Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 69 of 2020
MA Application 41 of 2020

Case of Tata Power Company Limited for review of the Commission' s Order in Case No.7 of 2002 and in MA Application 39 of 2019

Miscellaneous Application No. 41 of 2020 in Case No. 69 of 2020 filed by The Tata Power Company Limited (Distribution)

Coram
I.M.Bohari, Member
Mukesh Khullar, Member

The Tata Power Company Limited	…..TPC
Vs	
Adani Electricity Mumbai Limited	….Respondent
The Tata Power Company Limited (Distribution)	….Intervention Applicant

Appearance

For TPC:	….. Shri Venktesh (Adv)
For Respondent:	….. ShriHemant Singh (Adv)
For Intervention Applicant	….. Shri.Peyush Tandon (Rep)

ORDER

Date 21 August , 2020

1. The Tata Power Company Ltd. (TPC) has filed this review Petition being Case No.69 of 2020 on 4 March, 2020 seeking review of the Order passed by the Commission in Case No.7 of 2002 and in MA Application 39 of 2019 dated 22 January, 2020 (impugned Order) under Section 94 of Electricity Act, 2003 (EA) read with Regulation 85 of MERC (Conduct of Business) Regulation, 2004

2. **TPC's main prayers are as under:**

   i. The Respondent is liable to pay Interest at the rate of 24% per annum on its total Take or Pay liability to the Petitioner beginning from 6th April, 2001 and direct the

Respondent to pay the same.

ii. *The Energy drawn at 220 kV interconnection point could not have be included to determine the Respondent's Take or Pay liability.*

iii. *The effect of the change-over consumers could not have be included to determine the Respondent's Take or Pay liability.*

3. **TPC in its Petition has stated as follows:**

3.1. TPC has filed the present review Petition for seeking review of the Order dated 22 January, 2020 on the following grounds:

3.2. **Interest Not allowed**

3.2.1. The Commission while passing the Impugned Order has directed AEML to comply with Take or Pay (ToP) obligation under Principle Of Agreement (POA) but has held that interest for the period, wherein the ToP obligation not met by AEML, is not payable. It is an error apparent on the face of record for the following reasons:

3.2.2. The Commission at Para no 23 has correctly recorded that interest is payable to compensate for time value of money i.e. to compensate in delay of payment of money to TPC. However, the Commission then opines that TPC has not established actual loss and that the ToP computation may undergo change to deny such interest to TPC. At the same time the Commission at Para no 25 of the Impugned Order has observed that "*it would be cumbersome and onerous to verify actual loss incurred by TPC*"

3.2.3. However, while doing so the Commission has failed to acknowledge the law as laid down by the APTEL in the matter of *Gujarat Electricity Regulatory Vs. PTC India Limited(APTEL - Appeal Nos. 47 and 62 of 2013 - Decided On: 30.06.2014 2014 - ELR (APTEL) 1243)*. This judgment, passed in the light of a similar ToP arrangement, clearly holds that such arrangements contemplate the payment of liquidated damages and actual loss need not be proved. The APTEL granted such interest from the date that an unequivocal demand for such compensation was made.

3.2.4. Impugned Order makes an error in refusing interest on the ground of actual loss, when the APTEL deemed fit to grant interest under exactly similar circumstances. It is trite law that interest is payable to party if the party has been deprived of any contractual realization and therefore the Commission has on the face of it misdirected itself to equate interest with actual loss or profit of TPC.

3.2.5. Hon'ble the Supreme Court in the case of ***State of Karnataka v. Karnataka Pawn Brokers Assn., (2018) 6 SCC 363*** has traced the law on interest and has concluded that interest is also payable as compensation for retention of money/ forbearance of money/ deprivation in use of money.

3.2.6. The Commission by passing the Impugned Order has condoned the breach perpetuated by the defaulting party on the erroneous premise that no loss has been suffered by TPC. The said Order sets a dangerous precedent as any party can take advantage of the Impugned Order and not make legitimate payments under a concluded Agreement and defer its liability indefinitely.

3.2.7. The Commission while passing the Impugned Order has also not considered the entire concept of time value for money which is mutually exclusive to actual loss being suffered by the party seeking interest. The said concept has been explained by the APTEL in its Judgment dated 22 May, 2019 in Appeal No. 308 of 2017 titled as *Lanco Amarkantak Power Ltd vs. HERC & Ors*

3.2.8. The observations of the Commission in respect of interest not being awarded due to lack of proof of actual loss on the part of TPC is in violation of the position of law as set out above and by the Hon'ble the Supreme Court in the case *of Irrigation Deptt., Govt. of Orissa vs. G.C. Roy, (1992) 1 SCC 508.* In the said case the Hon. Supreme Court has categorically held that an individual which has been wrongly deprived of the use of money, over which he has legitimate entitlement, has a right to be compensated with interest.

3.2.9. The Commission due to cumbersome process of verification of actual loss incurred to TPC directed Respondent to pay the obligations on ToP issue and on the contrary based on very same loss denied claim of interest on the amount. Further Respondent, in support of their contention that TPC has been caused no loss, could not place evidence neither in the earlier proceedings nor in the present matter. Moreover, there is no adjudication by the Commission that no loss has been suffered by TPC. Therefore, in the absence of any adjudication on the said issue the Commission could not have denied interest to TPC on the assumption that no loss has been suffered by it.

3.2.10. POA dated 31 January, 1998 has three provisions over which dispute arose i..e Clause (2)- Stand By Charges, Clause (3) – Obligation to off take at 220 kV Borivali interconnection and Clause (4) – ToP Obligation. All three clauses have been subject matter of dispute. In so far Clause (2) and (3) of the POA are concerned, the Hon'ble Supreme Court vide Orders dated 02 May 2019 in CA No. 415 of 2007 and Order dated 23 July, 2019 passed in CA No. 4161 of 2008 and CA No. 4423 of 2008 has held that interest along with principal amount will be paid to the concerned party. Therefore, once the same agreement has been interpreted by the Hon'ble Supreme Court and interest has been awarded to the affected party then there was no occasion for the Commission to deviate from the already accepted principle of adjudication and deny interest amount to TPC.

3.2.11. The Commission has erred by disregarding the fact that, the interest so disallowed to TPC on account of "no actual loss", would have also been passed on for the benefit of the end consumers of the Distribution Licensees. Therefore, on one hand the

Commission has opined and held that the end consumers of the Distribution Licensees should be benefited by the income to be received by TPC and on the other hand, has disallowed the interest on the amount under ToP obligation, thereby depriving the end consumers of a lower tariff.

3.3. **Inclusion of energy drawn at 220 kV interconnection point**

3.3.1. To arrive at the conclusion that ToP obligation is inclusive of energy drawn at 220 kV interconnection point in the Impugned Order, the Commission has relied upon the Minutes of the Meeting (MoM) dated 01 September, 1997 and the Order and Judgment of the APTEL passed in Appeal No. 03 of 2008.

3.3.2. So far as reliance on the Judgment in Appeal No. 03 of 2008 is concerned the same could not have been relied upon in terms of the Order dated 23 July, 2019 passed by the Supreme Court in CA No. 4161 of 2008 and 4423 of 2008. This fact has also been accepted by the Commission at Para 11 of the Impugned Order. Therefore, on the face of it, a conflict exists between Para 11 and Para 20 of the Impugned Order wherein at Para 11 the Commission notes that the judgment of the APTEL in Appeal No. 03 of 2008 is not to be relied upon and the hearing ought to be held afresh. However, while deciding the issue of inclusion of power drawn at 220kV interconnection point the Commission has referred to/ relied upon the very same judgment. Therefore, admittedly on the face of it there exists an error apparent on the face of the record warranting exercise of Review Jurisdiction.

3.3.3. So far as the reliance of the Commission on the MoM dated 01 September, 1997 is concerned the same is also irrelevant and extraneous to the present proceedings earlier discussion had culminated on the POA signed between parties which confined the ToP liability to 22/33kV of supply. Hence, the Commission has erred by inserting words into the POA which is otherwise impermissible in law. The Supreme Court in *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470* has categorically held that no outside aid can be used to interpret an agreement. It thereby warrants exercise of Review Jurisdiction.

3.4. **Inclusion of Change Over consumers**

3.4.1. The Commission while passing the Impugned Order has held that Change Over consumers would be factored into while determining the quantum of ToP liability of Respondent which is contradictory to the observation of the Commission that TPC under its bulk supply license is eligible to supply electricity to retail consumers and it is settled legal principle that any condition which is contradicting the law needs to be treated as void. Then there was no occasion whatsoever for the Commission to consider the very same stipulation while computing the ToP liability of Respondent. In this regard reliance is placed on the decision of the Supreme Court in the case of *Dhurandhar Prasad Singh v. Jai Prakash University, (2001) 6 SCC 534* wherein the Supreme Court has categorically held that when a provision is held void/ voidable by a competent court then

the said provision is held to be non-existent from the very beginning and thereby warranting exercise of Review Jurisdiction.

4. **AEML in its submission dated 28 April, 2020 has stated as follows:**

4.1. It has preferred an appeal against the Commission Order dated 22 January, 2020 before the APTEL, on 11 March, 2020, vide DFR No. 136 of 2020 and has challenged part of the Impugned Order whereby the Commission has directed Respondent to pay compensation for failure to off-take minimum power during FYs 1998-99 and 1999-2000.

4.2. Review Petition filled by TPC is devoid of any merit and does not fulfil the criteria of filing a review as per the provisions of the Electricity Act, 2003, and the MERC (Conduct of Business) Regulations, 2004. Also, as per Rule 1(2) of Order 47 CPC, 1908, no review is maintainable in the event an appeal is filed by any party wherein the issue raised in the review can be agitated in the Appellate forum.

4.3. It received a letter dated 31 January, 2020 from TPC, seeking a payment of Rs. 57.05 Crores towards the alleged ToP obligation. The Respondent, without prejudice to its rights available under law, made a payment of Rs. 37.64 Crores, under protest, to TPC.

4.4. **Non-Grant of Interest:**

Regarding the issue of non-grant of interest TPC has not shown some mistake or error apparent on the face of record. Review Petition has a limited scope cannot be allowed to be an appeal in disguise. For this Respondent has placed reliance of Hon'ble the . Supreme Court Judgment in the case of *Parsion Devi and Others v. Sumitri Devi and Others, reported in (1997) 8 SCC 715*

4.4.1. Prayer of TPC in demanding 24% interest is against the Order dated 23 July, 2019 passed by the Supreme Court in CA Nos. 4161 and 4423 of 2008. TPC has committed a breach of the POA by luring away the consumers of the AEML. TPC failed to establish actual loss incurred/ suffered by it on account of the alleged non-honouring of minimum off-take by the AEML. The load of TPC increased on account of change-over of high value consumers of the AEML, thereby enabling the said TPC to earn reasonable additional revenue/ returns. Therefore, TPC seeks "undue enrichment" by way of the following:

a) Earning reasonable additional revenue/ returns on account of supplying power to the changed-over consumers of the Respondent, thereby breaching the conditions of the POA which were reiterated vide letter dated 10 March,1998; and
b) Claiming 'Take or Pay' compensation, along with alleged interest, from the AEML.

No court can permit "undue enrichment" by a party

4.4.2. TPC did not at all suffer any loss and instead, made reasonable returns, it is evident that the finding of the Commission on the issue of ToP. Hence, the question of allowing any interest in favour of TPC does not arise at all.

4.4.3. No specific penalty provision was there in the POA in case of non-offtake. This means that actual loss had to be demonstrated by the TPC, which was not done. Hence, the Impugned Order, qua interest, cannot be subjected to review

4.4.4. TPC, in para 8.2 of the review petition, has referred to a judgment dated 30 June, 2014, passed by APTEL in Appeal Nos. 47 and 62 of 2013, whereby, it is argued by TPC, that actual loss need not be proved. The reliance on the aforesaid judgment is entirely and completely misplaced, for the reason that the Hon. Supreme Court, in the judgment passed *in Kailash Nath Associates v. DDA, reported in (2015) 4 SCC 136,* has categorically held that whenever a loss or compensation is claimed, actual loss has to be proved even if an amount in the form of liquidated damages is mentioned in the agreement.

4.5. **Inclusion of Change Over consumers**

4.5.1. The Commission in its Order has categorically held that TPC had never communicated to Respondent that conditional projections were not acceptable or as per POA and thereby reducing the energy drawn by Respondent due to shifting of consumers and adding the same to TPC's demand. Hence, to the extent of such movement of consumers, there cannot be any quantifiable loss to TPC.

4.5.2. Very reason for a POA to exist was that TPC wanted to protect the energy generated from its power stations, in view of the fact that the Respondent had set up its own 2x250 MW station at Dahanu, which reduced the Respondent's dependence on the TPC's generation. However, even after entering into POA, thereby protecting its generation, the TPC decided to indulge in retail supply as well and started luring away the consumers of the Respondent itself which got added to the demand of the TPC. Hence, to the extent of such movement of consumers, there cannot be any quantifiable loss to TPC.

4.5.3. When the Respondent could not off-take the minimum guaranteed power as per the POA, on account of the aforesaid violation of the terms of the POA by TPC, it either sold the said power to other parties, or did not generate the said power at all. Further, under both the above scenarios, the TPC completely recovered its fixed cost. Therefore, TPC did not incur any loss, so as to seek any compensation from the Respondent. Therefore, there is no error apparent in the Impugned Order which requires any interference under the present review petition.

4.6. **Inclusion of energy drawn at 220 kV interconnection point**

4.6.1. The issue raised in the present review petition is with respect to the consideration of power availed by the Respondent from the 220-kV interconnection point, towards fulfilment of the ToP obligation. The said findings can only be challenged by way of any appellate proceedings In this regard, reference may be further made to *Kamlesh Verma v. Mayawati, reported in (2013) 8 SCC 320*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.

4.6.2. TPC has relied upon the final order/ judgment of the Supreme Court dated 23 July, 2019, so as to contend that any findings of APTEL, qua the issue of ToP will not come in the way of adjudication by the Commission. This simply meant that the Commission had to take a fresh view on the issue of inclusion of power procured from the 220 kV inter-connection point. While taking a fresh call on the above issue, the view of APTEL was also a valid view which was available for consideration. After detailed analysis the Commission decided that the view of the APTEL was appropriate, and accordingly the same was adopted. The said view taken by the Commission, after giving due reasons, cannot at all be a subject matter of review proceedings.

4.6.3. The finding of the Commission at Para 21 is based on a particular reasoning, and the TPC has not brought on record any information or document, or any omission thereof, which can change the aforesaid interpretation. Hence, there is no ground for review of the Impugned Order.

5. **TPC in its rejoinder dated 22 May 2020 has stated as follows:**

5.1. The three clauses of POA namely Clause (2) – Stand-By Charges, Clause (3) - Obligation to off take at 220 kV Borivali interconnection and Clause (4) - Take or Pay Obligations have been the subject matter of dispute and the Supreme Court has expressly upheld the grant of interest, on the TPC's claims, arising out of Clauses (2) and (3) of the POA, vide Orders dated 2 May 2019 in CA No. 415 of 2007 and Order dated 23 July, 2019 passed in CA No. 4161 of 2008 and CA No.4423 of 2008. As such, principle has been laid down by the Supreme Court in view of the POA, the Commission was obligated to follow the said principle and grant interest on TPC's Take or Pay claims as well. Failure to do so has resulted in a violation of the aforesaid Order passed by the Supreme Court. Respondent has not denied or rebutted the foregoing contention in its Reply. To the contrary it has implicitly acknowledged that the rate of interest mentioned in the said order should be used as the benchmark to award interest in the present Review Petition. The interest granted to the Petitioner will benefit its consumers and the end consumers as expressly observed in the Impugned Order. Hence, the same ought to be treated as admitted and the corresponding claim of interest ought to be allowed.

5.2. Respondent has preferred Appeal as DFA No 136 of 2020 dated 11 March 2020 against the Impugned Order dated 22 January 2020 after the lapse of 45 days. As such, the Respondent's appeal does not even exist in the eyes of law due to the admitted delay in filing the same. Rule 1(2) of Order 47 CPC Code contemplates a review in cases where

an appeal is pending. In the present case, no appeal was pending when the present review petition was filed. As such, the Appeal in question neither affects the validity nor the merit of the present Review Petition.

5.3. In the present case there is no common ground between the TPC's Review Petition and the Respondent's Appeal. Based on APTEL judgment *in Petition No. 2 of 2015 in Appeal No. 163 of 2015, titled as PTCUL v. UERC & Ors dated 15 May, 2015* , TPC is entitled to maintain the present Review Petition and to an order in terms of the prayers made herein.

5.4. Clause 4 of the POA does not mention or even contemplate any condition whatsoever regarding change-over consumers, or end consumers for that matter. Allegation of "*luring away*" is baseless, as the consumers moved from TPC to the Respondent too and the latter has not even quantified the effect of the alleged "luring away". Hence, the claim regarding the Respondent's growth vis-a-vis the "*luring away*" of customer is completely unsubstantiated. The Commission has also acknowledged the same in the Impugned Order that the changeover of consumers is bidirectional.

5.5. The reliance placed by Respondent on the APTEL's judgment dated 30 June 2014, passed in Appeal Nos. 47 and 62 of 2013, is misplaced. Contrary to the Respondent's contention, the Supreme Court, in *Kailash Nath Associates v. DDA,* has actually stated that the Liquidated Damages mentioned in a contract can be awarded where it is impossible or difficult to prove actual damages. In the present case, the Impugned Order clearly holds that assessing damages in the present case will be cumbersome and onerous. Hence, in view of the said judgment the Liquidate Damages, contemplated by the Take or Pay mechanism of the POA can and has been awarded.

5.6. There is an apparent error in inserting words of the Minutes of Meeting (MoM) into the POA which is impermissible in law. Hence, there is an apparent error and mistake in understanding. Clause 4 (a) of the POA provides an all-inclusive statement of "Overall minimum guaranteed aggregate energy off-take" and is independent of Clause 4(b) which is confined only to specific ports of 22/33 kV. It is denied that Clause 4 (a), therefore, represents the overall consumption of energy by the Respondent, thereby aggregating the off- takes from all points of 22/33 kV, including the 220 kV inter- connection point and the overall off-take contained in the POA, read with the letter dated 10 March 1998, includes the drawl at 220 kV point of interconnection.

6. **TPC-D in its MA Application 41 of 2020 dated 21 May 2020 has stated as follows:**

6.1. Impact of the Order for which Review is sought will have a direct bearing on the Distribution Licensees and consequently the end consumers of the Distribution Licensees, including those of TPC-D. Therefore, it is requested to pass any decisions/ orders in the instant matter after granting an opportunity of hearing to the TPC-D.

6.2. The decision of the Commission with respect to disallowance of interest for the period

wherein the Take or Pay obligation was not met by Respondent, has caused a huge tariff disadvantage to the consumers of the TPC-D as well as those of the other Distribution Licensees thereby denying the benefit of interest to the end consumers in terms of lower tariff to the consumers of Mumbai.

6.3. In spite of TPC-D being one of the Distribution Licensees who was being supplied by the TPC and therefore being directly impacted by the Impugned Order, no notice was issued to TPC-D neither during the proceedings in Case No. 07 of 2002 and Miscellaneous Application No. 39 of 2019 nor in the present Review Petition.

6.4. It is requested to the Commission to implead TPC-D as a party respondent in the instant Review Petition. In addition to the above, Commission may consider impleading the other Distribution Licensee i.e. Brihanmumbai Electric Supply and Transport (BEST), also as a party to the instant Review Petition for the same reasons as specified above.

6.5. In light of the foregoing, TPC-D is a necessary and proper party for the adjudication of the present Petition. It craves leave to file detailed submissions at the appropriate stage, if deemed necessary.

7. **AEML in its submission dated 4 August 2020 against MA application of TPC-D has stated as follows:**

7.1. TPC-D was never a party to the proceedings, either before the Commission, or before the the APTEL and the Supreme Court, which ultimately lead to the passage of the Impugned Order dated 22 January, 2020 against which the present review has been filed. Further, the entire dispute was between AEML and TPC, whereby the TPC-D had no role to play. It is submitted that when the proceedings in Case No. 7 of 2002 were initiated, there was one composite entity, namely TPC; however, the issue was always with respect to the alleged claim of the generation business of TPC.

7.2. It appears that there is a typographical error in the Order dated 22 January, 2020, passed by the Commission, to the extent that the case title of the order reflects the name of the Petitioner as Tata Power Company Limited –Distribution, whereas, it ought to have been Tata Power Company Limited – Generation (TPC-G).

7.3. TPC-D is also not a proper party to the present proceedings, for the reason that the alleged grievance of TPC-D in filing an application seeking impleadment/ intervention is that in the event TPC gets money (take or pay compensation) from Respondent , then a portion of the same has to be shared with TPC-D. This demonstrates that TPC-D is raising a claim against TPC, in the event the review is decided against Respondent, and as such TPC-D is alien to the present petition.

7.4. Any decision allowing TPC-D to implead in the present proceedings will result in expanding the scope of the review beyond what was there in the original proceedings. it is a settled principle of law that the scope of review proceedings is limited, and the said

scope cannot be widened beyond what has been contemplated under Order 47 Rule 1 of the Code of Civil Procedure, 1908. This has been held by the Hon. Supreme Court in *Parsion Devi v. Sumitri Devi*, reported in *(1997) 8 SCC 715*.

7.5. Therefore it is requested that Intervene application may be rejected.

8. At the E-hearing held on 7 August 2020, all parties re-iterated their submissions in the Petition /Reply.

9. **TPC-D in its rejoinder with respect to the contentions raised by AEML-D in MA Application 41 of 2020 has stated as follows:**

9.1. The question of TPC-D being a party or having to play a role in the previous proceedings is irrelevant since the dispute which lead to the Commission passing impugned Order dated 22 January 2020 under the present Review Petition finds its genesis in the initial Petition filed by an integrated entity i.e. TPC being Case No. 07 of 2002.

9.2. Further, the Commission for the first time vide the Impugned Order passed an Order directing the generation business of TPC to share the income from the Take or Pay Obligation amongst the consumers of generation business, i.e. the distribution business of TPC and other distribution licensees to whom TPC was providing power as bulk supply licensee. Therefore TPC-D is directly impacted. It is trite law that person/entity whose rights and interest are adversely affected, should be arrayed as a party before passing any Order to ensure the compliance of principles of natural justice.

10. **Further, TPC in its additional submission dated 10 August 2020 has reiterated earlier submission and has made following additional submission:**

10.1. In the present case the Take or Pay demand was made in the year 2001 and the Order for payment was passed by the Commission in the year 2020. Therefore, grave travesty of justice is being caused if the payment of ToP liability is not fixed with interest.

10.2. The concept of No -loss has wrongly been applied by the Commission. In this regard reliance is placed on the Judgment of the Hon. Supreme Court in the case of *Construction and Design Services vs. DD (2015) 14 SCC 263* wherein the Supreme Court categorically held that the party who has breached the contract needs to prove that no loss is suffered by the party who has suffered the breach. Therefore, it was obligatory upon Respondent to demonstrate that no loss was suffered by TPC at the relevant point in time. The Commission in passing the Impugned Order has completely ignored the above accepted proposition of law as Respondent had not led any evidence to demonstrate that no loss was suffered by Tata Power.

11. **AEML in its additional submission dated 10 August 2020 has reiterated earlier submission and made following additional submission:**

11.1. Respondent submitted that Review has a limited scope in terms of MERC Conduct of Business Regulations, 2004 and as per Order 47 Rule 1 of the CPC, 1908 Respondent in support placed various judgments of the Supreme Court *Parsion Devi and Others v. Sumitri Devi and Others*, reported in *(1997) 8 SCC 715*, *Kamlesh Verma v. Mayawati*, reported in (2013) 8 SCC 320 in support of the same. The issues raised in the present review petition cannot at all be agitated as the same essentially require a rehearing of the entire dispute, which is prohibited by the Supreme Court and remedy available to an aggrieved party is to file an appeal.

11.2. TPC has mentioned in the Petition that the Commission has misdirected itself to equate interest with actual loss and profit of Tata Power. This means that, as per TPC, the Impugned Order is erroneous. As demonstrated through the various Supreme Court judgments, under review jurisdiction, an erroneous Order cannot all be challenged in review, and that the only remedy available is to file an appeal. Therefore, the review petition on the issue of non-grant of interest needs to be rejected.

11.3. The Hon. Supreme Court in the judgment of *Kailash Nath Associates v. DDA, reported in (2015) 4 SCC 136*, held the party complaining of a breach, is only entitled to a reasonable compensation which has to be proved based upon well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act. Further, it is also held that the aforesaid requirement applies whether a person is a plaintiff or a defendant, and that the same means that there is no strict rule that the person committing an alleged breach has to prove actual loss. It is the responsibility of the court for determining actual loss

Commission's Analysis and Ruling

12. TPC has filed the present Petition seeking review of the Order passed by the Commission in Case No.7 of 2002 and in MA Application 39 of 2019 dated 22 January 2020 primarily on the following grounds:

    a) Denial of Interest on Take or Pay obligations
    b) Inclusion of Changeover consumers in take or pay obligation
    c) Inclusion of energy drawn at 220kV interconnection point

13. Regulation 85(a) of the Commission's Conduct of Business Regulations, 2004 governing review specifies as follows:

"Review of decisions, directions, and orders:

85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon 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 direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may

apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission…"

Further, the Hon'ble Supreme Court in the matter of *Smt. Meera Bhanja vs Smt. Nirmala Kumari Choudhury* on 16 November 1995 has held as follows regarding review jurisdiction:

8. ***It is well-settled 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, C.P.C.*** *In connection with, the limitation of the powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma and Ors. , speaking through Chinnappa Reddy, J., has made the following pertinent observations :*

It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent mis-carriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. ***The power of review may exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.***

Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view ***that an error apparent on the face of 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.***.

Thus, the ambit of review is limited, it cannot be an appeal in disguise, and this Petition is required to be evaluated accordingly.

14. Before dealing with review sought by TPC, the Commission first needs to decide on the intervention application filed by TPC-D.

14.1. TPC-D in its intervention application has stated that decision of the Commission with respect to disallowance of interest for the period wherein the Take or Pay obligation was not met by Respondent, has caused a huge tariff disadvantage to its consumers and hence

it should be allowed to intervene in the matter. Respondent, has opposed such intervention of TPC-D.

14.2. The Commission notes that Original Petition in Case No. 7 of 2002 was filed by TPC as an integrated entity. This review Petition has also been filed on behalf of TPC and not on behalf of any specific business (Generation, transmission, or Distribution) of TPC. Further at para 8.8 and 8.9 of the review Petition, TPC in support of its claim for review has argued that if review is not allowed then Distribution Licensee will be deprived of the money which could be made available for reducing tariff of their consumers. Hence, reason for which TPC-D wants to intervene in the matter has already been taken up by its parent company in review Petition.

14.3. On going through the contentions of the parties, the Commission is of the considered view that no purpose will be served by allowing intervention of TPC-D in the matter. Its stated interest is already being taken care by TPC. Hence, the Commission rejects intervention application of TPC-D in present matter.

15. Respondent has objected to the maintainability of this review Petition on the ground that Respondent has challenged part of the Impugned Order in appeal with respect to the decision of the Commission to pay compensation for failure of Respondent to off-take minimum power. As per Rule 1(2) of Order 47 CPC, 1908, once appeal is filed, review cannot be held to be maintainable. TPC has opposed such contention and has stated that appeal is filed on different issues.

In this regard, the Commission notes that Rule 1(2) of Order 47 CPC, 1908 states as follows:

> *"(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."*

Thus, party who is in appeal is barred from filing review. In the present case, Respondent, AEML has filed appeal while review Petition is filed by Petitioner, TPC. Clearly, the appeal is not filed by TPC, the Petitioner in this case. Further, the issue in the appeal filed by the Respondent is different from the issue raised in the present review Petition as Respondent has challenged Commission's decision of granting compensation on Take of Pay obligations whereas in this Review Petition, TPC has not sought review of allowing compensation but some computational issues including payment of interest. Further, Respondent in its Reply on merits has opposed review sought by TPC and has stated that Commission's Order on these issues is correct.

In view of the above, as appeal filed by Respondent is on different issue the Commission rejects contentions of Respondent and holds that present Review Petition filed by TPC can be decided by this Commission.

16. Having decided about Intervention Application and preliminary objection of the Respondent on review jurisdiction as above, now the Commission will deal with the issues on which review has been sought by TPC which are discussed as follows:

17. **Denial of Interest on Take or Pay obligations:**

17.1. By referring to Para no 23 and Para no 25 of the impugned Order dated 22 January, 2019, TPC has contended that the Commission at Para 23 has correctly recorded that interest is payable to compensate for time value of money however, it has denied the interest due to non-establishment of actual loss. TPC after placing reliance on various Judgment of higher Authorities has finally referred to the Supreme Court Orders dated 02 May. 2019 in CA No. 415 of 2007 and Order dated 23 July, 2019 passed in CA No. 4161 of 2008 and CA No. 4423 of 2008 (on the same clauses in POA) wherein Supreme Court has granted interest on Standby Charges and payment at 220 kV interconnection points. TPC has further contended that Take or Pay demand was made in the year 2001 and the Order for payment was passed by the Commission in the year 2020. Therefore, if the payment of Take or Pay liability is not made with interest, it will not be just and fair.

17.2. While opposing contentions of the TPC, Respondent has contended that TPC has not proved the actual loss due to non- honouring of minimum off take quantum and therefore TPC is not eligible for the interest thereon. In support, Respondent has placed reliance on the Supreme Court judgment passed *in Kailash Nath Associates v. DDA, reported in (2015) 4 SCC 136*, in which it has been categorically held that whenever a loss or compensation is claimed, actual loss has to be proved even if an amount in the form of liquidated damages is mentioned in the agreement.

17.3. In this regard the Commission in the Impugned Order at Para No 23 and 25 has ruled as follows:

> *"23. TPC has also claimed interest on the outstanding amount under 'take or pay' obligation. In this regard, the Commission notes that normally interest is allowed to compensate time value of money. In the present case, as explained in subsequent paragraphs of this order, TPC has not established actual loss incurred by it on account of non-honoring of minimum guaranteed off-take by the Respondent. Also, 'take or pay' computation will undergo change based on above directives. Hence, the Commission deems it fit not to allow any interest cost in the present matter.*
>
> *……..*
>
> *25. The Commission notes that TPC's claim on 'take or pay' is based on the provisions of POA. In this Petition, it did not provide details of actual loss incurred by it on account of non-honoring of minimum offtake obligation by the Respondent. Also, first Tariff Order in respect of TPC was issued by the Commission on 11 June 2004 for the*

FY 2003-04 and FY 2004-05. Period under consideration i.e. FY 1998-99 and FY 1999-2000 is prior to this Order. Therefore, it would be cumbersome and onerous to verify actual loss incurred by TPC. At the same time, one cannot deny respective obligations agreed under the POA. Hence, notwithstanding verification of actual loss, the Commission directs the Respondent to comply with 'Take or Pay' obligations under POA."

17.4. Thus, in para 23 of the impugned Order, the Commission has provided justification for not allowing interest on compensation. TPC is trying to show error in that finding by referring to para 25, wherein the Commission has stated that notwithstanding verification of actual loss, Respondent has to comply with Take or Pay obligations. In the opinion of the Commission such comparison is not correct as interest cost is not denied just because the actual loss has not been computed, but also for the reason that take or pay claim would now be calculated based on principle approved by the Commission in impugned Order and thereafter it becomes payable. Hence, interest has been disallowed.

17.5. With regard to TPC's contention that in the matter of disputes relating to PoA, the Supreme Court has already granted interest for standby charges and payment at 220 kV interconnection points and same principle shall be adopted for Take or Pay obligation, the Commission notes that although these issues are arising out of same PoA, they are not on the same footing. In case of Standby Charges, payment had already been made and excess levied amount was to be refunded and hence interest was allowed. But in the present case of Take or Pay obligation, amount is yet to be quantified as per principles approved in impugned Order.

17.6. Thus, in view of the above analysis, there is no error apparent found on the face of the records. The Commission notes that TPC has argued extensively for allowing interest and while doing so relied on various judgments of higher authorities. However, these arguments are in the nature of challenging in review proceeding the merits of the decision of the Commission which is not permissible. Review Petition cannot be appeal in disguise. Hence, the Commission rejects the review sought by TPC on this issue.

18. **Inclusion of energy drawn at 220kV interconnection point:**

18.1. By referring to Para No 11, Para no 19 and Para no 20 of the impugned Order dated 22 January, 2019, TPC has contended that the Commission had relied on APTEL Order in Appeal No 3 of 2018 while delivering its decision which is in contravention of the directions of the Supreme Court in Civil Appeal No CA No. 4161 of 2008 and 4423 of 2008. Also, the Commission has relied on MoM dated 01 September 1997, the pre agreement discussions, which had culminated on signing of POA confining the Take or Pay liability to 22/33kV of supply. Hence, the Commission has erred in inserting words into the POA which is otherwise impermissible in law.

18.2. Respondent has contended that plain reading of POA makes it clear that overall off-take contained in the POA, read with the letter dated 10 March, 1998, includes the drawal at

220 kV point of inter-connection. While taking a fresh call on this issue, the view of APTEL was also an additional input which was available for consideration of the Commission. After detailed analysis, the Commission has decided that the view of the APTEL was appropriate, and accordingly the same was adopted. The said view taken by the Commission, after giving due reasons, cannot at all be a subject matter of review proceedings.

18.3. Relevant paragraphs of the impugned Order dated 22 January 2019 is reproduced below:

19. In this regard, the Commission notes that genesis of 'take or pay' obligations stipulated under POA is on the recommendations of the Committee setup by the GoM on the dispute between the TPC and the Respondent relating to revision in rate of Stand by Charges. Said Committee while providing its recommendations on Stand by Charges, has also recommended the following in its report dated 1 September 1997:

……

Thus, 'Take or Pay' obligation was recommended and accordingly agreed between the parties in order to ensure no adverse commercial implication on TPC because of lesser purchase of energy by the Respondent. Therefore, what is important is total energy purchased by the Respondent from TPC instead of considering energy purchased at 22 kV / 33 kV only*.*

20. ***Incidentally****, the ATE in its judgment dated 12 May 2008 reproduced at para 11 above has observed that "It is the total off-take which makes a significant impact on Reasonable Return of TPC. Hence, the REL's contention that the overall off-take contained in the letter dated 10.03.1998 includes drawl at 220 kv point of inter-connection, can not be ruled out."*

21. The Commission notes that if the computation of minimum energy drawn by the Respondent is restricted to the 22 kV / 33 kV points only and energy drawn at 220 kV interconnection point is excluded, then the Respondent will be subjected to double penalty i.e. payment of charges for energy drawn at 220 kV interconnection point (which is Rs. 2.09/ kWh, higher than Rs. 1.77/kWh applicable at 22 kV / 33 kV points) and at the same time payment under 'take or pay' obligation for the same energy. In the opinion of the Commission, this cannot be intent of the recommendation of the Committee setup by the GoM and POA signed between the parties.

22. Hence, the Commission thinks it fit to direct TPC to revise the bill for 'Take or Pay' obligations by including energy drawn by the Respondent at 220 kV interconnection point in the drawal of the Respondent.

Thus, it is evident that Commission has provided detailed justifications beside considering the view of APTEL, for its decision to include energy drawn at 220 kV interconnection points while computing take or pay obligation. Such detailed reasoned decision of the Commission cannot be ground for review.

18.4. TPC has also contended that even though the Supreme Court has directed the Commission not to be influenced by APTEL Judgment, the Commission has referred to finding of APTEL judgment which is an error. In this regard, the Commission notes that these contentions of TPC are factually incorrect which can be seen from the relevant paras of the impugned Order reproduced above. As can be seen, in para 19 of the impugned Order, the Commission has made its independent observations and then in para 20 has observed that incidentally APTEL has also made same observations. Therefore, the Commission is not at all influenced by APTEL decision while making its own finding and hence there is no contravention of Supreme Court's Order.

18.5. In view of above, there is no merit in this issue for review for considering views of APTEL and hence the same is rejected.

19. **Inclusion of Changeover consumers in take or pay obligations:**

19.1. By referring to Para No 16 and Para no 17 of the Order dated 22 January, 2019, TPC has contended that it is contradictory to consider the change over sales in Take or Pay compensation once the Commission had made observation that TPC under its bulk supply license is eligible to supply electricity to retail consumers. TPC has contended that it is settled legal principle that any condition which is contradicting the law needs to be treated as void. Respondent has opposed such contention on the ground that the Commission has provided justification for its decision and if TPC is aggrieved then it needs to file appeal and not invoke review jurisdiction.

19.2. The Commission in the Impugned Order has dealt with the issue of changeover/ new consumers. Relevant extract of the Order is as follows:

"16. In this regard, the Commission notes that when the Respondent has put the condition that TPC cannot take over its consumers, at that time issue of whether TPC under its bulk supply license is eligible to supply electricity to retail consumers was under dispute. At that time, the Respondent's contention was that TPC cannot supply electricity to retail consumers. With that background, the Respondent must have put such condition while communicating its projection for FY 1998-99 and FY 1999-2000. However, this issue is finally settled by the Supreme Court in its judgment dated 8 July 2008 in the Civil Appeal No. 2898 of 2006 clarifying that TPC's bulk license enables it to supply electricity to retail consumers also. With this judgment of the Supreme Court, condition that TPC cannot supply electricity to the retail consumers of the Respondent would be against provision of law/ license granted to TPC. It is settled legal principle that any condition which is contradicting the law needs to be treated as void. ***Therefore, the Commission rejects the contention of the Respondent that just because TPC has supplied energy to their existing retail consumers of the Respondent, it is not liable for 'take or pay' obligation****s.*

17. ***At the same time, TPC never communicated to the Respondent that providing such conditional projections was not acceptable to it or it was not in accordance with POA. Therefore, the Respondent may be under presumption that TPC had accepted its condition and thereafter started supplying electricity.*** *The Commission notes that during the concerned period, the consumers shifted between both the licensees and such shift was not unidirectional i.e. from the Respondent to the TPC, but consumer shifted from TPC to the Respondent also. However, neither of the parties have submitted exact quantum of energy consumed by such consumers.* ***As noted in the subsequent paragraphs of this Order, 'take of pay' obligation was entered into to avoid any adverse commercial impact on the TPC due to lesser purchase of energy by the Respondent. Consumer shifting from the Respondent to TPC reduced the energy drawn by the Respondent from TPC, but same quantum got added to the sale of TPC to its own consumers. Hence, in totality, there is no adverse commercial impact on TPC due to not honoring 'take or pay' obligation by the Respondent to the extent of sale to the consumers changed over to the TPC.*** *Hence, in the opinion of the Commission, impact of changed over consumers needs to be appropriately factored in while deciding quantum of minimum off-take not honored by the Respondent.* ***Accordingly, the Commission directs both parties to reconcile the impact of change-over consumer during the concerned period and appropriately factor in the computation of 'take or pay' obligations.***

19.3. As can be seen from para 17 of the impugned Order reproduced above, the Commission has provided detailed justification for inclusion of change over consumers in computation of Take or Pay obligation. Such a reasoned and duly considered decision cannot be ground for review. TPC through this review Petition is trying to challenge correctness or otherwise the merits of such decision which is not permissible under the review. Review Petition cannot be appeal in disguise.

19.4. As there is no merit for review in this issue the same is rejected.

20. In view of above analysis, Commission doesn't find any merit in the issues for which review has been sought by Petitioner.

21. Hence the following Order.

ORDER

Case No 69 of 2020 is rejected. Miscellaneous Application No. 41 of 2020 filed in Case No. 69 of 2020 is also rejected.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

(Abhijit Deshpande)
Secretary