



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi –110017.

No. F.11(1928)/DERC/2021-22/7242

R. Petition No. 61/ 2021

In the matter of: Petition seeking review of the Tariff Order dated 30.09.2021 in Petition No. 02 of 2021 (Tariff Order of BSES Yamuna Power Limited for True up upto 2019-20 and ARR for FY 2021 -22).

BSES Yamuna Power Limited

.... Review Petitioner

Coram:

Hon'ble Shri Justice Shabihul Hasnain 'Shastri', Chairperson

Hon'ble Dr. A.K. Ambasht, Member

Appearance:

Mr. Buddy A Ranganadhan, Advocate, BYPL

ORDER

(Date of Order: 09.09.2022)

1. The instant Petition has been filed by BYPL for seeking review of the Tariff Order dated 30.09.2021 in Petition No. 2 of 2021.
2. While considering the issues raised in this Review Petition, it is important to understand the scope and applicability of Review of an Order. Section 94 of the Electricity Act, 2003 provides the power of the Commission for reviewing its decision, directions and orders and is reproduced below:

“(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under the Act, have the same powers as are vested in a civil court under the Code of Civil Procedure 1908 (5 of 1908) in respect of the following matters, namely:-

- a.....
- b.
- c
- d.;
- e.;
- f. reviewing its decisions, directions and orders;
- g.”

3. The right to review has been conferred by Section 114 of Civil Procedure Code, 1908. The limitation and conditions are provided under Order 47, Rule 1 of Civil Procedure Code, 1908.

The Order 47, Rule (1) of Code is given below: "Application for review of judgment. - (1) Any person considering himself aggrieved-
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
(b)
(c)
and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

4. In this regard the Hon'ble Supreme Court of India in Lily Thomas Vs Union of India & Ors on 5th April 2000 held the following:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise."

5. The Hon'ble Supreme Court of India vide its judgement dated 21st April 2006 In the matter of Haridas Das VS Usha Rani Bank And Ors. had also the refer the decision of the Hon'ble Supreme Court in Tungabhadra Industries vs. Govt. of Andra Pradesh (MANU/SC/0217/1963) which stipulates as follows:

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which states one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out but, there are definitive limits to be exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merit. That would be in the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all manner of error committed by the Subordinate Court an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected."

6. The Hon'ble Supreme Court of India vide its judgement dated 18.08.2022 in the matter S. Madhusudhan Reddy v. Narayana Reddy and others held as follow: -

"26. As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be corrected by exercising review jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as "for any other sufficient reason". The said phrase has been explained to mean "a reason sufficient on grounds, at least analogous to those specified in the rule" (Refer: Chajju Ram v. Neki Ram¹⁷ and Moran Mar Basselios Catholicos and Anr. v. Most Rev. Mar Poulouse Athanasius and Others"

7. Therefore, it is very necessary to process the application with the above premises with utmost caution and to be seen whether the application is necessarily fulfilling one of the above requirements to be maintainable under law.

8. The Review Petitioner has sought review of the following issues:

- i. Inadvertent error in considering Net Metering units in Energy input for FY 2019-20.
- ii. Inadvertent computational error in considering rate of carrying cost for FY 2019-20.
- iii. Inadvertent omission to allow capitalization of Rs. 0.06 Cr. For FY 2017-18 on account of EIC.
- iv. Inadvertent computational error in considering rate of Carrying Cost for FY 2021-22.
- v. Erroneous application of the principles of banking transaction.

9. The submissions made by the Petitioner have been considered and analysed to arrive at the decision. The issue wise analysis and decision are as follows:

10.1 **Issue No. 1 Inadvertent error in considering Net Metering units in Energy input for FY 2019-20.**

Petitioner's Submissions

- 10.1.1 This issue pertains to an inadvertent error whilst truing up of energy sales and energy input for FY 2019-20 in as much as while the Net Metering units have been considered for energy sales, thereby creating a mismatch. If Net metering units are being considered in energy input, it only stands to reason that the same be

also considered in energy sales and its non-consideration thereof, is an error apparent on the face of record.

10.1.2 There cannot be a differential treatment for Net Metering units for energy input and energy sales, which require the same treatment. Therefore, if the same are being considered for energy input, they must also be considered for energy sales. Similarly, if they are not being considered for energy input, they must also not be considered for energy sales. A similar inadvertence had cret in for FY 2017-18 as well which was subsequently rectified in the Order dated 18.06.2021 passed in Review Petition No. 64 of 2019.

10.1.3 The inadvertent non-consideration of Net Metering unit in energy sales (or its consideration in energy input only) has had an adverse impact on the Distribution Loss of the Petitioner for FY 2019-20 as well as an adverse impact account of overachievement of loss computed.

Commission's Analysis

10.1.4 With respect to consideration of Net Metering units in Energy Input for FY 2019-20, the Energy Input was considered based on the joint reconciliation statement submitted by Delhi-SLDC vide email dated 10/03/2021. However, only in case of Review Petitioner, the Energy Input from net metering (3.07 MU) was inadvertently considered while computing the Actual Energy Input of the Review Petitioner. The impact of the same will be allowed in subsequent Tariff Order.

10.2 **Issue No. 2: Inadvertent computational error in considering rate of carrying cost for FY 2019-20.**

Petitioner's Submission

10.2.1 The issue pertains to an inadvertent error in computing the rate of carrying cost for FY 2019-20 at 12.57%, which, in the Petitioner's respectful submission, ought to have been 12.89%.

10.2.2 There is no dispute on (i) the debt: equity ratio on which the carrying cost is to be determined; and (ii) the weighted average rate of interest on loan the rate of debt. The rate of RoE of 14% is also a constant.

10.2.3 As per the methodology followed by the Commission itself in the earlier true up Orders for FY 2017-18 and FY 2018-19, in the Petitioner's respectful submission, the carrying cost, based on Debt: Equity ratio of 70:30 ought to have been 12.89% for FY 2019-20 instead of 12.57%.

Commission's Analysis

10.2.4 With regards to determination of rate of Carrying Cost, it is pertinent to state that as per proviso of Regulation 20 (4) of DERC (Business Plan) Regulations, 2017, the Commission determines the Actual Equity available for funding of Revenue Gap and arrives at the balancing figure of Debt for funding of Regulatory Assets. Thereafter, the Carrying Cost rate is determined as sum product of rate of Equity i.e. 14% with Actual Equity available for Regulatory Assets and rate of Debt (Considering total loan portfolio – Loan corresponding to Capitalization, Working Capital and Regulatory Assets).

10.2.5 The similar practice was followed by the Commission in determination of Carrying Cost of other DISCOMs for trueing-up of FY 2019-20 and in the past as well.

10.2.6 In order to determine the actual Equity of BYPL, Commission analyzed the net worth of the Review Petitioner from Annual Audited Accounts for FY 2019-20 and observed the availability of Shareholder's funds towards regulated business as follows:

(Rs. Cr.)

Equity Available for Regulatory Assets	Normative Requirement	Actual Available
Opening Equity as per Net Worth		939.86
Closing Equity as per Net Worth		1158.74
Average Equity Net Worth		1049.30
Equity Utilized for Capitalization	490.85	490.85
Equity Available for Regulatory Asset	882.00	558.45
Equity Utilized towards investment accruing short term gain (Note 6 & 13)		156.85
Funds available towards Regulatory Assets		401.60

10.2.7 The funding rate of the debt portfolio as considered by the Commission is the loan rate approved for various loans availed, which comes to 12.34%. Accordingly, the Computation of Carrying Cost Rate for FY 2019-20 is as follows:

(Rs. Cr.)

Sr. No.	Particular	Amount	Remarks
1	Opening Revenue Gap	(2292.00)	As per TO dated 30/09/2021
2	Impact of Prior period Issues	(869.09)	
3	Revenue Surplus/(Gap) during the year	65.53	
4	Recovery of Revenue Gap via 8% surcharge	376.65	
5	Closing Revenue Gap	(2718.91)	
6	Average Revenue Gap	(2940.00)	
7	Equity Fund available towards Regulatory Assets	(401.60)	As stated above
8	Debt for funding Regulatory Assets	(2538.41)	
9	Return on Equity (Re)	14.00%	
10	Rate of Debt (Rd)	12.34%	
11	Rate of Carrying Cost	12.57%	11 = (7*9+8*10)/6

10.2.8 Further, with respect to the claim of BYPL in Para 13 E for consideration of 12.41% for Carrying Cost rate is factually incorrect as the same is determined by sum product of debt on capitalization and rate of debt on working capital only which is used for computation of WACC/ROCE and not for Carrying Cost rate. The relevant tables of BRPL, BYPL and TPDDL in this regard is as follows:

Particulars	BRPL	BYPL	TPDDL	Remarks
Rate of Debt (rd) on capitalization	12.52%	12.33%	8.63%	Table 3.86 of BRPL and BYPL Table 3.101 of TPDDL
Rate of Debt (rd) on working Capital	11.74%	12.58%	8.11%	
Rate of interest on Debt(rd)	12.29%	12.41%	8.49%	

Formula: $[(\text{Average Debt at 70\% of net Capitalization} * \text{Rate of Debt on Capitalization}) + (\text{Debt at 100\% working Capital} * \text{Rate of Debt on Working Capital})] / (\text{Average Debt at 70\% of net Capitalization} + \text{Debt at 100\% working capital})]$

10.2.9 Accordingly, there is no error apparent on face of record and the issue doesn't survive.

10.3 **Issue No. 3 : Inadvertent omission to allow capitalisation of Rs. 0.06 Cr. For FY 2017-18 on account of EIC.**

Petitioner's Submissions

10.3.1 The present issue pertains to the inadvertent omission of an amount of Rs. 0.06 crore of capitalisation on account of unavailability of Electrical Inspector Certificate (EIC). The said amount of Rs. 0.06 crore was provisionally disallowed in the Tariff Order 31.07.2019 and was made subject to the report of the physical verification. While the report of the physical verification acknowledges receipt of the EIC, the amount of capitalization of Rs. 0.06 crore have been inadvertently omitted.

Commission's Analysis

10.3.2 The EIC of the scheme for the said amount of Rs 0.06 crore was obtained by BYPL in May 2019 which is beyond FY 2017-18 hence not considered for capitalisation in FY 2017-18. Since the EIC was obtained by BYPL for the said scheme in FY 2019-20 the said amount will be considered while finalisation of true up of Capitalisation for FY 2019-20.

10.4 **Issue No. 4: Inadvertent computational error in considering rate of Carrying Cost for FY 2021-22.**

Petitioner's Submissions

10.4.1 This issue pertains to the erroneous computation of the rate of carrying cost for FY 2021-22, which has been computed at 11.63%. There has been an inadvertent calculation error in the Order under Review in as much as despite the rate of debt having been provided coupled with the constant rate of return on equity, the carrying cost for FY 2021-22 has been incorrectly calculated.

10.4.2 Even if the rate of debt is considered at 11.25%, the weighted average rate of carrying cost in the ratio of 70:30, with rate of return on equity considered at 14%, the carrying cost comes out to be 12.08%, as against the 11.63% as approved Order under Review. Without prejudice, for the other two DISCOMs, the rate for FY 2021-22 is taken the same as FY 2019-20. On this score, the rate of carrying cost for the Petitioner ought to have been 12.57%.

Commission's Analysis

10.4.3 With regard to consideration of rate of carrying cost for FY 2021-22, Commission has considered the same ratio of available Equity and Debt for Regulatory Assets

as considered for true-up of FY 2019-20. The computation of Carrying Cost rate for FY 2021-22 on similar lines as stipulated above in issue no. 2, is as follows:

(Rs. Cr.)

Sr. No.	Particular	Amount	Remarks
1	Opening Revenue Gap	(2292.00)	As per TO dated 30/09/2021
2	Impact of Prior period Issues	(869.09)	
3	Revenue Surplus/(Gap) during the year	65.53	
4	Recovery of Revenue Gap via 8% surcharge	376.65	
5	Closing Revenue Gap	(2718.91)	
6	Average Revenue Gap	(2940.00)	
7	Equity Fund available towards Regulatory Assets	(401.60)	As stated above
8	Debt for funding Regulatory Assets	(2538.41)	
9	Re	14.00%	
10	Rd	11.25%	As approved for FY 2021-22
11	Rate of Carrying Cost	11.63%	11 (7*9+8*10)/6

10.4.4 The submission of BYPL at Para 24 (e) for considering same rate of carrying cost for FY 2021-22 as approved for FY 2019-20 is denied. As per Regulation 2(16) of DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017, the Commission has computed the carrying cost rate based on the weighted average loan portfolio of all the DISCOMs. The rate of Debt for BYPL for FY 2021-22 is 11.25% (Table 4.60) which for FY 2019-20 is 12.34% whereas for BRPL & TPDDL, the rate of debt of FY 2019-20 and FY 2021-22 is same i.e. 12.28% & 8.58% respectively. However, the rate of carrying cost for FY 2021-22 is subject to True-up.

10.4.5 Accordingly, there is no error apparent on face of record and hence the issue is rejected

10.5 **Issue No. 5 Erroneous application of the principles of Banking Transactions.**

Petitioner's Submissions

10.5.1 This issue pertains to an inadvertent erroneous application of the principles underlying banking transactions. The Commission has acknowledged the principle that banking transactions are 'revenue neutral' in nature. However, with utmost respect, the Commission has inadvertently misapplied this principle, thereby causing an adverse financial impact of Rs. 68.9 Cr. (40.7 Cr. + 28.2 Cr.) Which is against the principles of revenue neutrality.

10.5.2 The Petitioner had submitted the relevant information pertaining to its banking transactions for FY 2018-19 and FY 2019-20. The Petitioner had correlated each "banking transaction" in as much as the Petitioner mapped each "sale" with the corresponding "purchase" to render a revenue neutral result.

Commission's Analysis

10.5.3 The Commission had considered the normative rate of Banking Transactions as per the methodology approved by the commission.

10.5.4 Therefore, review on the ground of erroneous application of the principles of banking transactions is not an error apparent on the face of the record and hence, review on said ground is not maintainable.

11 Accordingly, the Review Petition is disposed off as per the directions and decisions contained in the paragraph 10 cumulatively of this Order.

Sd/-
(Dr. A.K. Ambasht)
Member

Sd/-
(Justice Shabihul Hasnain 'Shastri')
Chairperson