

**IN THE JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION
AT RANCHI**

Case No. 10 of 2019

M/s. Damodar Valley Corporation (DVC)..... .Petitioner

Versus

Association of DVC HT Consumers of JharkhandRespondent

**CORAM: HON'BLE SHRI R. N. SINGH, MEMBER, (ENGINEERING)
HON'BLE SHRI P. K. SINGH, MEMBER (LEGAL)**

For the Petitioner : Mr. Srijit Choudhury and Ms. Srija Choudhury, Advocates

For the Respondent : Mr. Saket Upadhyay, Advocate

ORDER

Date – 16th September, 2020

1. This Review Petition has been filed by Damodar Valley Corporation (hereinafter referred to as 'DVC or the 'Petitioner') on 01.07.2019 under Section 94(1) (f) of the Electricity Act, 2003 read with the Section Regulation 41.1 of the JSERC (Conduct of Business) Regulations 2016 for making review of the Order dated 28.05.2019 passed by the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as 'JSERC' or the 'Commission') in Case no. 07 of 2018 and 02 of 2019 relating to True-up for FY 2016-17, APR for FY 2017-18 & FY 2018-19 and ARR & Tariff for FY 2019-20 for Damodar Valley Corporation. The Petitioner in its Review Petition prayed for the following:-
 - a. Review the Order dated 28.05.2019 and decide in the applicability of simple interest instead of compound interest for computation of carrying cost and applicability of plant/transmission availability factor for computation of the recoverable amount of contribution to Pension & Gratuity Fund and Sinking Fund as approved by CERC;
 - b. Review the computation of Interest on Working Capital;
 - c. Removing difficulty in meeting the power supply commitment from DVC generators directly to Beneficiaries in view of MOD principle being adopted in the Order dated 28.05.2019 without considering Beneficiary allocation as per bilateral Power Purchase Agreement (PPA);
 - d. Review the Order dated 28.05.2019 and allow T&D loss during FY 2017-18 to FY 2019-20 as submitted by the Petitioner;
 - e. Review the Order dated 28.05.2019 and revise the sale percentage of JBVNL as considered in the Order for FY 2016-17 to FY 2018-19 based on the submission in the present petition;
 - f. Review the Order dated 28.05.2019 and allow DVC to recover the expenses on Cyber Security for FY 2017-18 based on the submission in the present petition;
 - g. Review the Order dated 28.05.2019 and allow DVC to recover contingency power purchase cost based on the submission made in the present petition;
 - h. Pass such Order(s) as the Hon'ble Commission may deem fit and proper keeping in view the facts and circumstances of the case.
2. The Learned Counsel for the Respondent submitted that before going into the merits of the case; maintainability of the Review Petition may be decided as a preliminary issue. The Learned Counsel for the Respondent added that Section 94(1)(f) of the Electricity Act, 2003 and Regulation 41 of

JSERC (Conduct of Business) Regulations, 2016 empowers the Commission to review its Order only under certain conditions.

3. Learned Counsel for the Respondent further submitted that Section 94(1)(f) of the Electricity Act, 2003 empowers Commission with powers of a civil court under the Code of Civil Procedure, 1908, where the Court has only a limited jurisdiction and limited by the unqualified language of Order 47, Rule 1 as follows.

7. The above mentioned provisions of CPC mandate 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.”*

Therefore, the conditions under which a review application can be processed are clearly specified under the Code of Civil Procedure and the scope of such a review is thus very limited.

4. Learned Counsel for the Petitioner submitted that the instant Review Petition has been filed under sub-section (1)(f) of Section 94 of the Electricity Act 2003 and Regulation 41 of JSERC (Conduct of Business) Regulations, 2016. The Commission has admitted the Petition and directed DVC to publish a general notice in newspaper in the hearing dated 29.07.2019. DVC in compliance has published the same on 09.08.2019 and submitted the cuttings of different newspapers containing the aforesaid general notice before the Commission. The Petitioner further submitted that the issues on which the instant Review Petition has been submitted are of immense importance so far as the distribution activity of the Petitioner is concerned in the State of Jharkhand.
5. Review Petition has been brought on following counts: -

- i. **Consideration of Compound Interest instead of Simple Interest for Computation of Carrying Cost by The Commission**

Petitioner's Submission

The Petitioner submitted that in light of practice followed by Maharashtra and Gujarat Electricity Regulatory Commission as well as the practice followed by Central Commission and the decision of the Hon'ble APTEL in the judgment dated 11.05.2017 passed in Appeal no. 250 of 2015, the Petitioner prayed before the Commission for consideration of Simple Interest instead of Compound Interest in computation of Carrying Cost.

Objector's Submission

The Objector stated that this issue has already been raised by the Petitioner in its past appeals pending before the Hon'ble APTEL and hence, can't be raised before two forums at the same time.

Commission's Finding

The Commission observed that the above point relates to consideration of Compound Interest instead of Simple Interest for computation of Carrying Cost, the issue has already been challenged by the Petitioner it is pending before The Hon'ble APTEL. Hence, the Commission doesn't find any merit to review it.

ii. **Applicability of PAF/TAF on recovery of contribution to P&G and Sinking Fund as approved by CERC**

Petitioner's Submission

The Petitioner has submitted in the instant Review Petition that it is entitled to recover the entire amount of the year wise contribution to P&G Fund and Sinking Fund as approved by CERC in the tariff orders of DVC's generating stations and T&D System in terms of the judgment dated 23.11.2007 passed by the Hon'ble APTEL which has been subsequently upheld by the Hon'ble Supreme Court in its judgment dated 23.07.2018 in a bunch of Civil Appeal nos. 971 to 973, 4289 of 2008. Further, in light of CERC Order dated 08.04.2019 in the petition no.: 331/MP/ 2018, the Petitioner further submitted that recovery of P&G and Sinking Fund should be on standalone basis and not linked to PAF/TAF. To further rationalize his argument, the Petitioner presented the fact that States like Chhattisgarh and Haryana allow expenditure towards Employee Pension in totality irrespective of performance.

Objector's Submission

The Objector stated that this issue has already been raised by the Petitioner in its past appeals which are pending before the Hon'ble APTEL and hence, can't be raised before two forums at the same time.

Commission's Finding

The Commission observed that the above point relates to recovery of contribution to P&G and Sinking Fund which have already been challenged by the Petitioner and the issue is pending before The Hon'ble APTEL. Hence, the Commission doesn't find any merit to review it.

iii. **Computation of interest on Working Capital**

Petitioner's Submission

The Petitioner submitted that in order to maintain distribution activity, DVC is required to arrange additional funds for the activities specially related to Distribution Business. The Petitioner further added that Hon'ble Central Commission, while fixing the norms in the Tariff Regulations for determination of Transmission Tariff envisaged the activity of a Transmission business only and not distribution activity. Accordingly, the requirement of Working Capital for running the electricity business which consists of generation, transmission and distribution activities is more than that allowed by CERC for generation and transmission businesses only.

Objector's Submission

The Objector submitted that the Petitioner's O&M Expenses & GFA may not be segregated between its generation and transmission businesses on one hand and retail business on the other, and therefore, it is not possible for the State Commission to consider Working Capital for retail supply in terms of the Tariff Regulations. In view of non-segregation of O&M Expenses and GFA, it is not possible for the State Commission to consider Working Capital requirement of DVC as per the Regulations. Therefore, consistent with its approach in the previous Tariff Orders, the State Commission estimated the Working Capital requirement for Jharkhand area at the rate of 1% of the projected revenue from sale of power in Jharkhand and allowed interest thereon at SBI PLR as on 1st April of the

corresponding year. It is submitted that in the order under review this commission has passed a reasoned and speaking order.

Commission's Finding

The Commission observed that the above point relates to additional Working Capital and this issue has already been challenged by the Petitioner with regard to previous orders pending before The Hon'ble APTEL. Hence, the Commission doesn't find any merit to review it.

iv. **Adoption of MOD keeping aside the allocation to the Beneficiaries in terms of bilateral Power Purchase Agreement (PPA);**

Petitioner's Submission

The Petitioner submitted that in addition to distribution to consumers, DVC also sells power directly from some of its Generating Stations at the tariff approved by Hon'ble CERC to the Licensees situated outside the valley area. Further, in FY 2017-18 and FY 2018-19, the generation quantum approved to be utilized for distribution sale from CTPS U#7&8, MTPS U#5&6, KTPS U#2 and DSTPS U#1 &2 had in fact encroached the allocated capacity to the Beneficiaries from those generators.

The Petitioner requested the Commission to review the matter and allow the Petitioner to maintain proper allocation to the consumers as well as the beneficiaries in terms of their respective power purchase agreements and consequent effect in Tariff.

Commission's Finding

The Commission in its Order dated 28.05.2019 had approved the availability from each Generating Station based on the Plant Availability submitted by the Petitioner in its submission during the Tariff proceedings. The Commission in the said Order had also observed that the Petitioner had proposed lower actual power generation against the proposed Plant Availability Factor (PAF) from its own generating stations and allocated power from CSGSs (Central Sector Generating Stations) and contingency source for purchase of power in spite of having surplus power available. Hence, the Commission in the said Order had considered the PAF as per CERC Tariff Regulations for CSGSs and actual PAF as submitted by the Petitioner for its own generating stations. Hence, the approved availability by the Commission is higher than that proposed by the Petitioner. The Commission in its Order dated 28.05.2019 has considered the Quantum of Bilateral PPA while approving the availability for the said years and has not encroached on the power available to Beneficiaries as per the Bilateral PPAs with the Petitioner. The Commission therefore finds no merit in the issue raised by the Petitioner and hence the review is denied.

v. **Consideration of T&D loss for FY 2017-18 to FY 2019-20 at a level same as that of FY 2016-17**

Petitioner's Submission

The Petitioner prayed to review the loss level approved For FY 2017-18 & FY 2018-19, in light of Clause 5.23 of JSERC (Terms & Conditions of Determination of Distribution Tariff) Regulations, 2015.

Objector's Submission

The Objector submitted that the Commission has passed reasoned order for considering the T&D loss at 3.23% for 2017-18 and 2019-20, which is further subject to truing up.

Commission's Finding

The Commission had clarified the same stating the reason for reduced T&D losses considered for the said years in its Order dated 28.05.2019, it reads as:

“6.36 The Commission observes that Clause 5.23 of the Distribution Tariff Regulations, 2015, provides for approval of actual loss below 5% without any profit/loss to the Licensee. However, since the Petitioner has not been able to substantiate the consistent increase in the T&D losses of the system, the Commission has approved the energy requirement considering the loss of 3.23% as approved for FY 2016-17. The same shall be subject to truing up.”

The Commission had approved the trued up losses of FY 2016-17 for FY 2017-18 and FY 2019-20 clearly stating that the same may be trued up as the increased losses as proposed by the Petitioner is not substantiated by its submissions. The Commission therefore finds no merit in the issue raised by the Petitioner and hence the review is denied.

vi. Error in computation of sales percentage for the consumers other than JBVNL out of total sale in Jharkhand

Petitioner's Submission

The Petitioner submitted that while computing the sales percentage of JBVNL, an error has been noticed by the Petitioner and requested the Commission to revise the ratio based on the actual sales as submitted along with review Petition.

Objector's Submission

The Objector submitted that the Commission has clearly stated in its order that sales considered are on estimated basis. Hence, this is neither a discovery of new and important matter or evidence nor any mistake or error apparent on the face of the record as far as this issue is concerned and accordingly the review of this aspect is devoid of any merit.

Commission's Finding

The Commission in the Order dated 28.05.2019 observed that consumer profile of DVC has underwent major changes in FY 2019-20. Consumers earlier drawing significant quantum of power from DVC till FY 2018-19 are no more consumers of DVC in FY 2019-20. Hence, while issuing the Order dated 28.05.2019, the Commission had estimated sales percentage of such consumers in Petitioner's overall all sales as approximately 44.00% in FY 2016-17, 42.00% in FY 2017-18 and 33.00% in FY 2018-19. The Commission, in the said order further emphasized that these values are provisionally allowed based on their share in Petitioner's sales for the respective years, i.e., 56% for FY 2016-17, 58% for FY 2017-18 and 67% for FY 2018-19. The Commission also directed the Petitioner to file a proposal for treatment of withheld gap/surplus along with truing up Petition for FY 2017-18. Hence, in the Order dated 28.05.2019, the Commission had made amply clear that the above sale percentage are provisional and will be reviewed based on the actual sales percentage

submitted by the Petitioner with proper supporting documents. Hence, the Petitioner claiming error on the said issue has no merit and therefore do not qualify for review.

vii. Disallowance of the Cyber Security Expenses

Petitioner's Submission

The Petitioner submitted that in compliance to the directives of the Commission in Order dated 28.05.2018, the Petitioner carried out the expenses towards Cyber Security and requested the Commission to kindly allow the expenditure.

Objector's Submission

The Objector submitted that the JSERC had clearly recorded the submissions of Petitioner and passed a reasoned direction wherein the Petitioner may claim prudent expenses during the truing up exercise.

Commission's Finding

The Commission has performed APR on Suo-moto basis for FY 2017-18 in the said Order. This issue is to be dealt while truing up for FY 2107-18.

viii. Disallowance of Contingency Power Requirement

Petitioner's Submission

The Petitioner submitted that contingency power purchase is done during exigency condition that may arise due to sudden shortfall in generation. The contingency power purchase is to be done to meet up the consumer demand in un-interrupted manner.

Objector's Submission

The Objector submitted that the Commission has passed a reasoned Order as far as disallowance of contingency power is concerned. Accordingly, there is neither a discovery of new and important matter or evidence nor any mistake or error apparent on the face of the record as far as this issue is concerned.

Commission's Finding

The Commission in the Order dated 28.05.2019 was of the view that power allocation/tied up power of the DVC was sufficient to meet its energy demand. Further, the Commission did not find any merit in the proposal of the Petitioner to purchase power from Open Market/Other source and paying Fixed Charge to own tied up source without scheduling. Hence, the Commission after prudence check did not find any merit in approving any contingency power purchase for the APR and ARR years.

ix Discovery of New Facts :-

By way of rejoinder to the objection on behalf of DVC HT Consumers it is stated by the petitioner that apart from the ground taken in the main review petition, the petitioner has also taken a ground of discovery of new fact and important matter within the meaning of XLVII Rule 1 of the CPC.

Respondent has replied that it is not a case of the petitioner that any such discovery of new fact 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 order was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason petitioner desires

to obtain a review of the order passed by this commission. None of the modification or review sought by the petitioner is clerical or arithmetical in nature. Discovery of new fact and issues can result in new cause of action and not ground for review of the earlier order.

A catena of decisions has been furnished and submitted by the Learned Counsel for the petitioner to support its case to bring the review petition within the purview of order XLVII Rule 1 of the CPC. The following decisions have been filed by the Learned Counsel:

- (A) Board of Control for Cricket in India-V-Negaji Cricket Club (2005) 4 SCC 741
- (B) Dhanani Shoes Limited V State of Assam and Others [2008] 16 VST 228 (Gau)
- (C) Mt. JamnaKuer V LalBhadur and Others AIR 1950 FC 131
- (D) Moran Mar BasseliosCatholicos and Anr.-V-The Most Rev. Mar Poulouse Athanasius and Ors., (1955) 1 SCR 520
- (E) Rajender Singh Vs. Lt. Governor, Andaman and Nicobar Islands and Ors., (2005) 13 SCC 289
- (F) Green View Tea and Industries Vs. Collector, Golaghat, Assam and Anr. (2004) 4 SCC 122

We have considered to the submission of the Learned Counsel, we find that none of the judgment is going to ensure the petitioner for admissibility of the review petition within the meaning of XLVII Rule 1 of the CPC, all the decisions cited by the Learned Counsel stipulates that the facts must be brought within the meaning of proviso of order XLVII Rule 1 of the CPC, for being admissible as a review petition.

Commission's Finding

We find that in the Review petition, the petitioner has failed to bring the case within the proviso of Order XLVII Rule 1 of the CPC.

x **Pendency of Appeal before Hon'ble APTEL**

Against the order dated 28.05.2019 by the Hon'ble commission passed in True Up for FY 2016-17, Annual Performance Review for FY 2017-18 & 2018-19 and Determination of Aggregate Revenue Requirement and Retail Tariff for FY 2019-20, the Respondents (Association of DVC HT Consumers of Jharkhand) have preferred an appeal under section 111 of the Electricity Act, 2003 which is numbered as APL No. 387 of 2019.

Submission of the Respondent

The petitioner has appeared in the appeal before the Hon'ble APTEL through counsel and filed affidavit contesting the appeal. The petitioner is pursuing review and appeal of the same order before two different forums under two different mechanism of law i.e. review and appeal (as respondent). Learned counsel has referred the case law titled as Khoday Distilleries Limited Vs Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal reported in (2019) 4 SCC 376. It is stated that the Doctrine of Merger has been explained "as that there cannot be more than one decree or operative order governing the same subject matter at a given point of time. When a decree passed by an inferior court, tribunal or authority is subjected to a remedy available under law before a superior forum. Once the superior court disposes of the dispute in any manner, it is the decree by the superior authority

which is final and binding and the authority of the inferior Court gets merged into the order passed by the superior forum.”

3. At para 23 of the judgment more particularly at 44(vii) it is observed by the Hon’ble Apex Court that on appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided sub rule (1) of Order XLVII Rule 1 of the CPC. Similarly, once the Hon’ble APTEL is in session of the matter, review of the same order under challenge is null and void.

In view of the settled proposition of law and judicial pronouncement, the Review petition is not maintainable before the Hon’ble Commission and it may be dismissed at the stage of admission.

Commission’s Finding

We have considered the submissions of both the parties, we find that the impugned order is under challenge before the Hon’ble APTEL and further the most of the grounds as taken in the review petition are also under the challenge before the APTEL in Appeals brought by the petitioner regarding earlier tariff orders passed by this Commission. It is considered that even if in appeals for earlier tariff orders is allowed by the Commission, it will not have any effect on this impugned order, as it is also required be to set - aside by the Hon’ble ATPEL only. We find that any relief in the review petition will not help the petitioner in getting impugned order get rectified in review by this Commission. To conclude, we find that on both the counts 1. Ground as raised by the petitioner is not within the meaning of proviso of XLVII Rule 1 of the CPC. 2. The purpose of interest of justice will not be served even if the matter raised by the petitioner is considered by this Commission in this Review petition, on merit.

CONCLUSION

6. For the points mentioned at Sl.no. (i) to (iii), the Commission observes that the issues are sub-judice before Hon’ble APTEL with regard to the previous Orders. Hence, the Commission doesn’t find any merit in reviewing these points.
7. For the points mentioned at Sl.no. (iv) to (viii), the Commission has scrutinized every aspect in detail before passing the Order dated 28.05.2019. Further, the Commission has provided detailed reason behind decision on each point. Therefore, the Commission is of the view that none of the the issues qualify for review.
8. In view of the above observations and findings, this Review Petition is rejected on preliminary issue of maintainability.

Sd/-
(P.K. Singh)
Member (Legal.)

Sd/-
(R. N. Singh)
Member (Engg.)