

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.117 of 2013**

**Dated: 14<sup>th</sup> Nov, 2013**

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER**

**In the Matter of:**

**DNH Power Distribution Company Limited.,  
(Formerly Electricity Department, Dadra and Nagar Haveli)  
Opposite Secretariat,  
Silvassa – 396230  
Union Territory of Dadra and Nagar Haveli**

**...Appellant**

**Versus**

**Joint Electricity Regulatory Commission  
2<sup>nd</sup> Floor, HSIDC Office Complex,  
VanijyaNikunj Complex, Udyog Vihat Phase - V,  
Gurgoan – 122016, Haryana**

**....Respondent**

**Counsel For Appellant(s): Mr. Anand K. Ganesan  
Ms. Swapna Seshadri**

**Counsel for Respondent(s) Mr. Ravi Prakash  
Mr. Varun Pathak with  
Mr. Suyosh G**

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,**  
**CHAIRPERSON**

1. The question posed in this Appeal is as under:

**“Whether the Appellant is liable to pay interest on the amounts to be refunded by the Appellant to the consumers on account of a revision in the tariff for the Financial Year 2011-12 in implementation of the Remand Order passed by this Tribunal after setting aside the Power Purchase Cost Adjustment approved by the Joint Commission?”**

2. This Appeal has been filed by M/s. DNH Power Distribution Company Limited as against the Orders dated 24.1.2013 and 31.7.2012 passed by the Joint Commission directing the Appellant to refund the amount to the consumers on account of revision of tariff along with interest.

3. The short facts are as follows:

- (a) M/s. DNH Power Distribution Company Limited, the Appellant is an unbundled Utility of the Electricity Department, Dadar, Nagar and Haveli.
- (b) It has been vested with the functions of Distribution of Electricity in the Union Territory.

- (c) The Joint Commission, the Electricity Regulatory Commission for the Union Territories, is the Respondent herein. It is exercising jurisdiction and discharging functions u/s 61, 62 and 86 of the Electricity Act, 2003.
- (d) The Distribution and Retail Supply functions of the Appellant are regulated by the Joint Commission under the provisions of the Electricity Act, 2003, including the determination of Retail Supply Tariff chargeable from the consumers in the Union Territory.
- (e) The Joint Commission had for the Financial Year 2011-12 by the order dated 13.9.2011 determined the Annual Revenue Requirements and Retail Supply Tariff applicable to the Appellant.
- (f) In the said order, the Joint Commission had stipulated a Formula for Power Purchase Cost Adjustment. The Joint Commission had also sought to apply Principle of Reduction in Cross Subsidy in the Union Territory.
- (g) The Appellant was entitled to revise the Power Purchase Cost Adjustment quantum on a quarterly basis by application of the said Formula and levy the amounts on the consumers.

- (h) The above order dated 13.9.2011 was challenged by some consumers before this Tribunal in Appeal No.169 of 2011 and Appeal No.175 of 2011.
- (i) This Tribunal by the Judgments dated 29.2.2012 and 14.3.2012 allowed those Appeals in part. In the judgments, this Tribunal held that the Appellant was entitled to pass on all the additional Power Purchase Cost including the Unscheduled Interchange (UI) charges through the mathematical application of Power Purchase Cost Adjustment Formula stipulated by the Joint Commission in its Tariff Order.
- (j) However, this Tribunal observed in these judgments that the Power Purchase Cost Adjustment Formula should be restricted only to the changes for Fuel Cost as per the Electricity Act, 2003 as well as the Commission's own Regulations. In view of the above, this Tribunal set aside the Tariff Order dated 13.9.2011 prescribing the Power Purchase Cost Adjustment Formula and remanded the matter back to the Joint Commission for re-determination of tariff by reworking the Formula.
- (k) In pursuance of the above remand order passed by this Tribunal, the Joint Commission took-up the matter in the Tariff Order for the Financial Year 2012-13

and reviewed the financials of the Appellant for the Financial Year 2011-12 to implement the directions given in the judgment of this Tribunal.

- (l) On that basis, the Power Purchase Cost Adjustment Formula was revised by the Joint Commission and passed the fresh order on 31.7.2012.
- (m) In this order, the Joint Commission observed that the Appellant has collected Rs.81.11 Crores in excess from its consumers and directed the Appellant to return such excess amount to consumers along with the interest. On this issue, the Appellant aggrieved by this order filed a Review on 10.9.2012 before the Joint Commission on various issues including the issue of interest.
- (n) Ultimately, the Joint Commission by the order dated 24.1.2013 though allowed some of the issues, rejected the prayer of the Appellant to cancel the interest part holding that since there was surplus by collection of excess charge from consumers, the same was directed to be refunded along with interest to the consumers by invoking Section 62 (6) of the Electricity Act.

- (o) Aggrieved by the directions of the Joint Commission in respect of payment of interest alone, the Appellant has filed this Appeal.
4. The learned Counsel for the Appellant has made the **following submissions** to assail the impugned order in respect of payment of interest:
- (a) The interest is not payable in the present case as Section 62 (6) would not apply to the facts of this case. By application of Power Purchase Cost Adjustment formerly stipulated in the Commission's earlier order dated 13.9.2011, the Appellant has recovered an amount of Rs. 342.80 Crores. There is no finding in the said order that the Appellant applied the formula wrongly.
- (b) In the Tariff Order dated 13.9.2011, the Joint Commission approved Power Purchase Cost of Rs.1342.19 Crores for the Financial Year 2011-12. As such, the difference between the New Power Purchase Cost which is Rs.1609.38 Crores and Original Power Purchase Cost i.e. Rs.1342.19 works out to only Rs.267.19 Crores. This amount was less than Rs.348.80 Crores recovered by the Appellant through the Power Purchase Cost Adjustments formula. This amount alone has to be refunded to the consumers. In

view of the fact that the amount of Rs.1619.38 Crores as Power Purchase Cost for FY 2011-12 was worked out for the first time in the impugned order, the question of the Appellant deliberately recovered the amount of Rs.1609.38 Crores by invoking Section 62(6) would not arise.

- (c) The Joint Commission in its Review Order dated 24.1.2013 has merely held that since there was a surplus amount, the same was to be refunded with interest. There is no finding in the impugned order that the amount was collected by wrongly applying the Formula but, it merely said that there was a surplus. It was the formula which was found to be defective by the Tribunal and not the recovery of the Power Purchase Cost Adjustment as per the Formula to invoke Section 62(6) of the Electricity Act. Therefore, the direction to pay the interest also is not sustainable under law.

**5. The reply of the Joint Commission is as follows:**

- (a) The Joint Commission after analysis of the data submitted by the Appellant and after applying prudence check found that the Appellant had billed on account of Power Purchase Cost Adjustment more than actual increase in power purchase cost. What was to be collected on account of fuel cost increase should be

equal to the amount paid by the licensee to the generating company.

(b) The billing of Rs 81.11 crores by the Appellant in excess of what was considered prudent by the Commission amounts to billing beyond allowed by the Joint Commission by its order dated 13.09.2011. This excess billing beyond what was authorised by the Commission squarely falls within the scope of Sec 62(6) as held by the Commission.

(c) The excess amounts were charged by the Appellant even after the Power Purchase Cost Adjustment formula was set aside by this Tribunal by its judgment dated 29.02.2012 and 4.93.2012. Once the formula was set aside, the Appellant was not expected to recover the excess tariff without the sanction of law. Thus, the Appellant has wrongly charged from the consumers under the earlier Power Purchase Cost Adjustment Formula when the same had clearly been set-aside by this Tribunal. Therefore, the Appellant is liable to refund the excess tariff along with the interest.

6. Having regard to the rival contentions, the only issue that arises for consideration is **“Whether the Appellant is liable to pay interest also on the amount to be refunded to the consumers on account of revision in the Tariff for the**



Financial Year 2011-12 in pursuance of the judgment of this Tribunal setting aside the Tariff Order of the Joint Commission for the said year namely Financial Year 2011-12?”

7. Before discussing the issue, we shall quote the findings of the Joint Commission in the impugned order dated 31.7.2012 which is as follows:

**"Commission's analysis**

*Commission has accepted the actual revenue submitted by the Petitioner for FY 2011-12 on the basis of actual energy sales during that period. Commission has noticed that the actual revenue of FY 2011-12 includes the additional charge on account of Power Purchase Cost Adjustment from the consumers of DNH. The actual category wise Power Purchase Cost Adjustment charged from the consumers is not provided by the petitioner. **The petitioner has provided the total amount of Rs 348.29 Crores as Power Purchase Cost Adjustment billed in the FY 2011-12. In view of the APTEL order in the matter of Appeal no. 175 of 2011 & I.A. No. 263 of 2011 the Commission has analyzed the options for treatment of Power Purchase Cost Adjustment charged during FY 2011-12. The same has been discussed in the Chapter 5 of this order. Accordingly the Commission keeping in view interest of the utility and the consumer has considered the option c as a reasonable option and has accordingly reviewed the ARR of FY 2011-12 and (surplus)/deficit thereof to be carry forward for FY 2012-13 in this order.***

***The Commission had approved the power purchase cost of Rs 1342.19 Crores for FY 2011-12 in the order dated September 13' 2011, however the approved power purchase cost in this order is considered at Rs 1609.38 Crores (Net of UI sale). The variation in the power purchase cost therefore comes to 267.19 Crores ( i.e. Rs 1609.38 Crores minus Rs 1342.19 Crores) against which the utility has collected 348.80 Crores. The petitioner has thus collected an additional amount of Rs 81.11 Crores (Rs. 348.80 Crores – 267.19 Crores).***

8. The above order would reveal the following aspects:
- (a) The approved power purchase cost in the tariff order for the year 2011-12 was Rs. 1342.19 crores, which also had the Power Purchase Cost Adjustment formula for adjustment in case of increase or decrease in power purchase cost.
  - (b) By application of the Power Purchase Cost Adjustment formula, the Appellant had recovered an amount of Rs. 348.80 crores.
  - (c) In the Impugned order dated 31.7.2012, the Joint Commission approved the Power Purchase Cost for the Year 2011-12, after some disallowances at Rs. 1609.38 crores. This determination of Rs. 1609.38 crores was for the first time on 31.7.2012.

- (d) Since the difference between the previously approved Power Purchase Cost i.e. Rs.1342.19 Crores and now approved power purchase cost namely Rs.1609.38 Crores was only Rs. 267.19 crores which was less than Rs. 348.80 crores recovered earlier through the Power Purchase Cost Adjustment formula and this amount has to be refunded to the consumers along with the interest.
- (e) The main aspect to be noticed in this order is that there is no finding in the order dated 31.7.2012 that the earlier Formula was incorrectly applied.
9. Let us see the Review Order dated 24.1.2013 which is as follows:

**"Commission's findings**

*2.5.2. Commission likes to place reliance on the relevant provision of Electricity Act, 2003 in this regard*

*62. Determination of tariff*

*(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.*

*(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

*(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee”.*

*“Unquote **[Emphasis supplied]***

*The sub-section (4) of section 62 of Electricity Act, 2003 clearly specifies that amount recovered from the fuel surcharge formula is a part of tariff and sub-section (6) of section 62 of Electricity Act, 2003 says that in case of recovery of charge exceeding the tariff by the licensee, the excess amount shall be recovered by the licensee along with interest equivalent to the bank rate. The prevailing bank rate is 9.5% for FY 2012-13, therefore in view of sub-section (5) of section 62 of Electricity Act, 2003; Commission considers it reasonable to give the interest to the consumers due to excess recovery of charge due to fuel surcharge formula from April 2012”.*

10. In the Review Order dated 24.1.2013, the Joint Commission has held that since there was a surplus, the same was to be refunded with interest to the consumers. The surplus was only on account of the approval of the amount of Rs.1609.38 Crores in the Order dated 31.7.2012 and not any time prior thereto.
11. There is no dispute in the fact that this Tribunal held that earlier Formula was found to be defective and on that

ground, the matter was remanded by this Tribunal for fresh determination of the tariff after reworking of the Formula.

12. The relevant portion of the judgment of this Tribunal dated 29.2.2012 in Appeal No.169 of 2011 setting aside the Formula is as follows:

***"10.4 However, the formula devised by the Joint Commission applies to the Power Purchase Cost Adjustment on quantity of power purchased from different sources on the basis of the difference between the average rate of power purchase during the adjustment period and the average rate of power purchase as approved by the Commission in the impugned order. Thus the formula specified is not in consonance with the intent and conditions indicated in paragraph of 6 of the impugned order. The formula as specified by the State Commission also cannot be mechanically applied to calculate the variation in Power Purchase cost per kwh on account of revision in fuel cost as charged by the generating companies from the respondent no.1. By mechanical application of the specified formula the variation in entire Power Purchase Cost of the respondent no.1 which includes fixed and variable charges will be recoverable from the consumer whereas the intent and the conditions specified by the Joint Commission and the Regulation indicate Power Purchase Cost Adjustment to be recovered on account of revision in fuel cost at generating stations only. No wonder, the respondent no.1 has worked the Power Purchase Cost Adjustment***

***taking into account the entire variation in Power Purchase Cost including the UI charges for the adjustment period, which was not admissible.***

***10.5 Thus, the formula devised by the State Commission is inconsistent with the Tariff Regulations and the conditions specified in the Power Purchase Cost Adjustment clause. Accordingly, the Power Purchase Cost Adjustment formula specified by the Joint Commission in the impugned order is set aside.***

***10.6 The Joint Commission is directed to re-determine the formula taking into account the Regulations and the conditions specified under the Power Purchase Cost Adjustment formula. The formula should be such that there is no scope for ambiguity and it determines the Power Purchase Cost Adjustment by mechanical application of the formula. The State Commission may also direct the respondent no.1 to display the computation for Power Purchase Cost Adjustment in a consumer friendly format on its website for the benefit of the consumers. As the FY 2011-12 is going to end shortly, the State Commission is also at liberty to decide the Power Purchase Cost Adjustment for the FY 2011-12 and consequential modification in retail supply tariff after hearing the concerned parties and our directions for specifying the correct formula may be noted for future.***

.....

**11. Our findings are summarized as under:**



***(i) In view of the provisions of the 2003 Act, Tariff Policy, Tariff Regulations and findings of the Tribunal in OP 1 of 2011 and other judgments, there is no illegality in the Joint Commission permitting the Electricity Department (R-2) to compute the Power Purchase Cost Adjustment according to the formula and conditions specified by the Joint Commission and recover the same from the consumers. Computation of Power Purchase Cost Adjustment is only by mechanical application of the formula. The authority given to the distribution licensee is not absolute without any regulatory control of the Commission. The final Power Purchase Cost to be allowed to the distribution licensee is subject to prudence check at the true up stage by the Joint Commission.***

***(ii) The formula specified by the Joint Commission in the impugned order is set aside as it is inconsistent with the conditions specified therein and the Tariff Regulations. The Joint Commission is directed to re-determine the formula taking into account the Regulations and the conditions specified under the Power Purchase Cost Adjustment formula. The formula should be such that there is no scope for ambiguity and it determines the Power Purchase Cost Adjustment by mechanical application of the formula. The State Commission may also direct the respondent no.2 to display the computation for Power Purchase Cost Adjustment in a consumer friendly format on its website for the benefit of the consumers. As the FY 2011-12 is going to end shortly, the State Commission may decide the***

***Power Purchase Cost Adjustment for the FY 2011-12 and consequent modification in retail supply tariff after hearing the concerned parties and our directions for specifying the correct formula may be noted for future.”***

13. In the light of the summary of findings rendered by this Tribunal, we have to analyse the impugned order.
14. The perusal of the impugned order dated 31.7.2012 and review order 24.1.2013; it is evident that only reason given by the Joint Commission for invoking Section 62 (6) was the surplus with the Appellant found by the Joint Commission. In these orders, there is no finding of the Joint Commission that the Appellant has charged more amount by wrong application of the Formula.
15. Keeping the above in mind, we have to consider the question as to whether the present case is fit for invoking the provisions of Section 62 (6) of the Act for directing the payment of interest.
16. Section 62 (6) of the Electricity Act is reproduced below:

***“If any licensee or a generating company **recovers a price or charge exceeding the tariff determined under this section**, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee”.***



17. On going through this provision, it is clear that the essential requirement for application of Section 62(6) of the Act, 2003, the licensee should have recovered the price or charge more than the tariff determined u/s 62 of the Act. Fuel price adjustment is covered under Section 62(4) of the Act.
18. The reading of the entire Section 62 (4) and 62(6), would make it clear that in order to invoke Section 62 (6), one has to establish that the Appellant had charged the **tariff** more than what had been approved. We are only concerned with the term '**tariff**' and not the '**amount**'.
19. Of course, in the present case, it has been established that the Appellant had collected amount in excess of the approved amount. But the question is 'Whether the Appellant charged higher tariff or Power Purchase Cost Adjustment than the approved.
20. The records submitted by the Appellant would show that it had charged the Power Purchase Cost Adjustment rate strictly as per the Power Purchase Cost formula stipulated in the Order dated 13.9.2011. Mere availability of surplus does not prove that it had wrongly applied the formula.
21. Further question arises as to whether the amount collected by the Appellant towards the Power Purchase Cost Adjustment was more than the actual increase in the

Power Purchase Cost. The answer for this question is available in the judgment of this Tribunal in Appeal No.169 of 2011. While dealing with the question of Power Purchase Cost Adjustment, we had observed as follows:

*“by mechanical application of the specified formula the variation in entire Power Purchase Cost of the respondent no.1 which includes fixed and variable charges will be recoverable from the consumer whereas the intent and the conditions specified by the Joint Commission and the Regulation indicate Power Purchase Cost Adjustment to be recovered on account of revision in fuel cost at generating stations only. No wonder, the respondent no.1 has worked the Power Purchase Cost Adjustment taking into account the entire variation in Power Purchase Cost including the UI charges for the adjustment period, which was not admissible”.*

- 22.** From the above, it is clear that one of the reasons for collection of this amount was inclusion of Unscheduled Inter Change Charges (UI charges) in the Power Purchase Cost Adjustment rate which was not permissible under Regulations but included in the formula. The other reason for excess amount could be that the Power Purchase Cost Adjustment rate is computed on actual data and Power Purchase Cost Adjustment is recovered at this rate in future. If the sale of the energy in the period during which the Power Purchase Cost Adjustment is recovered, then

the amount thus recovered, is bound to be more than the actual amount spent on Power Purchase.

23. In fact, there is no material to show that the Appellant has applied the Formula wrongly. As indicated earlier, there is no such finding also in the impugned order.
24. The tariff is always based on the projection for the future. If actual power purchase during the year is reduced due to availability of cheaper power, the licensee has surplus at the time of truing-up; it would not mean that the licensee has recovered the higher tariff. In that context, surplus thus arrived would have to be adjusted in the future ARRs.
25. In view of the above, it cannot be contended that the Appellant deliberately has recovered a tariff more than the tariff determined under section 62 of the Act.
26. In this context, it would be appropriate to refer to the judgment of Hon'ble Supreme Court dated 28.9.2011 in the case of NTPC Limited Vs MP State Electricity Board & Ors, Civil Appeal No.2451 of 2007 wherein it has been held that the question of interest under section 62 (6) arises only when the Generating Company or the Licensee deliberately over charged tariff in excess of what has been determined by the Regulatory Commission and it does not apply to the cases where the tariff itself has been revised by the

Regulatory Commission. The relevant portion of the judgment is extracted below:

“ .....

*The words ‘tariff determined under this section’ indicates that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections. The counsel for the Electricity Boards submitted that this sub-section should be applied even during the period when the tariff was being determined (as in the present case), and if in the final determination the price fixed is lesser than what was charged during the intervening period, then interest should be read as recoverable for the excess amount collected during the intervening period. In this connection, we must note that this sub-section does not refer to the period during which the tariff is being determined. It also does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by a statutory notification, then interest shall be payable on the differential amount.*

*That is why the Appellate Tribunal has observed that it is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined under section 62 (6), that such person can claim the excess price or charge paid by him along with interest. For the reasons stated above we are unable to accept the submission on behalf of the Electricity Boards, and are in agreement with the view taken by the Appellate Tribunal that Section 62 (6) cannot be pressed into service to claim interest on the differential amounts in the present case.*

.....”

27. The above judgment would squarely apply to the present facts of the case so long as the tariff is charged as per the Formula specified by the Joint Commission. Merely because the same has been amended subsequently, it would not render the levy illegal so as to invoke Section 62 (6) of the Electricity Act.
28. In view of the above, the portion of the impugned order with reference to the payment of interest is not valid in law and the same is liable to be set-aside.
29. **Summary of Our Findings:**

The reading of the entire Section 62 (4) and 62(6), would make it clear that in order to invoke Section 62 (6), one has to establish that the Appellant had charged the tariff more than what had been approved. We are only concerned with the term ‘tariff’ and not the ‘amount’. Of course, in the present case, it has been established that the Appellant had collected amount in excess of the approved amount. But the question is ‘Whether the Appellant charged higher tariff or Power Purchase Cost Adjustment than the approved. The records submitted by the Appellant would show that it had charged the Power Purchase Cost

**Adjustment rate strictly as per the Power Purchase Cost formula stipulated in the Order dated 13.9.2011. Mere availability of surplus does not prove that it had wrongly applied the formula.**

**30.** In the light of the above finding, the impugned order to the extent indicated above is set aside. The Appeal is allowed.

**31.** However, there is no order as to costs.

**(V J Talwar)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 14<sup>th</sup> Nov, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~