CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram
Shri R.Krishnamoorthy, Member
Shri V.S.Verma, Member

Review Petition No. 98/ 2009
In
Petition No. 97/2005

In the matter of

Review of order dated 19.10.2005 in Petition No.97/2005 seeking directions from the Commission to the review petitioner for adhering to CERC tariff order and Regulations.

Review Petition No. 99/ 2009
In
Petition No. 17/2006

In the matter of

Review of order dated 14.9.2006 in Petition No.17/2006 seeking directions to the review petitioner for payment of power bills of the respondent as per the Commission's order dated 19.10.2005 in Petition No. 97/2005 and to refund excess rebate availed.

And in the matter of

Tamil Nadu Electricity Board, Chennai …Review Petitioner

Versus

Neyveli Lignite Corporation Limited, Chennai ……Respondent

Parties present

1. Shri.P.H. Parekh, Senior Advocate, TNEB
2. Smt. Maheswari Bai FC/Accts, TNEB
3. Smt. V.Savitha, DFC, TNEB
4. Shri. M. Mahesvari Rai, TNEB
5. Shri. E.R. Kumar, TNEB
6. Shri. N.A.K. Sharma, Advocate, NLC
7. Shri. R. Suresh, GM/COMMC, NLC
8. Shri. S. Ganeshan AM/Finance, NLC

ORDER
(Date of Hearing: 13.10.2009)

These review petitions have been filed by Tamil Nadu Electricity Board (hereinafter "the review petitioner") for review of order dated 19.10.2005 in Petition No.97/2005 and order dated 14.9.2006 in Petition No.17/2006.

Background

2. Neyveli Lignite Corporation Limited, the respondent herein, had signed the Bulk Power Supply Agreement (hereinafter "BPSA") with the constituents of the Southern Region including TNEB, the review petitioner herein, on 18.2.1999 for supply of power from its generating station, TPS-II, effective from 1.4.1996 to 31.3.2001. As per para 5.4.1 of the BPSA, the review petitioner was required to make payment to the respondent through an automatic revolving irrevocable letter of credit (hereinafter "LC") opened in favour of NLC at a branch of State Bank of India or any nationalized bank as mutually agreed, for an amount equivalent to one month's estimated monthly bill payable by the review petitioner from time to time against presentation of bill by NLC. Para 5.4.2 of the BPSA provided that the bank charges relating to opening and operation of LC shall be borne by NLC. Para 5.4.5 of BPSA provided that even when LC had not been established or having been established, had not been kept valid for any reason, a rebate of 2.25% would still be allowed if the payment was made within three working days of receipt of the bills. In case of delay in payment of the bill beyond 30 days from the date of receipt of the bill, the review petitioner

was required to pay surcharge, calculated at the rate of 1.5% p.m. on the amount of the bill, for the actual period of delay. The BPSA further provided that in case the review petitioner continued to get power from the generating station after expiry of the BPSA, without renewal or formal extension, its provisions would continue to operate till such time it was formally renewed, extended or replaced.

3. Another Agreement was signed by the respondent with the review petitioner on 9.3.2001 for supply of power from the TPS-I generating station owned by the respondent for a period of five years from 1.4.1997 to 31.3.2002. The Agreement provided that the review petitioner was to make payment of the bills through an irrevocable revolving LC opened at the cost of the review petitioner in favour of NLC. The respondent would allow a rebate of 2.5% on the amount of bill negotiated through LC immediately on presentation by the respondent. It further provided for a rebate of 2.5% even where LC was not opened or could not be maintained but the payment was made within 3 working days from the date of presentation of the bill. Clause 16 of the Agreement provided that in case the agreement was not renewed or extended before 31.3.2002, the provisions thereafter would continue to operate even if the period covered by the agreement had elapsed, till such time it was formally renewed, replaced or extended.

4. A BPSA was also entered into between the respondent and the review petitioner on 20.9.2001 for the supply of power from TPS-I (Expansion)

generating station of the respondent. As per the said BPSA, the review petitioner was to open an irrevocable revolving LC at its own cost in favour of the respondent for an amount equivalent to the value of one month's estimated supply payable by the Board from time to time. The BPSA allowed a rebate at 2.5% on the amount of the bill negotiated through LC immediately on presentation thereof. The BPSA further provided that the payment towards supplementary bill should be made by the review petitioner within three working days from the date of presentation for which a rebate of 2.5% was to be allowed.

5. On 26.3.2001, the Central Commission in exercise of powers under Section 28 of the Electricity Regulatory Commissions Act, 1998 (since repealed) notified the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001, for the control period from 1.4.2001 to 31.3.2004. Regulation 2.15 of these regulations provided that if payment of the bill was made through LC, a rebate of 2.5% would be allowed and if payment was made through any mode other than LC within a period of one month from the date of presentation of the bill, a rebate of 1% would be allowed.

6. The Central Government evolved a securitization scheme for settlement of dues by State Electricity Boards (SEBs) to the Central Power Sector Utilities (CPSUs). Under this scheme, SEBs were required to open and maintain irrevocable LC equal to 105% of the average monthly billing for the preceding 12 months. In accordance with this scheme, LC was to be opened all SEBs by

30.9.2002. The scheme further provided that SEBs were free to establish any other security mechanism, mutually agreed to between SEBs and the CPSUs. Based on the scheme, a tripartite agreement was signed between the Central Government, State Governments and the Reserve Bank of India.

7. In exercise of powers vested under Section 61 of the Electricity Act, 2003 (hereinafter "the Act"), the Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, valid for the period from 1.4.2004 till 31.3.2009. Regulation 25 of the said regulations provided for rebate of 2% on payments made through LC on presentation of bill and rebate of 1% on payments made within one month of presentation, through a mode other than LC.

8. The review petitioner defaulted in opening LC in terms of the tripartite agreement and any alternative payment security mechanism as contemplated under the scheme of securitization. The review petitioner was making payments to the respondent through cheques within three working days of receipt of the bills after deducting rebate of 2.25% or 2.5% up to October 2004 and thereafter with rebate of 2%.

9. The respondent filed Petition No. 97/2005 before the Commission seeking a direction, among others, to the review petitioner to honour the Commission's regulations and orders of Ministry of Power under the securitization scheme to make payment of bills for supply of electricity through

LC and avail rebate as per the Commission's regulations and refund the rebate deducted from the bills raised by the respondent in excess of 1% in respect of TPS-1 and TPS-1 (Expansion) generating stations. The Commission by its order dated 19.10.2005 directed the review petitioner to refund or adjust the excess amount of rebate which had been retained for the past period, in variance with the Commission's regulations, within a period of three months from the date of the order. Since the review petitioner did not comply with the order dated 19.10.2005 in Petition No.97/2005, the respondent filed Petition No. 17/2006 seeking fresh direction to the review petitioner for refund of excess rebate unilaterally retained by it and to avail rebate in accordance with the Commission's regulations in future. The Commission by its order dated 14.9.2006 directed the review petitioner to refund or adjust the excess amount withheld within a period of two months from the date of the order.

10. As the review petitioner did not release the excess rebate retained by it in compliance with the Commission's directions, the respondent filed Petition No. 163/2008 seeking a direction to the review petitioner to clear the excess rebate availed. The respondent also sought a direction to the review petitioner to clear the outstanding income-tax dues. On the issue of refund of excess rebate, the Commission by its order dated 31.3.2009 directed the review petitioner to refund Rs.79.52 Crore by 30.4.2009. The Commission also issued a show cause notice to the review petitioner under Section 142 of the Act for contravention of the Commission's orders dated 19.10.2005 and 14.9.2006.

The petition was kept pending as regards the respondent's claim for refund of income-tax to be considered separately.

11. The review petitioner filed three appeals, being Appeal Nos. 78/2009, 79/2009 and 80/2009 challenging the Commission's orders of dated 31.3.2009, 19.10.2005 and 14.9.2006 ibid, before the Appellate Tribunal for Electricity (hereinafter "the Appellate Tribunal"). The review petitioner sought to withdraw Appeal Nos. 79/2009 and 80/2009, filed against the orders dated 19.10.2005 and 14.9.2006 respectively, to approach the Commission with review petitions for review of the orders impugned in the appeals. The Appellate Tribunal dismissed the appeals and the applications for condonation of delay as withdrawn, without expressing any opinion on the maintainability of the review petitions to be filed before the Commission. The order of the Appellate Tribunal is extracted as under-

> "Heard Mr. P.H. Parekh, the learned Senior Counsel appearing for the Appellant and Mr. R. Chandrachud, the learned Counsel appearing for the Neyveli Lignite Corporation Ltd..
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> Mr. P. H. Parekh, the learned Senior Counsel appearing for the Appellant has made his submissions with regard to the merits of the Appeals as well as the Applications for the condonation of delay. However, at the end he wanted the permission to withdraw these Appeals and Applications to condone the delay to enable him to approach the Central Commission for filing Review Petitions as against the impugned orders in these Appeals.
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> Mr. R. Chandrachud, the learned Counsel appearing for the Neyveli Lignite Corporation Ltd. would submit that he does not want to stand in the way of withdrawal of these Appeals and Applications to condone the delay, but this Tribunal may not give any liberty to the Appellants to file the Review Petition before the Commission, in view of the fact that the Review Petitions before the Commission at this length of time are not maintainable.
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> Taking into consideration of the submissions made by the learned Senior Counsel for the Appellant as well as the learned Counsel for the Respondent, we permit the learned Senior Counsel for the Appellant to

withdraw all these Appeals and Applications to condone the delay and accordingly the same are dismissed as withdrawn.

We make it clear that we are not expressing any opinion with reference to the maintainability of the said Review Petitions that may be filed by the Appellants before the Commission."

12. The review petitioner has filed Review Petition Nos.98/2009 and 99/2009 seeking review of the order dated 19.10.2005 in Petition No. 97/2005 and order dated 14.9.2006 in Petition No. 17/2006 respectively on the following grounds:

(a) Discovery of new and important matter or evidence,

(b) Error apparent on face of the record,

(c) Order passed is without jurisdiction and a nullity in law,

(d) Order obtained by fraud and suppression of material documents,

(e) Other sufficient reasons.

The review petitioner has also prayed for condonation of delay in filing the review petitions.

13. We have heard the learned counsel for the parties and perused the pleadings and documents on record. We proceed to discuss the question of limitation in filing the review petitions and the grounds raised for review of the orders dated 19.10.2005 and 14.9.2006.

Question of Limitation

14. There is a delay of 1247 days in filing Review Petition No.98/2009 and delay of 917 days in filing Review Petition No.99/2009. The review petitioner has sought condonation of delay in filing the review petitions on the ground that it was making concerted efforts for an amicable settlement of the disputes and the delay was not intentional and was for the reasons beyond its control. The reasons given in para 9 of the review petitions are as under:

(a) The orders under review were passed by the Commission on 19.10.2005 and 14.9.2006. Subsequent to the said orders, NLC filed Petition No.163 of 2008 on 23.12.2008 for refund of the rebates and reimbursement of its claim of income tax.

(b) While preparing the reply to Petition No.163/2008, the review petitioner discovered certain material documents, i.e. letters dated 5.6.2003 and 26.10.2004 and the MOM dated 26.12.2003. On the basis of the said documents, the review petitioner made a prayer for review of the order dated 19.10.2005 and 14.9.2005 in its counter to petition No.163 of 2008.

(c) As the Commission in its order dated 31.3.2009 in Petition No. 163/2009 failed to review the order dated 19.10.2005 and 14.9.2005, the review petitioner filed Appeal Nos.79/2009 and 80/2009 before the Appellate Tribunal. The said appeals were withdrawn on the submission of the review petitioner that it would file petitions for review of the orders before the Commission.

(d) The review petitioner has submitted that it has been making concerted efforts throughout the proceedings to arrive at an amicable solution to the dispute and has submitted that the delay of 1247 days in filing Review Petition No.98/2009 and delay of 917 days in filing Review Petition No.99/2009 were unintentional and beyond the control of the review petitioner.

15. The respondent in its reply has submitted that there is nothing in the petitions explaining as to what efforts were made by the review petitioner to ensure that all relevant materials available in the office of TNEB were taken into consideration while filing the reply affidavits to Petition Nos.97/2005 and 17/2006. It has been further submitted that power to condone the delay is an inherent power and can be excercised only if provided in the statute. The Commission does not have the inherent power to condone the delay and therefore for want of jurisdictional power and that the petition does not contain satisfactory explanation, the prayer for condonation of delay deserves to be rejected. Relying on the judgment of the Hon'ble Supreme Court in Pundik Jalam Patil Vs Executive Engineer Jalgaon Medium Project [2008 (5) CTC 663], it has been submitted that the review petitioner is not entitled to special consideration on the ground of public interest or its status of being a PSU and will have to be dealt with as per the law applicable to the citizens. During the hearing of the petition, the learned counsel appearing for the respondent submitted that in the light of the Appellate Tribunal's judgment dated 13.8.2009

in Appeal No. 114/2009 -Managing Director, BESCOM Vs Chief Manager, SBI and another, the review petitions deserve to be dismissed on the ground of lack of diligence and vigilance on the part of the review petitioner.

16. The review petitioner in its rejoinder has submitted that the Commission by virtue of the powers vested under section 94(1) of the Act read with Regulation 103 of the Conduct of Business Regulations has the power to exercise review jurisdiction and pass appropriate orders in order to do substantial justice between the parties. It has however been submitted that the grounds of review raised in the review petition go to the root of the jurisdiction of the Commission to pass the order under review. Moreover, the review petition also raises the question of fraud and suppression of material documents by NLC. Therefore, the orders under review are a nullity for want of jurisdiction as well as for the practice of fraud which ground can be taken at any stage of the proceedings or even in collateral proceedings. It has been urged that the delay in filing the review petitions is irrelevant and in any case ought to be condoned as the grounds for review go to the root of the jurisdiction of the Commission in passing the order under review.

17. On the question of review, we find that under Section 94 of the Act, the Commission has same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (hereinafter “Code”). Neither the Act nor the Code lays down the period of limitation for making an application for review. However, the

Commission in Regulation 103 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter "Conduct of Business Regulations") specified under the Electricity Regulatory Commission Act, 1998 and presently in force, has prescribed a period of limitation of 60 days from the date of the order for making an application for review which has subsequently been amended as 45 days w.e.f 28.5.2009. Regulation 103 of the Conduct of Business Regulations as it stands now reads as under:

> **"**Review of the decisions, directions, and orders
> (1) The Commission may at any time, on its own motion, or on an application of any of the persons or parties concerned, within 45 days of making such decision, directions or order, review such decision, directions or orders and pass such appropriate orders as the Commission deems fit:
>
> Provided that power of review by the Commission on its own motion under this clause may be exercised only for correction of clerical or arithmetical mistakes arising from any accidental slip or omission.
>
> (2) An application for such review shall be filed in the same manner as a Petition under Chapter II of these Regulations."

18. Regulation 116 of Conduct of Business Regulations empowers the Commission to extend or abridge the period for sufficient reasons. Regulation 116 reads as under:

> "Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission."

19. Thus the period of limitation for making an application for review before the Commission was 60 days prior to 28.5.2005 and 45 days with effect from

28.5.2009 from the date of making of the order. This period can be extended or abridged by the Commission for sufficient reasons. In view of the provisions in the Conduct of Business Regulations vesting discretion on the Commission to extend the time for filing the review petition for sufficient reasons, **w**e do not agree with the contention of the respondent that the Commission is not vested with the power to condone the delay in filing the review petition. We also do not agree with the contention of the review petitioner that the delay in filing the review petition in the circumstances of the case is irrelevant as it has a case in merit. In our view, merit of the case may be one of the factors to be borne in mind while considering the question of delay, but the alleged merit will not be an excuse for not disclosing the cause of delay. In the case of P.K. Ramchandaran vs. State of Kerala [1997 (7) SCC 566], the Hon'ble Supreme Court observed that the High Court had not recorded any satisfaction whether the explanation for the delay was reasonable or satisfactory which is an essential prerequisite for condonation of delay. Having regard to the cryptic and irrelevant explanation given in the affidavit in the said case, the Supreme Court held that there was no justification to condone the delay of 565 days in preferring an appeal by the State against the arbitration award. The Supreme Court made the following observations:

> "Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus neither proper nor judicious."

In view of the above authority, we reject the review petitioner's contention that the delay in filing the petitions is irrelevant because it has otherwise a case on alleged merits.

20. The expression "sufficient reasons" has not been defined in the Conduct Business Regulations. Therefore, the expression "sufficient reasons" shall receive the same interpretation as the expression "sufficient cause" in Section 5 of the Limitation Act, 1963. It has been held that the existence of sufficient cause is a condition precedent for the exercise of discretion under Section 5 of the Limitation Act. The cause should be beyond the control of the party invoking the said section. A cause for delay which by due care and attention, the party could have avoided cannot be a sufficient cause. The test therefore, whether or not a cause is sufficient is to see whether it could have been avoided by a party by the exercise of due care and attention. The Hon'ble Supreme Court in Dinbandhu Sahu vs. Jadumoni Mangaraj. [AIR 1954 SC 411] has held as under:

> "As was observed in the Full Bench decision in Krishna vs. Chathappan, (1890) ILR 13 Mad 269 in a passage which has become classic, the words 'sufficient cause' should receive 'a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant".

In the case of The State of West Bengal vs. The Administrator, Howrah Municipality and Ors [1972 (2) SCR 874], the Supreme Court while considering the scope of the expression 'sufficient cause' within the meaning of Section 5 of

the Limitation Act reiterated that the said expression should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party.

21. In the light of the settled principles of law, we now proceed to consider whether the review petitioner has made out a case for sufficient reasons to meet the requirement of Regulation 116 of Conduct of Business Regulations for condonation of delay in filing the review petitions. Analysis of the sequence of events leading to the filing of the review petitions shows that though the Commission passed order on 19.10.2005 in Petition No.97/2005 and order on 14.9.2006 in Petition No.17/2006, the review petitioner has neither challenged the orders in appeals before the ATE nor has filed review petitions before this Commission within the period of limitation. The review petitioner for the first time made a prayer for review of the order dated 19.10.2005 in Petition No.97/2005 in its reply affidavit dated 2.3.2009 in Petition No.163/2008. There is no explanation for the delay/inaction on the part of the review petitioner from 19.10.2005 till 2.3.2009 and what efforts were made by it during this period in furtherance of its claim. The review petitioner has not placed on record any documents to establish the efforts made by it for amicable settlement as claimed in the petitions. It proves that the review petitioner was apparently satisfied with the orders of the Commission dated 19.10.2005 and 14.9.2006 and made efforts for the first time in 2009 only after its submission for review of the orders in the reply affidavit to Petition No.163/2009 was rejected by the Commission in the order dated 31.3.2009. The review petitioner challenged the

orders dated 19.10.2005 and 14.9.2006 in Appeal Nos. 80 and 79 of 2009 respectively before the Appellate Tribunal and subsequently, withdrew the appeals for filing review petitions before the Commission. The Review Petition Nos. 98/2009 and 99/2009 have been filed after a period of 1247 and 917 days of making of the respective orders. The reasons advanced for delay in filing the review petitions are that the Planning Department of TNEB which was handling the petitions before the Commission had no knowledge about the documents now being relied on which were in the possession of its Accounts Department and therefore could not be produced at the time of the hearing of the main petitions. We are not convinced by the explanation as the documents were in the possession of the review petitioner and it was expected that TNEB as a composite entity should have carried out inter-departmental consultations prior to filing the replies before the Commission. In our view, the conduct of the review petitioner in these cases suffers from inaction and negligence, lacking in due care and attention in pursuing the legal remedies provided in law. The order dated 19.10.2005 in Petition No. 97/2005 and order dated 14.9.2006 in Petition No. 17/2006 having not been challenged in appeal or in review within the period of limitation have attained finality and we do not find the reasons advanced by the review petitioner as “sufficient” to establish its diligence and bona fide so as to warrant condonation of delay in filing the review petitions. Accordingly we reject the prayer for condonation of delay and consequently, the review petitions are not maintainable being barred by limitation.

Maintainability under Order 47 Rule 1 of CPC

22. Notwithstanding our finding that the review petitions are barred by limitation and we are not inclined to condone the delay, we proceed to examine whether the grounds raised in the review petitions meet the requirements of law. In accordance with Order 47 Rule 1 of the Code read with Section 94 of the Act, any person feeling aggrieved by any order made by the Commission, may apply for review of the order under the following circumstances;

(a) on 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 order was made, or

(b) on account of a mistake or error apparent on the face of the record, or

(c) for any other sufficient reasons.

23. The grounds urged in the review petitions have been discussed in the subsequent paras in the light of the above principles.

Discovery of new and important matter or evidence

24. The review petitioner has submitted that subsequent to orders dated 19.10.2005 and 14.9.2006, it has discovered certain material documents, that is, letters dated 5.6.2003 and 26.10.2004 and the Minutes of Meeting dated 26.12.2003 which go to the root of the matter to establish that the respondent had been allowing and had agreed to allow rebate of 2.5% without insisting on

opening of LC in case the payment was made within three days of raising of bills by the respondent. While explaining the reasons for non-production of these documents when orders dated 19.10.2005 and 14.9.2006 were made, the review petitioner submitted that they could not be produced even after exercise of due diligence, as the petitions were handled by the Planning Department, whereas the documents were held by the Accounts Department. The review petitioner further submitted that it came across these documents when details relating to the respondent's claim for income-tax raised in Petition No. 163/2008 were being verified and other correspondences were being looked into.

25. The first a letter is dated 5.6.2003 written by the then CMD of NLC addressed to the Chairman of TNEB (the review petitioner) wherein it was stated that -

> "TNEB has been making monthly payments directly by cheque. In view of our long association, NLC did not object for direct payment instead of LC payment and allowed rebate on the amount settled within three days of presentation of bills as per the expired BPSA."
>
> "12. We therefore request you to settle the arrears accrued after 1.10.2001 in full together with surcharge accrued. The monthly payments may also be made in full in accordance with BPSA and not to invoke "Dispute clause" as really there is no dispute."

26. The next letter is dated 26.10.2004 addressed by Mr. V. Sekar, General Manager (Commercial) of NLC to the Chief Financial Controller, TNEB stating *inter alia* that:

> "NLC, hitherto, is allowing rebate of 2.5% for the timely payment of power Bills as per clause 8.2 of the Bulk Power Supply Agreement entered between TNEB and NLC signed on 20 sep 01 for TPS-I Expn. However, it may be seen that clause 25 of the CERC Notification dated 26.3.2004 provides that rebate of 2% shall be allowable for the payment of bills of power supply through a Letter of Credit. However rebate of 1% is allowed if the payment is made other than LC but made within one month from the date of presentation of bills.
>
> Though the revised tariff petition for all the Thermal Power Stations for the period from 01.04.2004 to 31.3.2009 is yet to be filed, we wish to inform you that the rebate allowable shall be 2% as per clause 25 of the notification dated 26.3.2004. Accordingly rebate from 1.4.2004 shall be retrospectively adjusted. From Nov 2004 onwards, rebate of 2% on the bill amount excluding duties, cess, royalty and other statutory levies can be availed for the payment made within 3 working days from the date of presentation of bills."

27. The review petitioner relying on the minutes of the meeting held on 22.12.2003 between the officials of the respondent and the review petitioner to discuss the status of pending payment from 1.10.2001 to 30.11.2003 has submitted that an amount of Rs. 191.62 crore was agreed to be payable by the review petitioner in ten equal monthly instalments after allowing rebate on payments made within 3 days.

28. It is a settled law that when a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the petition, it might have possibly altered the judgment. Before a review is allowed on this ground it must be established that the applicant had acted with due diligence and that the existence of evidence was not within its knowledge. Mere discovery of new and important matter or evidence is not sufficient ground for review. The party seeking the review has to

show that such additional material was not within his knowledge and even after exercise of due diligence could not be produced in court earlier.

29. In Ramaswami Padeyachi v. Shanmuga Padayachi, [(1959) 2 Mad LJ 201], the High Court of Madras has held that:--

> "When a review is sought under O.47, R. 1, Civil Procedure Code, on the ground of discovery of new evidence, such evidence must be (1) relevant and (2) of such a character that, if it had been given in the suit, it might possibly have altered the judgment. The new evidence must at least be such as is presumable to be believed, and, if believed, would be conclusive. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. The party seeking a review should prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive. A bare assertion in the affidavit that the party could not trace the documents earlier will not do. It is not the proper function of a review application to supplement the evidence or to make it serve the purpose of merely introducing evidence which might possibly have had some effect upon the result."

30. First we consider the relevance of the documents relied by the review petitioner. In its reply to Petition No.97/2005, the review petitioner had submitted the following:

> "There could be no reason for the petitioner to demand for opening a Letter of Credit suddenly without realizing the earlier mutual agreements on this issue or making efforts to negotiate this issue with TNEB. Again it is not in good taste to file a petition on this issue before CERC unilaterally bypassing all the earlier agreements/undertakings on this issue."

In its reply to the Petition No.17/2006, the review petitioner has stated that "the payment so far realized within 3 days of presentation of bills availing 2% rebate is with the full concurrence with the NLC and in line with clause 11.4

of BPSA which allows for a direct payment within 3 working days of presentation of bills".

31. It is evident from the replies as extracted above that the review petitioner had taken the defence of "the concurrence of NLC" for retaining the rebate, though the documents in support of its submissions were not produced. In the review petitions, the review petitioner has merely produced the documents to supplement its earlier contention of concurrence of NLC for the rebate. In our view, the documents are not relevant for two reasons. Firstly, the Commission after taking into account the submissions of the review petitioner regarding the "concurrence of NLC" as quoted in the preceding paragraph had in its order dated 19.10.2005 directed the review petitioner to refund or adjust the excess amount of rebate withheld for the past period. In other words, the submission of the review petitioner regarding "concurrence of NLC" was rejected on merit. Secondly, the Commission had not allowed rebate in excess of 1% without opening the LC as it was not in conformity with the provisions of the regulations. It is settled law that the statutory regulations will have precedence over the agreements between parties. Therefore, the review petitioner and the respondent through their agreement cannot waive their obligations under the regulations on terms and conditions of tariff which stipulate opening of LC for availing rebate of 2.5%/2%. In other words, the regulations which have statutory force will prevail over the agreement of the parties. Therefore, the documents now being relied on by the review petitioner are not relevant to the orders

sought to be reviewed and cannot be considered as new and important matters of evidence.

32. The discovery of new evidence or material by itself is not sufficient to entitle a party for review of a judgment or order. It has to be established that due diligence was exercised and despite that, the evidence or material sought to be produced subsequently could not be produced. Admittedly, in the replies in Petition Nos. 97/2005 and 17/2006, no averment was made by the review petitioner regarding availability of the documents relied upon in the review petitions and considered to be important and material. It is not the case of the review petitioner that these documents were not within the knowledge of its officers. The review petitioner has admitted that the documents were with the Accounts Department of TNEB, while the matter was handled by the Planning Department. This line of argument is absurd as it is expected that in any organization where the question of any settlement or money is involved, the concerned Department should consult the Finance and Accounts Departments which the review petitioner has admitted to have not done and the documents now sought to be relied are not new since they were in possession of the review petitioner. In our view, the Accounts Department and the Planning Department cannot be treated as different and distinct entities. The two are part and parcel of TNEB. The two departments are the limbs of the same organization. The review petitioner as a legal entity cannot cite lack of internal co-ordination or lack of inter-departmental consultations as the ground for review. To us it appears to be the case of want of due diligence on the part of the review

petitioner and accordingly, we reject the prayer of the review petitioner for review on the ground of discovery of new evidence.

Error apparent on the face of record

33. The review petitioner has submitted that the orders suffer from error apparent on the face of the record on the ground that the Commission while passing the orders did not take into account the fact that the parties had agreed to rebate of 2.5%, 2.25% or 2% in terms of the BPSAs and PPA when payments were made within three working days of receipt of the bills and they had acted upon the said agreements. According to the review petitioner, the respondent while agreeing to rebate under the BPSAs and PPA is deemed to have waived its rights under the terms and conditions notified by the Commission and as such waiver did not infringe upon any public right or public policy. For this, learned senior counsel for the review petitioner placed reliance on the following judgments of the Hon'ble Supreme Court, namely –

(a) Shri Lachoo Mal vs Shri Radhey Shyam [1971 (1) SCC 619]

(b) Commissioner of Customs Vs Virgo Steels [2002 (4) SCC 316]

34. Learned senior counsel argued that the Commission while passing the order dated 19.10.2005 completely ignored the case of the review petitioner which was an error apparent on the face of record.

35. The submission made by the review petitioner touches upon the merit of the case. It is an established law that the scope of review proceedings is very limited. A review does not mean an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only on account of patent error and not for rehearing even if the party in review was able to satisfy the Court that the order under review was erroneous on some count.

36. In our view, acceptance of the argument made by learned senior counsel for the review petitioner would amount to reopening the order on merit which is beyond the scope of the review proceedings. Accordingly, we are not inclined to agree to the review of the orders on this ground. We also recognize the fact that the review petitioner filed appeals against the said orders before the Appellate Tribunal, but chose to withdraw the appeals, presumably due to the fact that there was no apparent error in the orders.

37. Another argument made on behalf of the review petitioner was to the effect that the Commission did not have the jurisdiction to adjudicate upon the dispute raised in the petitions, under clause (f) of sub-section (1) of Section 79 of the Act and, therefore, the orders suffer from the error apparent on the face of record. Learned counsel for the review petitioner contended that clause (f) of sub-section (1) of Section 79 of the Act vests the Commission with the power to adjudicate upon the disputes between the transmission licensees and generating companies with respect to tariff alone whereas the dispute raised by the respondent pertained to “availing of

rebate" which was only a money claim based on contract between the parties. Therefore, in the contention of learned counsel, the dispute could only be adjudicated by a civil court in a civil suit. The learned senior counsel for the review petitioner contended that jurisdiction of the Commission was circumscribed by the statute and hence, the Commission could not have out-stepped the jurisdictional boundaries to take cognizance of the dispute.

38. The relevant clauses of sub-section (1) of Section 79 of the Act provide as under:

> "(a) to regulate the tariff of generating companies owned or controlled by the Central Government;
>
> (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
>
> (c) to regulate the inter-State transmission of electricity ;
>
> (d) to determine tariff for inter-State transmission of electricity;
>
> (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.
>
> (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to maters connected with clauses (a) to (d) above and refer to any dispute for arbitration"

39. From the above provisions it is clear that the Commission can adjudicate upon disputes involving the generating companies and transmission licensees. There is no dispute that the respondent is a generating company owned and controlled by the Central Government. Therefore, the Commission has the jurisdiction to adjudicate upon the dispute so long as it is in relation to regulation of tariff. In exercise of its

statutory powers, the Commission has specified terms and conditions for determination of tariff. The provision of rebate forms an integral part of the statutory terms and conditions for determination of tariff notified by the Commission as such provision is incidental to determination and regulation of tariff of the generating companies. Prior to establishment of the Commission, tariff determination was being done by the Central Government under Section 43A (2) of the Electricity (Supply) Act, 1948 (since repealed). To ensure prompt settlement of dues of the generating companies, the Central Government made provisions for rebate in the tariff notifications. Thus, historically rebate for prompt payment has been treated as part and parcel of the process of tariff determination. Therefore, the dispute raised by the respondent in the petitions filed during 2005 and 2006 were in relation to regulation of tariff of a generating company owned and controlled by the Central Government and its adjudication was within the jurisdiction of the Commission under clause (f) of sub-section (1) of Section 79 of the Act. There is another strong reason to support this conclusion. As provisions relating to rebate are notified as a part of statutory terms and conditions for determination of tariff, any dispute arising out of non-compliance with such statutory provisions has to be adjudicated by the Commission and not by the civil court.

40. The review petitioner had filed appeals before the Appellate Tribunal against the orders of the Commission which it had chosen to withdraw. The question of jurisdiction of the Commission to decide the dispute regarding

rebate was not raised in those appeals. The contention of the review petitioner to raise the issue of jurisdiction is only an afterthought. The Appellate Tribunal in its judgement dated 10.12.2009 in Appeal No.161/2009 (Damodar Valley Corporation Ltd. V. BSES Rajdhani Power Ltd. & Ors) has categorically held that the Commission has the power to adjudicate upon disputes between the licensees and generating companies. Relevant para of the judgement is extracted as under:

> "18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term 'regulate' as contained in Section 79(1)(a) is a broader term as compared to the term 'determined' as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term 'regulation' has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the *Judgments of the Supreme Court in 1989 Supp(2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781*, and also in *Tata Power Ltd. vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513."*

41. We accordingly reject the contention of the review petitioner that the orders under review suffered from error apparent on the face of record on the ground of jurisdiction of the Commission.

Order passed without jurisdiction is nullity in law

42. The review petitioner submitted that the Commission did not have jurisdiction to pass the orders and therefore, these orders are nullity in the eyes law. Learned senior counsel pointed out that the parties by their agreement,

conduct or consent cannot confer jurisdiction unless such jurisdiction is vested in law. Learned senior counsel in support of his argument relied on the observations of the Hon'ble Supreme Court in Kiran Singh Vs Chaman Paswan and others (AIR 1954 SC 340).

43. The judgement relied by the review petitioner was in the context of Section 11 of the Suits Valuation Act wherein the Hon'ble Supreme Court was considering the question whether 'a decree passed on appeal by a Court which had jurisdiction to entertain it only by reason of under-valuation be set aside on the ground that on a true valuation that Court was not competent to entertain the appeal'. By interpreting the words 'unless the over-valuation or under-valuation has prejudicially affected the disposal of suit or appeal on its merit' appearing in Section 11 of the said Act, Hon'ble Supreme Court came to the conclusion that the prejudice contemplated by the said Section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suits as ultimately determined and decided that no prejudice was caused to the appellants in that case by the appeal having been heard by the District Court. The facts of the present case stand on a different footing in that the provision for rebate being an integral part of the statutory regulations on terms and conditions of tariff, any dispute arising therefrom involving the generating companies or licensees will be adjudicated by the Commission in exercise of its jurisdiction under Section 79(1)(f) of the Act. There is not a single iota of doubt

about the jurisdiction of the Commission to adjudicate the question of rebate and therefore, the orders dated 19.10.2005 and 14.9.2006 do not suffer from any jurisdictional infirmity.

Orders obtained by fraud and suppression of material documents

44. The review petitioner next submitted that the respondent was in possession of the letters dated 5.6.2003, 22.12.2003 and the minutes of the meeting held on 26.10.2004. It was alleged that this evidence was suppressed by the respondent while filing the petitions before the Commission. As the respondent had deliberately suppressed the documents, the orders were vitiated by fraud and had to be set aside. According to learned counsel for the review petitioner, the decree obtained by fraud can be set aside at any stage, including the stage of execution of decree.

45. The contention of the review petitioner is without any basis. The orders sought to be reviewed were passed by the Commission after notice to the review petitioner who participated in the proceedings by filing reply affidavits and during oral hearings. We have already recorded our finding in para 31 of this order that the documents being relied upon in review petitions are neither new nor relevant which if produced at the time of issue of the orders of 19.10.2005 and 14.9/2006 would have the effect of altering the orders and therefore, the respondent cannot be blamed for fraud for not having produced such documents. The judgment of the Hon'ble Supreme Court in

S.P.Chengalvaraya Naidu vs Jagannath [(1994) 1 SCC 1] relied upon by the review petitioner is not applicable in the present case as the documents relied upon were also with the review petitioner who had the opportunity to meet the respondent's claim.

46. It is pertinent that while the review petitioner has chosen to rely on letters dated 5.6.2003, 22.12.2003 and the minutes of the meeting held on 26.10.2004, he has chosen to ignore the subsequent letter dated 7.1.2005 of General Manager, NLC and letter dated 17.1.2005 of Director (Finance),NLC in which the respondent had requested the review petitioner to open LC in order to avail the rebate as per the provisions of the regulations. These letters were on record before the first order of the Commission dated 19.10.2005 was issued. We observe that the BPSA between the review petitioner and NLC, the tripartite agreement entered into at the behest of the Government of India as also the regulations of the Commission provide for opening of LC for payment of power supply bills. But the review petitioner had chosen to follow his own rule and did not bother about the requirement of opening LC as envisaged in all the three documents, mentioned above. We have no hesitation to conclude that the approach of the review petitioner is an act of disrespect to the statutory regulations on the terms and conditions of tariff and the terms and conditions carefully arrived at and included in the tripartite agreement which is applicable to all State utilities and to which the review petitioner is also a party.

Other sufficient reasons

47. The review petitioner has sought review of orders of the Commission under this head for the following reasons:

(a) The respondent had agreed to allow 2.5%,2.25%/2% rebate to the review petitioner on payment within three working days of the presentation of bills and the review petitioner had acted upon the said agreement.

(b) The respondent has suffered no losses as all the bills were admittedly paid within three working days of presentation of the bills, without any delay. The benefit of rebate had been passed on to the consumers by the review petitioner and it is not practically feasible to recover the amounts from the customers, large and small.

(c) The rebate which was granted under the agreement was nothing but a refund of Interest on Working capital which was already factored into while fixing tariff.

(d) If the review petitioner is entitled to only 1% rebate as per regulations/order and not 2.5%,2.25%/2% as agreed to by the parties, then the respondent has to pay interest at 18% per annum for use of money for the period of 27 days (since payments were

made within 3 days) on account of benefit derived under the agreement with the review petitioner.

48. The expression any other sufficient reasons used in Order 47 Rule 1 means a reason sufficiently akin to those specified in the said rule. Other 'sufficient reasons' must be construed as ejusdem generis with the two clauses preceding these two words i.e. discovery of new and important matter or evidence, or occurring of mistakes or an error apparent on the face of record. It is observed that the sufficient reasons advanced by the review petitioner are new facts on merit and were not raised by the review petitioner in its replies to the main petitions. In Thungabhadra Industries Ltd v. The Government of Andhra Pradesh [(1965) 5 SCR 174], the Hon'ble Supreme Court amplified the ambit and scope of Order 47 Rule 1 of the Code as under:

> "What, however, we are not concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". *A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.*"

In Parsion Devi and Ors. Vs. Sumitri Devi and Ors, [(1997) 8 SCC 715] the Supreme Court held as under:

> "Under Order 47 Rule 1 CPC a judgment 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 and has to be detected by a process of reasoning, 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 Order 47 Rule I CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise."

49. In view of the settled principles of law as quoted above, the grounds relied by the review petitioner as sufficient reasons are nothing but an attempt to reopen the issue of rebate on merit which is beyond the scope of Order 47 Rule 1 of the Code.

Conclusion

50. In view of our discussion in the preceding paragraphs, the review petitions are not maintainable on the ground of limitation as well for the failure on the part of the review petitioner to make out a case for review under Order 47 Rule 1 of the Code.

51. We are constrained to observe that the entire excercise of the review petitioner gives the impression that it wants to intentionally delay in arriving at a finality to the issues which stood settled long back vide orders dated 19.10.2005 and 14.9.2006, by raising flimsy issues subsequently which are not relevant to the matter under consideration and trying to divert the attention from the main issue.

52. Review Petition No.98/2009 in Petition No. 97/2005 and Review Petition No.99/2009 in Petition No.17/2006 are dismissed in terms of our findings in this order.

Sd/-	**sd/-**
[V S VERMA]	**[R. KRISHNAMOORTHY]**
MEMBER	**MEMBER**

New Delhi the 17th December 2009