

DELHI ELECTRICITY REGULATORY COMMISSION

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

F.11(524)/DERC/2009-10/

Review Petition No. 15/2009

In the matter of: Petition seeking clarification and/or reconsideration and/or review and or modification of certain observations and findings in the Order dated 22.09.2009 in Petition No. 55 of 2007 – Petition for determination of Single Maintenance Charges including the cost of material utilized during the maintenance of street lights.

AND

In the matter of:

North Delhi Power Limited
Through its: **CEO**
Sub-Station Building,
Hudson Lines, Kingsway Camp,
Delhi – 110 009.

...Review Petitioner

Versus

Commissioner
Municipal Corporation of Delhi,
Town Hall,
Delhi.

...Respondent No. 1.

Engineer in Chief
Public Works Division
12th Floor MSO Building,
IP Estate, New Delhi.

...Respondent No. 2.

Chief Engineer (Electrical)
Delhi Development Authority,
Vasant Kunj, Sector –D,
New Delhi.

...Respondent No. 3.

Director General (Works)
Central Public Works Division
1st Floor Nirman Bhawan,
New Delhi.

...Respondent No. 4.

BSES Rajdhani Power Limited
Through its: **CEO**
BSES Bhawan,
Nehru Place,
New Delhi-110019.

...Respondent No. 5.

BSES Yamuna Power Limited
Through its: **CEO**
Shakti Kiran Building, Karkardooma,
Delhi-110092.

...Respondent No. 6.

Coram:

**Sh. Berjinder Singh, Chairman, Sh. Shyam Wadhera, Member &
Sh. Subhash R. Sethi, Member.**

Appearance:

1. Sh. Ajay Kapoor, CFO , NDPL;
2. Sh. Anurag Bansal, HOG-CORP, Legal, NDPL;
3. Sh. Varun Sharma, Manager (CCM), NDPL;
4. Sh. Vikas Jain, EE (Elect), MCD;
5. Sh. B.K. Grover, SE(Elect), DDA.

ORDER

(Date of Hearing: 16.02.2010)

(Date of Order: 06.04.2010)

1. The North Delhi Power Ltd. has filed the present Review Petition No. 15/2009 for review of the impugned Order dated 22.09.2009 in Petition No. 55/2007.
2. The Review Petitioner has referred to Section 94 and 185(3) of the Electricity Act, 2003, Section 114 read with Order 47 of the Code of Civil Procedure, 1908 and Regulation 57, 58 and 59 of the DERC Comprehensive (Conduct of Business) Regulations 2001 of the Commission to establish that the Commission has powers to review its Order.
3. This Review Petition has been filed subsequent to the said impugned Order and according to the Petitioner, the Order passed by the Commission suffered from mistakes and errors apparent on the face of record which are required to be corrected and that there are other sufficient reasons for reviewing and/or modifying the Order.
4. 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.
5. 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.
6. With the enactment of the Electricity Act, 2003, the State Electricity Regulatory Commissions have been vested with powers for reviewing their decisions,

directions and Orders by virtue of sub-Section 1 (e) of Section 94 of the Electricity Act, 2003. The application, made before the Commission, for the review of its decisions, 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.

7. The Commission is of the view that the scope of review is more strict and restricted than an appeal. The Court of review has only a limited jurisdiction and limited by the unqualified language of 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 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 judgement of the Court which passed the decree or made the order."*

8. 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 opened to review, inter-alia, if there is a mistake or an error apparent on the face of 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 record, justifying the Court to exercise its power of review under the above said provisions.

9. 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 :-
- a) 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.
 - b) 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.
 - c) The error should be self-evident.
 - d) Review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected.

ISSUES RAISED

A. REVISION OF CHARGES/RATES WHETHER PROSPECTIVE OR RETROSPECTIVE:

10. Sh. Ajay Kapoor, CFO, appearing for NDPL, Review Petitioner has submitted that the Commission has not appreciated the submission of the Review Petitioner that the rates being determined be made applicable retrospectively w.e.f. 16.03.2004. Further, it was submitted that at the very least, the revised maintenance charges be made applicable from an alternative date i.e. 07.03.2006, the date of the first letter written by the Review Petitioner to the Commission on this issue. It is submitted that the Commission due to oversight or omission may not have noticed the entire relief as had been prayed for in terms of the original prayer made by the BRPL for providing the revised rates effective from the date of earlier order i.e. 16.03.2004 which was also endorsed by the Review Petitioner and subsequently re-agitated from time to time.
11. It is further contended that the efficiency in working of street lighting which was earlier approximately 50% has improved significantly and had reached around 98% by the month of March, 2006. In view of the fact that the efficiency of operation of street lights have improved considerably, cost of maintenance and consumable of street light materials have gone up considerably which in turn requires the maintenance charges also to be increased suitably. The bill for consumables was only partially cleared by MCD and as on 07.03.2006, the total outstanding amount qua MCD and PWD was Rs.4,71,33,238/-.

12. Further, it is contended that the Commission has revised the maintenance and other charges in respect of street lights in the impugned Order but it has not taken into consideration the financial hardships being caused to the Review Petitioner for the last 3 years on the account of which Review Petitioner had made repeated representation from 07.03.2006. Keeping in view that the efficiency levels in the operation of street lights have been achieved solely due to the efforts of the Review Petitioner, it is just and proper and in the interest of justice without prejudice that the revised rates vide impugned Order dated 22.09.2009 be made applicable retrospectively w.e.f. 16.02.2004 or in the alternative not later than 07.03.2006.
13. It is further contended by the Review Petitioner that a direction be passed by the Commission directing the MCD/PWD to clear forthwith the outstanding amount to the tune of Rs.10 core in relation to the consumables used by the NDPL in respect of which bills have already been raised.

COMMISSION'S ANALYSIS:

14. The Commission has perused the record placed before it and is of the view that the Commission after taking into consideration all the relevant facts has correctly determined a single maintenance charges of Rs. 76.94(say Rs.77/-) per point per month. To arrive at single maintenance charge of Rs.77/- per point per month cost components broadly include annual cost on Tower Wagon (depreciation), maintenance cost (fuel cost, running cost including the salary of driver), contract labour cost, regular employee cost and overheads @15% of total maintenance cost. Additionally the charge of Rs.7/- per pole per month has been arrived at towards painting and numbering of each point.
15. The Commission has further noticed that it has determined the single maintenance charges of Rs.77/- per point per month based on the cost for the FY 2007-08 ending on 31.03.2008. Therefore, the question to give effect to these charges w.e.f. 16.03.2004 or 07.03.2006 does not arise. The Commission observed that petition No. 55/2007 was filed by M/s BSES Rajdhani Power Ltd. on 08.11.2007 and Review Petitioner, NDPL joined the proceedings as Respondent No. 5 in petition No. 55/2007 on 06.02.2008 unconditionally. Since, NDPL became a party to the petition No. 55/2007 originally filed by M/s BRPL on 06.02.2008 and single maintenance charges of Rs.77/- per point per month were based on the cost of FY 2007-08, therefore, the Commission is inclined to give effect to the impugned Order of the Commission dated 22.9.2009 w.e.f. 01.04.2008.

16. So far as the matter of suitable directions to be given by the Commission to the MCD/PWD to clear forthwith the bills for consumable etc., the Commission has observed that all the three Discoms including NDPL and the Civic Agencies have agreed in the meeting on 27.10.2006 that the details of bills for maintenance charges and the cost of material utilised in the maintenance of street lights raised by the Discom and the payment thereof by the Civic Agencies should be reconciled between all the three Discoms and the concerned Civic Agencies.

B. APPLICATION UNDER SECTION 142 OF THE ELECTRICITY ACT, 2003 NOT ADJUDICATED:

17. Sh. Ajay Kapoor for NDPL submitted that the Commission failed to consider and/or decide upon the application made by the Review Petitioner under Section 142 of the Electricity Act, 2003 and to pass any directions as regards to the prayer made there under. The said application was made in view of deliberate and wilful non-compliance by MCD of the Commission's Directions in its order dated 03.11.2008 and subsequent Show-cause notice dated 06.03.2009. It is further submitted that as recorded in the said order the Counsel for the MCD had made a submission that they were in the process of seeking exemption from levy of service tax on maintenance of street lights. It is submitted that this application has not been considered by this Hon'ble Commission in the impugned Order dated 22.09.2009 nor any direction have been issued to MCD to comply with the earlier order of this Commission. MCD has also not clarified as to whether it has applied for exemption from levy of service tax and if so the status of that application. Accordingly, for no fault on its part, the Petitioner has been left to bear the burden of the service tax component which in law, is liable to be paid by MCD.

COMMISSION'S ANALYSIS:

18. The Commission has observed that the said application filed under Section 142 of the Electricity Act, 2003 was not a part of the petition No. 55/2007 filed for determination of single maintenance charges. Thus, the said application was not considered in the Commission's impugned Order dated 22.09.2009. Further, the Commission during the hearing of petition No. 55/2009 regarding determination of single maintenance charges clarified to all the Discoms that this matter shall be dealt with separately. The Commission reiterated its observation in the hearing held on 16.02.2010.
19. It appears from the above that there is no error apparent on the face of the record. There is no case for the review of the impugned Order dated 22.09.2009.

C. NO ORDER AS TO SERVICE TAX:

20. It is contended on behalf of the Review Petitioner that Commission has failed to pass any directions/orders as regards the issue of non payment of service tax by the Respondent No. 1, MCD, despite specific orders from the Commission to the MCD to pay the service tax to the Discom while proceedings seeking exemption from the realm of service tax in respect of services like maintenance and repairs works pertaining to street lights are initiated by the MCD. It is further contended that the Discoms are unnecessarily burdened with the liability of paying the service tax with the authorities and the Review Petitioner has deposited a sum approximately Rs.185.60 with the authorities towards service tax although not a single penny has been received from MCD/PWD. It is needless to say that saddling of the Review Petitioner with such an additional and unjust burden inspite of the actual payments made by the Petitioner as well as the directions issued by the Commission in its order dated 07.11.2008. It is further contended that it appears that inadvertently the issue of liability of service tax as a component of maintenance charges and on whom it rests has not been addressed by this Commission in its impugned Order dated 22.09.2009.

COMMISSION'S ANALYSIS:

21. The Commission during the hearing of petition No. 55/2009 regarding determination of single maintenance charges clarified to all the Discoms that this matter shall be dealt with separately. The Commission reiterated its observation in the hearing held on 16.02.2010.
22. It appears from the above that there is no error apparent on the face of the record. The Review Petitioner has no case for review of the impugned Order dated 22.09.2009 on this issue.
23. Ordered accordingly.

Sd/-
(Subhash R. Sethi)
MEMBER

Sd/-
(Shyam Wadhera)
MEMBER

Sd/-
(Berjinder Singh)
CHAIRMAN