



## **Delhi Electricity Regulatory Commission**

**Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017.**

No. F.11(1707)/DERC/201920/6550

### **Review Petition No.59/2019**

**In the matter of:**      **Petition under Section 94 of the Electricity Act, 2003 read with Regulation 7(iv) and 57 of the DERC Comprehensive (Conduct of Business) Regulations, 2001 seeking review of the Order dated 13.05.2019 passed by the Commission in Petition No. 26 of 2018.**

**BSES Yamuna Power Limited**

**....Review Petitioner**

**Versus**

- 1. Indraprastha Power Generation Co. Ltd.**
- 2. Pragati Power Corporation Ltd.**
- 3. Delhi Transco Ltd.**

- .....Respondent No. 1**  
**.....Respondent No. 2**  
**.....Respondent No. 3**

### **Coram:**

**Justice Umesh Kumar, Former Judge, Chairman, DERC**  
**Sh. Ram Naresh Singh, Member**  
**Sh. Surender Babbar, Member**

### **Appearance:**

- 1. Mr. Buddy A. Ranganadhan, Sr. Advocate for Petitioner**
- 2. Mr. Anupam Verma, Ld. Counsel for Petitioner**
- 3. Mr. Rahul Kinra Ld. Counsel for Petitioner**
- 4. Mr. Girdhar Gopal Khattar, Ld. Counsel for Petitioner**
- 5. Mr. Aditya Gupta, Ld. Counsel for Petitioner**
- 6. Mr. Adamya Ojha, Ld. Counsel for Petitioner**
- 7. Mr. Yash Srivastava, Ld. Counsel for Petitioner**
- 8. Ms. Swapna Seshadri, Ld. Counsel for Respondent/IPGCL & PPCL**
- 9. Ms. Shivani Verma, Ld. Counsel for Respondent/IPGCL&PPCL**
- 10. Mr. Anju Shree Nair, Ld. Counsel for Respondent/DTL**

### **ORDER**

(Date of Order: 05.06.2025)

1. The instant Petition has been filed by BSES Yamuna Power Ltd. (Review Petitioner) for seeking review of the Order dated 13.05.2019 passed by the Commission in Petition No. 26 of 2018 on the following grounds:
  - a. The Commission has not considered material grounds raised by the Petitioner in the Petition No. 26 of 2018 which were essential for the adjudication of the present case.
  - b. There are errors apparent on the face of the Order under Review.

### **Petitioner's Submissions**

- i. The Review Petitioner herein filed a Petition bearing No. 26 of 2018 under Section 86(1)(a) and (b) of the Electricity Act, 2003 read with Regulations 171 and 172 of the DERC (Terms and Conditions for determination of Tariff) Regulations, 2017

along with corresponding provisions of the MYT Regulations, 2007 and 2011 relating to power to remove difficulties and power of relaxation, regarding the difficulties faced by the Petitioner.

- ii. The Review Petitioner has submitted that the Commission did not consider the following submissions/arguments advanced by the Review Petitioner as also detailed in its Written Submissions. The said arguments/submissions were material in nature and were required to be considered for the proper adjudication of the present case:

- a. Argument of the Utilities on Receipt Basis: Review Petitioner had submitted that the State Utilities will not suffer any commercial loss due to reduction in the amount of the LPSC, as LPSC is considered on Receipt basis i.e. as per actual and not as contingency in the books of accounts of the State Utilities. The said practice has been followed at industry level and not just NCT of Delhi and the rate of borrowing of the State Utilities is also less than the rate of LPSC allowed to them.

- b. Role of the Regulator to balance the Sector: Review Petitioner had submitted that if situation warrants a dispensation then the Commission has every power to relax the same. Reference was made to instances where no payments are made by the DISCOMs & the State Commissions (Uttar Pradesh) have intervene and stopped disconnection of supply of the electricity through the DISCOMs, as the same would have affected the consumers.

The Review Petitioner further referred its submissions regarding Statutory Advice dated 01.02.2013 of the Commission to the Delhi Government and the Stand of the Commission in WP No. 2203 of 2013 filed before the Hon'ble Delhi High Court.

- iii. It has also been submitted that the Commission was pleased to not consider the submissions made by the Petitioner that the tariff was projected to be cost reflective to meet the cost only for that relevant Financial Year and that tariff did not consider the overhang past liabilities including outstanding dues of IPGCL, PPCL and DTL. The estimated ARR in each year was barely sufficient to cover the Power Purchase Cost which was actually incurred by the Review Petitioner during a Financial year. It was only when the financials of each year were trued up that the imbalance was sought to be corrected almost 2-3 years after the year which was albeit too little, too late.
- iv. The Review Petitioner was not seeking equating the rate of LPSC with the rate of Carrying Cost. The Review Petition only seeks parity in terms of the borrowing cost allowed to them and the penalties being levied on them. State Utilities are charging an LPSC on the Review Petitioner which is in the range of 15%-18% in accordance with the Regulations, framed by the Commission. As against the

same the Commission has been allowing carrying cost in the range of 10.54% -14% which is substantially lower than the LPSC being imposed on the Review Petitioner.

- v. The Review Petitioner further submitted that the sole reason for non-payment of the dues of Power Purchase was the creation of the Regulatory Asset and not because of the unwillingness on part of the Review petitioner. As such the Review Petitioner may not be penalized for a decision taken by the Commission to safeguard the interest of the consumers, however Review Petitioner cannot be put to prejudice for the same.

### **Respondent's Submissions**

- 2. Respondents No. 1 and 2 have filed common reply to the Review Petition wherein following has been submitted:
  - i. The primary reason of the Petitioner for seeking relaxation in the rate of LPSC was that there was a non-cost reflective tariff determined by the Commission on a year on year basis since FY 2009- 2010 for the Petitioner and subsequent build-up of the Regulatory assets over the years which caused the Petitioner to delay the payments to the Answering Respondents.
  - ii. In Petition No. 26 of 2018, the Petitioner had also contended that the rate of LPSC charged by the Answering Respondents is high i.e. in the range of 15% to 18% in accordance with the Tariff Regulations 2017 and MYT Regulations, whereas the rate of carrying cost allowed to BYPL during the tariff exercise is between 10.34% -14% as per the Regulations and thus the rate of LPSC should be reduced by equating it with the rate of carrying cost by the Commissions by exercising the 'power to relax'.
  - iii. After going through the merits of the Petition No. 26 of 2018 and the submissions of the parties, the Commission in the Order under the review has *inter alia* held that the rate of LPSC and rate of carrying cost as determined under the Tariff Regulations 2017 cannot be equated, as they are primarily designed for different purpose having different objectives all together.
  - iv. The Commission has categorically held that there is no linkage or relation between the LPSC and carrying cost and the end objectives of both of them are different. The Commission while differentiating between the two, clearly observed that the carrying cost is allowed to meet the expenses or cost for managing the funding against the Regulatory Assets, whereas, LPSC is a deterrence mechanism to ensure regular and timely payments to the generators.
  - v. The Commission has also observed that LPSC is not a part of tariff. The fact that LPSC component and the rebate may have an impact on tariff, are not enough to equate the rates of LPSC and carrying cost. Further, the Commission has categorically held that lowering the rate of LPSC will

tantamount to amendment of Regulations, which is not permissible under the exercise of "Power to Relax" of the Commission.

- vi. However, despite the reasoned Order passed by the Commission, the Petitioner through the present Review Petition seeks to re-open the issues of relaxation of rate of LPSC which has already been dealt with conclusively. Further, in the entire Review Petition filed, the Petitioner has failed to point out an error apparent on the face of the Order under review.
- vii. It has been submitted by the Respondents that the present Review Petition is nothing but the re-hearing of the issues already adjudicated upon by the Commission, which is contrary to the fundamentals of the review proceedings.
- viii. The Respondents have also submitted that the PPA provides that for the computation of the rate of LPSC, the terms and conditions of the Tariff Regulations 2017 determined by the Commission would be applicable. Accordingly, the Answering Respondents were charging LPSC at the rate of 18% per annum effective from 01.02.2017 in compliance with Regulation 137 of Tariff Regulations 2017. As stated in the Review Petition itself, prior to Tariff Regulations 2017, LPSC was charged as per Regulation 7.24 of Tariff Regulations, 2007 and Regulation 7.25 of Tariff Regulations, 2011.
- ix. Apart from fundamental difference between the LPSC and carrying cost, it is stated that under the garb of invoking 'Power to Relax' of the Commission, the Petitioner is seeking an amendment in the Tariff Regulations 2017 by way a petition which is contrary to the principles laid down under PTC India Ltd v CERC (2010) 4 SCC 603. In the said judgment, the Supreme Court has clearly held that Regulations are statutory in nature and the contracts have to be aligned with the Regulations. The existing contract cannot be interfered without framing the appropriate Regulations.
- x. The Petitioner cannot ignore the clear stipulation contained in the Tariff Regulations, 2017 in the garb of praying for a relaxation under Regulation 137. The scope of exercise of power to relax and power to remove difficulty is not to change the Regulation itself or to interpret the Regulation in a manner that violates the terms of the Regulations.
- xi. Further, it is also relevant to note that the Petitioner had filed an identical petition against the Central Generating Companies before Central Electricity Regulatory Commission (CERC) being Petition No. 254/MP/2017 and the same has been dismissed by the CERC vide its Order dated 03.12.2018.
- xii. The Petitioner has also filed a Civil Appeal in the Hon'ble Supreme Court of India being WP(C) 105 of 2014 on the aspect of creation of regulatory assets by the Commission. The matter is pending adjudication. The Answering Respondents have also been arrayed as Respondents in the matter and the

precise issue before the Hon'ble Supreme Court is on the manner of liquidation of regulatory assets. The Petitioner is therefore once again raising the same issue which is pending before the Hon'ble Supreme Court.

- xiii. Moreover, it is stated that the present Review Petition is outside the scope of 'review proceedings' as propounded by the Hon'ble Supreme Court in catena of judgments while adducing the tenets and grounds for seeking a review of an Order.
  - xiv. It is re-iterated that the Petitioner under the garb of seeking the Review, is attempting to delay the payments due towards the Answering Respondents by misusing the power of review as provided under the Tariff Regulations 2017 of the Commission. Even as on date 18.08.2020, the Petitioner has an outstanding of Rs.1408.17 Cr. towards Respondent No. 1- IPGCL and Rs 3772.53 Cr. towards Respondent No. 2- PPCL.
  - xv. The Respondents further submitted that the Commission, in the Order under review, has held that the Petitioner is avoiding the payments to the Answering Respondents on the understanding that LPSC should be equivalent to carrying cost in order to fill in the gap created due to non-cost reflective tariff.
3. Respondent No. 3 made the following submissions in its reply to the Review Petition:
- i. That the Petitioner under the grab of the present Review Petition has sought to delay the payments due towards the answering Respondent. The Commission had also noticed the fact that the Petitioner was avoiding the payments of its dues to the Respondent No. 3.
  - ii. That it is settled law that provisions of Regulations can be supplemented but not supplanted through Clarification or Removal of Difficulty Order. As per the Order dated 13.05.2019 of the Commission, the scope of 'Power to Relax' and 'Power to Remove Difficulty' is not to change the Regulation itself or to interpret the Regulation in a manner that violates the terms of the Regulations.
  - iii. In view of the above, the Respondent No. 3 prayed for dismissal of the Review Petition.

#### **Commission's Analysis**

- 4. The instant Review Petition has been filed by the Review Petitioner seeking review of the Commission's order dated 13.05.2019, passed in Petition No.26 of 2018.
- 5. During the hearing of the matter held on 23.04.2025, Ld. Sr. Advocate for the Petitioner stated that the matter regarding LPSC rate, for which review is sought by the Review Petitioner, is pending before the Hon'ble Supreme Court. It was therefore observed that under such circumstances, the present Review Petition is rendered redundant and the same should be withdrawn by the Review Petitioner.

Learned Senior Advocate for the Review Petitioner submitted that he would seek instructions from the petitioner regarding the withdrawal of the present Petition.

6. In the meantime, the Review Petitioner, instead of communicating instructions regarding withdrawal of the present Review Petition, filed an Additional Affidavit to place on record subsequent developments. During the course of hearing held on 28.05.2025, Ld. Senior Advocate appearing on behalf of the Review Petitioner informed about filing of the aforesaid additional affidavit and that the Review Petitioner is unable to withdraw the present Review Petition, *inter alia*, owing to intervening developments which have taken place during the pendency of the instant Petition.
7. Ld. Counsel for the Respondent, though opted not to file any reply to the aforesaid additional affidavit, but raised specific objections against filing and maintainability of the same, relying upon the following principles laid down by the Hon'ble Supreme Court in *State of West Bengal and others Vs. Kamal Sengupta and Anr.* 2008(8) SCC 612:

"35. The principles which can be culled out from the above noted judgements are:

- i. The power of the Tribunal to review its Order/decision under Section 22(3)(f) of the Administrative Tribunals Act, 1985 is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.
- ii. The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.
- iii. ...
- iv. ...
- v. ...
- vi. ...
- vii. **While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent."**

Before proceeding further, it is pertinent to reproduce the provisions contained under Order XLVII Rule-I, which states as under:

- "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) by a decree or order from which no appeal is allowed, or
  - 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."

8. It is observed that the Review Petitioner, in Para-4 of the aforesaid additional affidavit, has stated that **"...certain new facts have become relevant, some of which are not on record before this Commission..."**. The plea of the Review

Petitioner as stated above cannot be accepted in view of the settled law governing the maintainability and adjudication of Review Petitions.

9. Further, Ld. Senior Advocate for the Review Petitioner prayed to adjourn the hearing in the present Review Petition *sine die* and has relied upon the Judgment dated 24.03.2014, passed by Hon'ble APTEL in Mahendra Gupta, Delhi and others Vs. DERC (APL 238 of 2013), wherein Hon'ble tribunal in Para-15 has stated,

*"15. It is not open to any State Commission or to this Appellate Tribunal to entertain and decide the issue pending before the Hon'ble High Court because the Doctrine of Comity of jurisdiction requires that this Tribunal should restrain from passing any order which may be in conflict with any order passed by any Competent Court namely; Hon'ble High Court of Delhi in the instant matter".*

10. It is the case of the Review Petitioner that issues raised in the Review Petition are also being agitated by the Review Petitioner in Writ Petition No. 105 of 2014 presently pending before the Hon'ble Supreme Court of India. Considering the same, the Review Petitioner was confronted with the query by the Commission as to whether the instant Review Petition can be decided on merits under such circumstances, when the issue was already being agitated by the Review Petitioner before the Hon'ble Supreme Court, Ld. Sr. Advocate responded to the said query in negative. Hence, no order on merits can be passed by the Commission at this stage.
11. Therefore, the prayer regarding adjourning the present Review Petition *sine die* awaiting the outcome of the proceedings pending before the Hon'ble Supreme Court, which is the only prayer being pressed by the Review Petitioner, cannot be accepted under the facts and circumstances of the present case as adjourning the Review Petition *sine die* would not serve any purpose since, even after adjudication of the issue by the Hon'ble Supreme Court, nothing would survive to be adjudicated by the Commission in the instant Review Petition.
12. In view of the above, the Review Petition stands dismissed.
13. Ordered accordingly.

**Sd/-**  
**(Surender Babbar)**  
**Member**

**Sd/-**  
**(Ram Naresh Singh)**  
**Member**

**Sd/-**  
**(Justice Umesh Kumar)**  
**Former Judge**  
**Chairman DERC**