55
Less Depreciation against SLDC assets	22.19	22.19
Net Depreciation for FY 2010-11 for Transmission Business	1518.75	877.80

22. It is clear from the above table that the Review Petitioner/ Appellant had claimed an amount of Rs 1572.03 Millions towards depreciation on GFA at the beginning of the year at @ 4.83%. It did not claim any depreciation on the assets likely to be commissioned during the year on pro-rata basis as stated by the Review Petitioner/ Appellant in its review petition. Thus, the Review Petitioner/ Appellant had also considered last day of the year as date of commissioning for the assets likely to be commissioned during the year for the purpose of computation of depreciation and not on pro-rata basis in its ARR filing for the year 20010-11 and the Commission has accordingly approved the depreciation on the same principle.

23. The Commission has considered last date of the year as commissioning date for the purpose of computing depreciation as well as interest capitalisation. All the grounds being argued by the

appellant now have been considered by the Tribunal at the time of hearing the main appeal. We do not find any error on the face of the record in respect of our findings. The review petitioner's elaborate submissions are for reconsideration of the issues on merits which is not permissible in the review petition.

24. The Second issue for review is related to Income from Short term Open Access Customers. This issue was decided by this Tribunal with the following reasoning which we quote herein below:-

> *"56. … the Commission had framed Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2008 and these Regulations had become effective from 19th December 2008. Regulation 28 of these Regulations provides for recovery of transmission charges from beneficiaries of the Appellant's transmission system and is quoted below:*
>
> > *"27. **Payment of Transmission Charges. -** (1) Annual transmission charges shall be fully recoverable at 98% target availability. Payment of transmission charges below 98% shall be on pro-rata basis. The transmission licensee may recover its annual revenue requirement by way of a fixed charge based on transformation capacity, contracted capacity, a charge based on energy transmitted, connectivity charge, reactive energy charge or a combination of these charges. The transmission charges shall be calculated on a monthly basis. In case of more than one beneficiaries of the transmission system, including the distribution licensees and long term open access customers, the monthly transmission charges leviable on each beneficiary shall be computed as per the following formula unless amended by the Commission.*
>
> > $$\text{Transmission Charges} = \frac{ATC}{12} \times \frac{CA}{CS}$$

Where, ATC = Annual Transmission Charges payable by the beneficiaries, ***after deducting total transmission charges paid by the short term open access customers;*** *other income, as decided by the Commission, to be passed on to the beneficiaries; reactive energy charges and transmission charges received from the CTUs ….”*

58. Bare reading of the Regulation 27 reproduced above would disclose that the revenue earned from short term open access customers is required to be deducted from the total Annual Revenue Requirement of the Appellant. The Commission has, therefore, correctly deducted the revenue earned by the Appellant from short term open access customers during FY 2008-09. The issue is answered against the Appellant.”

25. The Review Petitioner/ Appellant in its submissions has prayed for review of this Tribunal’s above decision and issue direction to the Commission for not directing the Review Petitioner/ Appellant to utilise the revenue earned from short term open access customers towards redemption of bounds as it would mitigate the very purpose for which it was allowed to be retained by the Review Petitioner/ Appellant.

26. The Commission has framed the Regulations and is expected to follow the same. There is no error on face of record in our above quoted decision. The contention of the Review Petitioner/ Appellant is, therefore, rejected.

27. The Review Petition is dismissed. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice P S Datta)
Judicial Member

Dated: 16th October, 2012

REPORTABLE/~~NOT REPORTABLE~~