

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under Section 82(1) of the Electricity Act 2003)
(Central Act 36 of 2003)**

PRESENT :

Thiru. S. Kabilan - **Chairman**

Thiru. R. Rajupandi - **Member**

and

Thiru K. Venugopal - **Member**

R.P. No. 2 of 2009

Union of India,
Rep. through Chief Electrical Distribution Engineer,
Office of the Chief Electrical Engineer,
Southern Railway, 7th Floor, NGO Annex, Park Town,
Chennai – 600 003. . . Petitioner

-vs-

The Chairman,
TNEB,
No.800 Anna Salai,
Chennai-600 002 ..Respondent

Date of hearing – 29-10-2009

Date of Order - 1- 4- 2010

1. Prayer of the Petitioner:

This Commission may be pleased to
review their order dated 29-6-2009 passed in M.P.No.3 of 2009 and pass such further or

other orders as this Commission may deem fit in the circumstances stated above and thus render justice.

2. History of the case:

i) The System of charging a surcharge for low Power Factor is in vogue for sometime. For this purpose only the 'lag' PF was measured. This was subsequently changed to cover both 'lag' and 'lead' PF. This involved payment of surcharge by the Southern Railway and they filed a petition, numbered as M.P.No.5/2006. This petition was heard by the Commission on 15-3-2007 and an order was passed on 2-4-2007 granting the petitioner 3 years time from the date of issue of the order for the introduction of new technology of on line Dynamic Reactive Power Compensation Equipment to maintain higher power factor so as to meet the technical requirements of the modified software system of the respondent. TNEB was also directed to defer the implementation of modified software system in the energy meters of the Petitioner (Southern Railway) for a period of 3 years. This order also provided for reverting to the old system of blocking the leading VAR to unity power factor for 3 years.

ii) The Petitioner filed another Miscellaneous Petition numbered as M.P.No.3/2009. After hearing the parties the Commission passed an order on 29th June, 2009 dismissing the petition.

“Now, nearly two years after the Order of the Commission, the Railways have pleaded that implementation of the Order would cause severe financial strain on the Railways. They have, further, pleaded that the dynamic compensation system would consume much higher power than the existing fixed compensation system. These are grounds, which the Railways were well aware of, at the time of passing order of the Commission on 2-4-2007. The Railways could have moved a Review Petition before the Commission within 30 days as provided in Clause 43(1) of the Conduct of Business Regulations 2004 or appealed against the Order before the Appellate Tribunal for Electricity. At this point of time, we are unable to entertain the petition of the Railways and therefore the petition is dismissed.”

3. The Petitioner filed the present Review Petition No.2/2009 requesting for review of the Order dated 29-6-2009 in M.P.No.3 of 2009.

3. Contention of the Parties:

3.1 Contention of the Review Petitioner

- 1) The Commission has not considered the reasons put forth by the petitioner in M.P.3 of 2009 for direction to the respondent Board to adopt the lag only logic in its proper perspective.
- 2) The Regulatory Commission mistook the fact in observing that the petitioner was aware of the fact that the Dynamic Reactive Power Compensation (DRPC) system would consume higher power than the existing fixed compensation system and hence should have filed the petition for review within the time specified. It was further stated that the Southern Railway had no prior knowledge about the working of the DRPC System although 2 DRPC systems were commissioned by Central Railway to try out this new technology.
- 3) The Commission had proceeded on the ground that the petitioner had filed the M.P.No.3 of 2009 against the tariff order of the Commission dated 15-3-2003 and the said tariff order afforded considerable relief to Southern Railway.
- 4) The Commission had ignored the material facts such as
 - a) The DRPC equipment is a low voltage equipment.
 - b) There was no benefit from the DRPC system as long as the grid is operating with lagging PF and on the contrary there would be a significant increase in the system loss.
- 5) System study conducted by Southern Regional Power Committee (SRPC) should have been seen by the Commission.
- 6) Using of DRPC system would increase the loss to Railways

3.2. Contention of the Respondent

1. The respondent in its counter has stated that this is a second review petition and therefore it is not at all maintainable. The petitioner has approached this Commission with this review petition although they had the opportunity to file an appeal against the order in M.P. No.3 of 2009. The respondent further mentioned that the Southern Railway is indulging in dilatory tactics to avoid penalty.

2. The respondent has also stated that the revision petition shall not be entertained after they having enjoyed all the relief granted in the order dated 2-4-2007 in M.P.No.5 of 2006. The benefit enjoyed by the petitioner so far is about Rs.8 crores in the form of incentive and also escaped successfully from the clutches of penalty for 3 years by the order of this Hon. Forum and it was allowed to become final. The respondents have further stated that there are about 7922 EHT/HT consumers and the review petitioner is one among them. The petitioner therefore cannot ask for further relief over the order dated 2.4.2007 in M.P.No.5 of 2006. It was further stated that allowing the relief to the petitioner may amount to causing disparity among a class of consumers within EHT/HT consumers, which may also amount to infringement of constitutional rights of the similarly placed consumers.

4. Arguments before the Commission:

The case was heard by the Commission on 29-10-2009. On a specific query from the Commission, the Learned Counsel for the review petitioner stated that this case may not fall strictly under the scope of review. He also placed a judgement of the Supreme Court (2009 6 SCC 235) UP Power Corporation Ltd. –vs- NTPC and others. The facts of the case decided by the Hon. Supreme Court in the above referred matter relates to the revision of O & M expenses by the CERC for various power stations consequent to the revision of salary of NTPC employees with retrospective effect. Paras 57 to 65 of the Hon'ble Supreme Court's order is relevant and is reproduced below:-

“57. The Government of India issued guidelines for revision of salaries for the employees of the Central public sector undertakings as far back on 25-9-1999 with effect from 1-4-1997. It has not been denied or disputed

that Respondent 1 implemented the revision and paid arrears of salaries with effect from 1-4-1997 to executives, workmen and supervisors, respectively during the years 2000-2001 by orders dated 6-7-2000, 2-3-2000 and 19-4-2001, respectively. They were already aware of the impending revision of scale of pay and had implemented in part, albeit, on a provisional basis.

58. We fail to understand as to why NTPC had filed applications for tariff determination for its generating stations at Korba and Dadri on 28-5-2001 and 8-6-2001, respectively. Not only that the amended applications did not contain the details of the prescribed data, a sheet with data of year 2000-2001, which was not a part of Form 16, was inserted at a later stage. Amended applications were filed only on 30-1-2002 and 7-2-2002. The year 2000-2001 was not the relevant year for the aforementioned purpose.

59. There cannot be any doubt whatsoever that for the purpose of making tariff the actual costs required for payment to the employees being a part of the operation and maintenance cost including a sum of Rs.55 crores, which were to be paid by way of extra amount, could fall for determination by the Central Commission. But, such an application ordinarily could have been filed within the period during which the tariff order was in force.

60. It is difficult to agree with the opinion of the Appellate Tribunal that increase in the salary with retrospective effect could have been a subject-matter for determination of tariff in another period. In a fact situation obtaining herein, we are of the opinion that the claim of the respondent Corporation was not justified as the Central Commission should not have been asked to revisit the tariff after five years and when everybody had arranged its affairs.

61. Regulation 2.7(d)(iv) of the 2001 Regulation clearly provides that applications must be entertained only in the event any situation arose within the purview thereof and not at any point of time. If Respondent 1 was aware that they were to incur an additional expenditure of Rs.55 crores, they could have preferred an appeal before the Central Commission. We have been informed at the Bar that the appeals were preferred on other issues but not on this one.

62. Framing of tariff is made in several stages. The generating companies get enough opportunity not only at the stage of making of tariff but may be at a later stage also to put forth its case including the amount it has to spend on operation and maintenance expenses as also escalation at the rate of 10% in each of the base year. It cannot, in our opinion, be permitted to reargue the said question after passing of many stages.

63. Furthermore, the direction of the Tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not

continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt. Such quick-fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh Regulations and not the old Regulations.

64. We are not oblivious of the fact that in the Rihand case, the Central Commission allowed the application of the respondent, but, therein a provision was made therefor in the original tariff order itself. Respondent 1 had filed a separate IA claiming the impact of arrears paid by it in 2000-2001 towards the years 1997-1998 to 1999-2000.

65. We, therefore, on the aforementioned ground alone are of the opinion that it was not a fit case where the Appellate Tribunal should have interfered with the order of the Central Commission.”

The Counsel for TNEB strongly pleaded for rejection of the petition outright and reiterated TNEB's written submission.

5. Scope of Review:

5.1. Before discussing the issues raised by the Petitioner, Commission would like to deal with the powers of the Commission to review its own order.

5.2 With the enactment of the Electricity Act, 2003, State Electricity Regulatory Commissions have been vested with powers for reviewing their decision, 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. Section 94(1) of the Electricity Act 2003 provides that 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 in respect of the matters specified in that Section. Sub-section 1(f) deals with reviewing of decisions, directions and orders. Accordingly Order 47 Rule 1 of the Code of Civil Procedure which deals with review of orders will be applicable for review of orders by the Commission.

5.3 The TNERC Conduct of Business

Regulations 2004 deals with this issue in its Regulation 43 which is reproduced below:

- “(1) The Commission may on its own or on the application of any of the persons or parties concerned within 30 days of the making of any decision, direction or order, review such decision, directions or orders on the ground that such decision, direction, or order was made under a mistake of fact, ignorance of any material fact or any error apparent on the face of the record.
- (2) An application for such review shall be filed in the same manner as a petition under Chapter I of these Regulations.”

5.4 The scope of review is more strict and restricted than that of an appeal. The Court of review has only a limited jurisdiction under Order 47, Rule 1 CPC. The review power, under the aforesaid provision are reproduced 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 an 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”*

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 an 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 the record, justifying the Court to exercise its power of review under the above said provisions.

5.5 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 the term so used and it must be left to the Court to determine judicially, on the basis of the fact of each case. However, an error must be one which speaks of itself and it glares at the face of it which rendered it difficult to be ignored. The error is not one limited to one of fact but it also includes obvious error of law. However, it is further to the fact that 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 as "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.

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

- 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.

5.6 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 an 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”.

The Supreme Court 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 an 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”.

5.7 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"

5.8. 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: -

- i. 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.
- ii. Where there is nothing to contest that the error is so convincingly parched in the order that on the face of the record it would be acceptable to continue. The error should be self-evident.
- iii. Review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected.

6. Findings of the Commission:

6.1 The Commission had perused the written pleadings of both the parties. After hearing of the parties, the Commission would like to summarize its views as below:

The power of review is rather limited and confined to discovery of new and important matters and evidence after exercise of due diligence was not within the knowledge of the aggrieved person or such matters or evidence which could not be produced by him at the time when the order was made OR mistake or an error apparent on the face of the record. A review application should not be an appeal in disguise.

6.2. In this particular case the review petitioner had to labour his point of view to establish that an error has been committed by this Commission while passing its order dated 29-6-2009 in M.P.No.3 of 2009. The details of power consumption of various compensation system were agitated by the Review Petitioner and the Respondent had also countered the submissions of the Review Petitioner at the time of hearing of M.P.No.3 of 2009. Thereafter, the Commission passed its order on 29-6-2009 in M.P.No.3 of 2009. Most of the issues raised in the present petition are on merits or re agitation of earlier agitated issues.

6.3. The Commission in its order dated 2-4-2007 in M.P.No.5 of 2006 directed the Southern Railway to introduce the dynamic compensation system within a period of 3 years and the Railways were also given the benefit of the old system of computation of the power factor during this 3 year period. The order dated 2-4-2007 in M.P.No.5 of 2006 was not contested by the parties and had become final and binding on all the parties. The review petitioner has not been able to make out a case for review of the order dated 29-6-2009 issued by this Commission in M.P.No.3 of 2009, within the ambit and scope for review as discussed above.

6.4. The petitioner has submitted now in its review petition that the first ever DRPC system in Southern Railway was commissioned on trial basis at Bommidi traction sub-station on 23-6-2009. The energy consumption in the DRPC equipment was measured at about 1100 units per day whereas it was only 80 units per day for the HT fixed capacitor. The petitioner informed the TNEB about this fact and sought a joint measurement which was not agreed to by the TNEB. This according to the Review Petitioner is the new point. The Commission would like to refer to its order dated 2-4-2007 in M.P. No.5 of 2006 wherein the contention of the respondent TNEB was recorded in para 6 (b). The relevant portion is reproduced below:

“The introduction of modified software is not in pursuance of the tariff order of March 2003. However, as per section 42(1) of the Electricity Act 2003 which came into force in June 2003, it is the duty of the Respondent Board as a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in the area of supply of the Respondent Board. In paragraph 1.1 at page 3 – 4 of the counter, the Respondent Board has stated as follows :

As per reference (2)(p) of the Electricity Supply Code, "power factor" means the ratio of the real power to the apparent power and average power factor means the ratio of the Kilowatt-hours to the kilovolt-ampere-hours consumed during the billing month. In this connection it is to be stated that simply connecting the shunt capacitors could not solve the low power factor problem. The capacitors should come into circuit proportionate to the load connected into the circuit wherever necessary. Connecting extra capacitors other than required by the consumer is over compensation which will lead to line loss and could damage the transmission lines and equipments. To avoid this condition and to stabilize the grid, the blocking of leading power factor has been removed in the existing electronic meters by changing the software programme in the meter to record power factor lead as lead during power factor leading conditions.

The above statement of the Respondent Board is not disputed by the petitioner in their rejoinder. In view of the provisions contained in Section 42(1) of the Act referred to above, namely the duty to maintain distribution system in an efficient and economical manner, modified software system is necessitated in order to avoid line loss and damage to transmission lines and equipment as contended by the Respondent Board. The Respondent Board has given due notice for the introduction of the modified software system to the Petitioner as early in 2005 itself. The petitioner ought to have implemented the modified software system to suit the requirement with dynamic compensation from the Respondent Board. Had the petitioner implemented the above modified software system in the year 2005 when they received the notice, the need for the levy of penalty by the Respondent Board would not have arisen at all. There is a delay of nearly one year on the part of the petitioner in approaching the Commission."

6.5. The Commission in the above referred order dated 2-4-2007 while deciding certain issues in favour of the Southern Railway, observed in para 6 (d) as follows:

"In view of the above circumstances, both the first and second issues are answered in favour of the petitioner. In this connection it may be relevant to state that the Commission is considering to issue an amendment to the Tariff Order dated 15-3-2003 so as to delete the expression "lag" occurring therein based on the proposal of TNEB. Measurement of over compensation with leading power factors which was blocked as unity will also be accounted now since over compensation causes problem of over voltage which is detrimental to the distribution network, besides increased line loss. Levy of compensation for the low power factor less than 0.9

taking into account the leading VAR can be made only after the relevant amendment is notified by the Commission.”

6.6. Thereafter, the Commission issued Order No.TO.1-102 dated 22-5-2007 amending Tariff Order dated 15-3-2003 to the extent explained above. By virtue of the order dated 2-4-2007 Railways were granted 3 years period to instal dynamic compensation.

6.7. The Commission is of the view that adequate notice has been given to the Southern Railway for installation of DRPC System. The merits of fixed compensation -vs- dynamic compensation is an issue related to each State grid. It will also depend upon the quantum of reactive compensation which is required and the quantum which is provided in the system. The reactive compensation will also depend upon the type of loading of the system. In view of this it may not be possible to compare the system of one State with the system of another State even if they are amenable for broad comparisons. It should also be noted that if proper correction is not taking place at the consumer end, corresponding action will be called for on the part of the utility to make such corrections. The cost involved in such corrections by TNEB will then get passed on to all the consumers, which is also not justified. The concerned consumer is the correct person to maintain the power factor based on his load and if the load is varying in nature, dynamic compensation as ordered by the Commission with the catch up period of 3 years is the ideal solution.

6.8. The issue now raised by the Southern Railway is the additional power consumption resulting from the installation of DRPC equipment. The Commission is of the view that this aspect would have been examined or taken into account at the time of procuring the equipment or tender evaluation. Further, the Railways are operating all over the country. It is quite likely that DRPC equipment might have been installed elsewhere in other Railways and a feed back of the same might have been available even earlier. Notwithstanding this, the issue of loss in DRPC equipment which is now being raised cannot be an adequate ground for review of an earlier order because this is a new development which is being raised and not an error apparent on the face of the record which would have been a valid ground for review of an earlier order. In case the review petitioner is given the relaxation of not

installing the dynamic compensation system and is allowed to continue with the fixed compensation system, the loss which is stated to be incurred by Southern Railways will then reflect in the TNEB system and the burden of such losses will get passed on to all other consumers of TNEB which should not be permitted. Correction of power factor is ideally to be controlled by the consumers and should not be passed on to the utility as it will create inequities in tariff setting. The order of the Supreme Court (2009 6 SCC 235) which was placed before the Commission during the hearing does not also support the cause of the review petitioner. It will be relevant to refer to para 62 of the Hon'ble Supreme Court's Order which is already extracted in para 4 of this order. In the case of UP Power Corporation Ltd. Vs NTPC, para 62 of the judgement has dealt with the number of opportunities given to the parties at the stage of making of tariff and it was concluded that a party cannot be permitted to re-agitate a question after passing of many stages. In our opinion the Southern Railway has been provided with many opportunities in this case by way of an order dated 2-4-2007 in M.P.No.5 of 2006 and thereafter by an order dated 29-6-2009 in M.P.No.3 of 2009 during the hearing of which power consumption was also agitated. The petitioner has not been able to make out a case for review of the order dated 29-6-2009 in MP No.3 of 2009, which was in effect a review petition. As discussed in para 6.6, 6.7 and 6.8 above, even on merits the Review Petition is not justified

In the result, the review petition No.2 of 2009 is dismissed.

7. Appeal

An appeal against this order lies with the Appellate Tribunal for Electricity as per Section 111 of the Electricity Act, 2003 within a period of 45 days.

Sd/-
(K. Venugopal)
Member

Sd/-
(R. Rajupandi)
Member

Sd/-
(S. Kabilan)
Chairman