

**Delhi Electricity Regulatory Commission**  
**Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi- 17.**

No. F. 3(148)/Tariff/DERC/2006-07

**Petition No. 52/2006**

**In the matter of:**

Review Petition under the provisions of the Electricity Act, 2003 against Order dated 22<sup>nd</sup> September, 2006 passed by Delhi Electricity Regulatory Commission on the petition of the Company for determination of generation tariff for the FY 2006-07.

**And**

**In the matter of:**

Pragati Power Corporation Limited,  
Regd. Office: Himadri,  
Rajghat Power House Complex,  
New Delhi.

**Before**  
**Delhi Electricity Regulatory Commission**

**Coram:**

**Sh. Berjinder Singh, Chairman, Sh. K. Venugopal, Member, &  
Sh. R. Krishnamoorthy, Member**

**ORDER**

**(Date of Hearing -19.12.2006)  
(Date of Order - 14.03.2007)**

This Review Petition has been filed under the provision of section 94(1)(f) of the Electricity Act, 2003, by Pragati Power Corporation Limited (PPCL), hereinafter called the Petitioner, against the Commission's Order dated 22.09.2006 in Petition No. 03/2006. In order to appreciate the issues raised in this Review Petition, it would be proper to state the facts giving rise to filing of this Review Petition.

2. The Delhi Electricity Regulatory Commission (DERC) (herein after referred to as "Commission") was established under the Electricity Regulatory Commission Act, 1998 and has been assigned the functions as described under

the Delhi Electricity Reform Act, 2000 and the Electricity Act, 2003. The Commission as per Section 86(1) (a) of the Electricity Act 2003 is vested with the powers to determine tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State.

3. A petition for approval of the Annual Revenue Requirement (ARR) and determination of Tariff for FY 2006-07 was filed by PPCL on 19<sup>th</sup> December, 2005.

4. The petition for approval of the Annual Revenue Requirement (ARR) and determination of Tariff for FY 2006-07 filed by PPCL was admitted by the Commission after seeking additional information/clarifications necessary for the purpose of admission of the said petition. The Commission passed its Order on 22.09.2006 on the aforesaid petition, after examining the information submitted by the Petitioner and also keeping in mind the subsequent interaction/submissions with the Petitioner and the views expressed by the various stakeholders.

5. The Policy Directions, issued by the Government of NCT of Delhi, envisages uniform retail supply tariffs across the DISCOMs and tariffs have to be determined in a manner that allows the DISCOMs to recover all permissible expenses and return for the year. Therefore, the BST for the DISCOMs cannot be determined in isolation. The tariff of Generating Company is an input to the Power Purchase Cost of the TRANSCO. The Commission processed the ARR and Tariff Petitions of IPGCL, PPCL, TRANSCO and three DISCOMs simultaneously. The Commission passed its Orders on the ARR and tariff petitions of IPGCL and PPCL, Transco and DISCOMs on 22.09.2006 and revised the electricity Retail Supply Tariff and the electricity Bulk Supply Tariff in Delhi w.e.f 1<sup>st</sup> October, 2006.

6. This Review Petition has been filed subsequent to the said impugned Order. According to the Petitioner, the impugned Order passed by the Commission suffers from mistakes and errors apparent on the face of the record which are required to be corrected and that there are other sufficient reasons for reviewing and/or modifying the impugned Order.

7. While touching the issues raised in this petition, it is important to understand that while dealing with an application for a review of an Order, it is

very necessary to process the application with utmost caution as the powers of review are not ordinary powers.

8. The provisions relating to review of an Order constitute an exception to the general Rule to the effect that once a judgement is signed and pronounced, it cannot be altered. Therefore, the Orders are not generally interfered with, till there are circumstances as defined under the law which make it necessary for a Court to alter or modify or reverse its original judgement. The application and the scope of the review of an Order are circumscribed under Order 47, Rule 1, of Code of Civil Procedure. The power of review is not inherently vested with a Court or a Tribunal or a Commission. The right and power of review does not exist unless conferred by law expressly or by necessary implication.

9. With the enactment of the Electricity Act, 2003, the State Electricity Regulatory Commissions have been vested with powers for reviewing its own decisions, directions and Orders by virtue of sub-Section 1(f) of Section 94 of the Electricity Act, 2003. The instant application, made before the Commission, for the review of its decision, directions and Orders, therefore, derives its scope and authority from the aforesaid section of Electricity Act 2003 read with Order 47, Rule 1, of the Code of Civil Procedure.

10. The scope of review, at the very outset, is much restricted than that of an appeal. The Court of review has only a limited jurisdiction under Order 47, Rule

1. The review power, under the aforesaid provision are re-produced as below: -

“Application for review of judgement – (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) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter of 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 judgement of the Court which passed the decree or made the order” .

11. The above mentioned provisions of CPC mandates that a Court of review may allow a review only on three specific grounds which are as under: -

- (i) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or such matter or evidence could not be produced by him at the time when the order was made; or
- (ii) Mistake or error apparent on the face of the record; or
- (iii) For any other sufficient reason which is analogous to the above two grounds.

Under Order 47, Rule 1, CPC, Order/Judgement may be open to Review, inter-alia, if there is a mistake or an error apparent on the face of the record. An error, which is not self-evident, has to be detected by process of reasoning and such an error 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 the above said provisions.

12. An error apparent on the face of the record may not be defined precisely and exhaustively, as there is an element of indefiniteness inherited in term so used and it must be left to the Court to determine judicially, on the basis of the facts of each case. However, an error must be one which speaks of itself and it glares at the face, which renders it difficult to be ignored. The error is not one limited to one of the fact but it also included obvious error of law. Further, the error is not just limited to error of fact or law but an error apparent on the face of the record is a ground, which would render a particular judgement to be reopened. Whether, the error may have crept by oversight or by mistake may need to be established. The exercise of review of judgement under Order 47, Rule 1, is not permissible for an erroneous judgement so as to render the judgement to be "reheard and corrected". The law has made clear distinction between what is an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the latter can be corrected by exercise of review jurisdiction. A Review Petition has a limited purpose that cannot be allowed to be an appeal in disguise.

13. The application for review on the discovery of new evidence should be considered with great caution. The applicant should show that: -

- a) That such evidence was available and of undoubtable character.
- b) That it was so material that the absence might cause miscarriage of justice.

- c) That it could not with reasonable care and diligence have been brought forward at the time of decree/order. It is well settled that new evidence discovered must be relevant and of such character that it has clear possibility of altering the judgement and just not merely reopening the case for the sake of it.

On the question of scope of review the Supreme Court in the case of Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma (AIR 1979 SC 1047) held that: -

“There are definitive limits to the exercise of power of review. The power of review may be exercised on the discovery of new and important matter or 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 merits. That would be 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 errors committed by the Subordinate Court”.

14. The Supreme Court, in the case of Smt. Meera Bhanja Vs. Nirmala Kumari Choudhury (AIR 1995 SC 455), while discussing the scope and jurisdiction of mistake apparent on the face of the record has held that:

“The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of order 47, Rule 1, CPC. The Review Petition has to be entertained only on the ground of error apparent on the face of the record and not on any other ground. An error apparent on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of court under Order 47, Rule 1, CPC is similar to the jurisdiction available to the High Court while seeking review of the orders under Article 226”.

15. Further also in the case of Parsion Devi Vs. Sumitri Devi, the Supreme Court has held that;

“A review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different Counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of Counsel’s certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost.

16. Keeping in view the statutory provisions and the pronouncements of the Supreme Court of India, the scope of review has been limited into the following words: -

1. That the power of review can be exercised only within the domain prescribed under Order 47, Rule 1, for the rectification of an error patent and glaring on the face which would warrant reconsideration of the judgement/order so pronounced.
2. Where there is nothing to contest that the error is so convincingly parched in the order that at the face of the record it would be unacceptable to continue.
3. The error should be self-evident.
4. Review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected.

#### **Issues Raised:**

##### **A) Heat Rate**

#### **Petitioner’s Submission**

1. The Petitioner has submitted that the Commission in its Tariff order dated 22nd September, 2006 for FY 2006-07 has allowed a heat rate of 2000 Kcal/Kwh for FY 2005-06 and FY 2006-07 as against the requested heat rate of 2018 Kcal/Kwh for FY 2005-06 and 2052 Kcal/Kwh for FY 2006-07. It has also been submitted that for Open Cycle operations, the Commission has allowed a heat rate of 2900 Kcal/Kwh, whereas the guaranteed open cycle heat rate at 100% load factor is 2986 Kcal/Kwh on GCV basis.

2. The Petitioner, in support of its contention, has also submitted that the plant has been facing gas shortage due to cuts imposed by GAIL and that the Company was able to achieve a PLF of 79.53% only during FY 2005-06.
3. The Petitioner has further submitted that due to PLF below 80%, the heat rate of the plant has increased to 2018 Kcal/Kwh during the FY 2005-06. Since the petitioner was expecting continued cuts in gas supply from M/s GAIL in FY 2006-07 also, they requested the Commission to allow a heat rate of 2052 Kcal/Kwh for FY 2006-07.
4. The Petitioner has therefore, prayed that since the heat rate of 2000 Kcal/Kwh for combined cycle operation and 2900 Kcal/Kwh for open cycle operation as allowed by the Commission is practically not achievable, the Commission may reconsider and allow the actual heat rate of 2018 Kcal/Kwh for FY 2005-06 and revise the heat rate for FY 2006-07 to 2052 Kcal/Kwh and also increase the heat rate for open cycle operation.

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

1. Insofar as consideration of the actual heat rate of the PPCL for FY 2005-06 is concerned, it has already been mentioned in the Commission's Tariff Order dated 22.09.2006 for FY 2006-07 that the Commission has considered the Station Heat Rate of 2000 Kcal/Kwh (on GCV basis) for FY 2005-06 and FY 2006-07 and the same is as per the draft PPA between the TRANSCO and the Petitioner for combined cycle operation. The Commission in its Tariff Order for FY 2006-07 has also clarified that the same norm is being followed by CERC for similar Gas Turbine Power Stations.
2. Further, the Commission has clarified in its Tariff Order dated 22nd September, 2006 that the approved Station Heat Rate of 2000 Kcal/Kwh for combined cycle operation is based on Gross Calorific Value (GCV) of the fuel and not on the Net Calorific Value (NCV).
3. As expressed in the preceding paragraphs, the scope and applicability of the Review Petition is circumscribed into a very limited sphere as defined under Order 47, Rule 1 of the Code of Civil Procedure and the Petitioner has not been able to make out a case for review for instant issue. As the issue has been deliberated upon in its Tariff Order dated 22nd September, 2006 and the Petitioner has not indicated that the Commission has left this issue unaddressed and this can be treated as an "error apparent on the face of the record", the Commission does not admit this issue for review.

## **B) Rebate on timely payment**

### **Petitioner's Submission**

1. The Petitioner has submitted that in the Tariff petition for FY 2006-07, they had requested the Commission to consider and allow the expenditure on account of rebate given to TRANSCO in FY 2005-06 as well as in FY 06-07 for timely payment of bills. However, the Commission in its Tariff Order for FY 2006-07 has not allowed the same and the rebate on timely payment was considered as trade off with the interest on 2 months receivables, considered in working capital computation.
2. The Petitioner has submitted that the interest allowed by the Commission on Working Capital is 10.25% p.a. on monthly rest basis which in the case of 2 months receivables comes to 20.50% p.a. While the 2% rebate on timely payment works out to 24% p.a. in annual percentage. The petitioner has, therefore, stated that even with trade off criteria, they are losing Rs. 1.5 crore annually.
3. It has been further submitted by the Petitioner that all the rebates and discounts received by the Company on its payments/expenditures are being accounted in the working of the tariff. A rebate of Rs. 1.78 crore was allowed to the Petitioner by Power Finance Corporation (PFC) during FY 2005-06. Similarly, the rebate/discount allowed by the Petitioner on its revenue earnings should also be considered and allowed in the tariff.

### **Commission's Analysis**

1. The issue of rebate allowed by the Petitioner to TRANSCO for timely payment has been discussed in detail in para - 3.3.3.2. of the ARR Order of the Commission dated 22nd September, 2006 for FY 2006-07 and it is the considered view of the Commission that the rebate offered by the Petitioner to TRANSCO is a commercial arrangement so as to expedite receipt of payment only. Therefore, the Commission did not allow any rebate allowed by the Petitioner to TRANSCO on account of timely payment while computing the interest charges.

The Commission in para - 3.3.3.2. of its Tariff Order dated 22<sup>nd</sup> September, 2006 for FY 2006-07 has discussed this issue at length and mentioned as under

*“The issue of rebate allowed by the Petitioner to TRANSCO for timely payment has been considered by the Commission in its Review Order on Tariff for FY 2005-06. The Commission has further considered the matter*



*in detail and is of the view that the rebate offered by Petitioner to TRANSCO is a commercial arrangement so as to expedite receipt of payment. The Commission has considered receivables for 2 months based on the projected sales keeping in view the norms for realisation of payment, for estimating the working capital requirement and the interest is allowed accordingly. The rebate on timely payment is therefore a trade-off with the interest on 2 months receivables considered in working capital requirement, hence does not merit any separate consideration.”*

2. The Commission therefore, feels that the issue raised by the Petitioner has been deliberated at length in its Tariff Order dated 22nd September, 2006 and the Petitioner has not shown anything which indicates that there is an “error apparent on the face of the record”. As the issue raised in the Review Petition does not qualify for invoking the review jurisdiction of the Commission, the Commission does not admit this issue for review.

### **C) Interest on loan**

#### **Petitioner’s Submission**

1. The Petitioner has submitted that for FY 2005-06, the Commission has allowed an interest of Rs.52.12 crore on the loans taken from PFC and Govt. of Delhi. It has been further submitted by the Petitioner that the above said figure of interest has been revised to Rs.55.58 crore during the audit. The bifurcation of interest to PFC as submitted by the petitioner is as under:-

Interest Paid	:	Rs. 52.09 crore
Premium on Restructuring of Loan	:	Rs. 5.23 crore
Rebate Allowed by PFC	:	Rs.(-) 1.78 crore
Total	:	Rs. 55.55 crore

The Petitioner has, therefore, requested the Commission to reconsider and revise the amount of interest charges to Rs.55.58 crore which is inclusive of interest on GNCTD loans.

#### **Commission’s Analysis**

1. The Commission would like to clarify that though the Petitioner had mentioned in the original ARR petition of FY 2006-07 that they have paid a premium of Rs. 5.23 crore towards re-structuring of loan and that is a part of interest cost during FY 2005-06, the same was not shown as a part of the Petitioner’s claim in form-6.8 (sheet showing computation of

interest on various loans) and form-6.11 (yearly fixed cost calculations) of their original petition.

The Commission had therefore, allowed the actual interest expenses incurred during FY 2005-06 at Rs 52.12 crore taking into account the interest of Rs. 52.09 crore on loan from PFC and interest of Rs. 0.03 crore on loan from GNCTD in its Tariff Order for FY 2006-07.

2. During the technical sessions, the Petitioner had requested the Commission to revise the amount of interest charges to Rs.55.58 crore taking into account the premium on restructuring of loan and the rebate allowed by PFC. In response thereto, the Commission requested the Petitioner to furnish the detailed break-up of financial charges considered by PFC for working out the effective interest rate to ensure that there is no double accounting of swapping charges. As the Petitioner did not submit the detailed break-up of financial charges, the premium on restructuring of loan and the rebate allowed by PFC was not considered by the Commission in the Tariff Order for FY 2006-07.
3. However, if it has caused undue under-recovery of interest expenses, the Petitioner is at liberty to provide necessary details in support of his claims to the satisfaction of the Commission during the subsequent tariff filing under MYT framework. The Commission would consider the variation in interest expenses, if any after verification of the necessary details during the truing up of expenses.
4. As such, there is no error apparent on the face of the record. Hence, the Commission does not admit this issue for review at this stage.

On the basis of the records produced before the Commission during the processing of the ARR and Tariff petition of the Petitioner, in the present Review Petition and the averments made before the Commission, the Petitioner has not been able to make out any case which would endorse a case for review of the Commission's Order dated 22<sup>nd</sup> September, 2006 issued for the purpose of determining the Tariff of the Petitioner. The Petitioner has not been able to show that there is any error apparent on the face of the record which would justify the review. Nor the Petitioner is able to bring out any new evidence which would require reconsideration of the Commission's Order. The Commission opines that the issues, which were raised by the Petitioner in its review application, and enumerated in this Order, have already been heard and deliberated in detail in the Commission's Order of 22<sup>nd</sup> September 2006. The issues were decided by the Commission based upon the prevalent law, practices and principles in the

domain of determination of Generation tariff. On these considerations, this Review Petition is dismissed being devoid of any merit.

The Commission orders accordingly.

Sd/-  
(K. Venugopal)  
Member

Sd/-  
(R. Krishnamoorthy)  
Member

Sd/-  
(Berjinder Singh)  
Chairman