



ASSAM ELECTRICITY REGULATORY COMMISSION

ORDER SHEET

FILE NO. AERC.734/2020

PETITION NO: 02/2020

CORAM: HON'BLE SHRI S.C. DAS, CHAIRPERSON
HON'BLE SHRI S.N. KALITA, MEMBER
HON'BLE SMT B. BORTHAKUR, MEMBER

In the matter of

Petition No. 02 of 2020 filed by Assam Power Distribution Company Ltd (APDCL) for Condonation of Delay in filing the Review Petition for recall and set aside the AERC orders dated 21.09.2018 and 06.10.2018

In the matter of

Assam Power Distribution Company Ltd. (APDCL)	----Petitioner
M/s Eastern India Powertech Limited (EIPL)	----Respondent
Government of Assam	----Pro-forma Respondent

Present:

Petitioner

Mr. Nalin Kohli, Advocate
Mr. Ankit Roy, Advocate
Mr. R Agarwal, MD, APDCL
Mr. B M Saikia, CGM (Com)
Mr. M Kalita, GM (TRC), APDCL
Mr. J P Choudhury, GM (Com-R), APDCL
Mr. B Medhi, AGM (TR), APDCL
Mr. N Deb, AGM (F&A), APDCL

ORDER

Dated 11.02.2020

1. The Petitioner filed the following Petitions:
 - a. Petition for Condonation of Delay in filing the Review Petition for recall and to set aside the AERC orders dated 21.09.2018 and 06.10.2018 in Petition No 04/2010 filed by M/S Eastern India Powertech Ltd. (EIPL) in the matter of Commercial disputes and non-payment of contractually due payments by ASEB/APDCL to EIPL, registered as **Petition No 02 of 2020**.

- b. Petition seeking stay of the orders dated 21.09.2018 and 06.10.2018 passed by the Hon'ble Commission in Petition No. 04/2010 filed by M/S Eastern India Powertech Ltd. (EIPL) in the matter of Commercial disputes and non-payment of contractually due payments by ASEB/APDCL to EIPL, registered as **Petition No. 03 of 2020**.
 - c. Review Petition by the Respondent, i.e. Assam Power Distribution Company Ltd (APDCL) against the order dated 21.09.2018 and 06.10.2018 passed by the Hon'ble Commission in Petition No 4/2010 filed by M/S Eastern India Powertech Ltd. in the matter of Commercial disputes and non-payment of contractually due payments by ASEB/APDCL to EIPL., registered as **Petition No. 04 of 2020**.
2. As there is a delay of more than 15 months in filing of Review Petition, the Commission decided to take up first the Petition No 02 of 2020 i.e. the Petition for Condonation of Delay.
3. The Commission perused the Petition and also heard the Petitioner on 11.02.2020.
4. EIPL had filed a Petition (Petition No 4 of 2010) before the Commission seeking resolution of disputes with APDCL regarding outstanding dues etc. While the adjudication of the disputes was in progress in AERC, the Hon'ble Supreme Court delivered a judgment on 12.04.2018 in **Civil Appeal No. 14697 of 2015** (*State of Gujarat & Others Vs Utility users welfare associations and others*) wherein the Hon'ble Supreme Court ordered that there should be a person of law as member in the state commission for exercise of the adjudicatory functions as provided in the Section 86(1)(f) of the Electricity Act'2003. Accordingly, the Commission decided vide its order dated 21.09.2018 in the Petition No 04/2010 to refer the matter for Arbitration and after due consultation with the parties, the Commission decided to appoint Shri Justice (retd.) D.N. Biswas, Former Judge of the Hon'ble Gauhati High Court, as the sole Arbitrator in the matter. The terms of reference for arbitration was finalized vide order dated 06.10.2018 in the said petition. The present petitions filed by APDCL after 15 months from the aforesaid dates of order, are for review of the aforesaid orders, after condonation of delay etc.
5. The Learned Advocate of the Petitioner put forth the following arguments for condoning the delay of more than 15 months in filing of review petition:
 - a. The Orders of the Commission for which Review is being sought i.e. Order dated 21.09.2018 and 06.10.2018 are in Nullity and grave injustice is done by the said orders. The Learned Counsel mentioned that as per the Hon'ble Supreme Court Judgment dated 12.04.2018 in the matter of **Civil Appeal No.14697 of 2015** (*State of Gujarat & Others Vs Utility users welfare associations and others*), the

Commission doesn't even have power to refer the matter to Arbitrator in absence of Judicial Member and there was no person of law as Member at the time of passage of Orders dated 21.09.2018 and 06.10.2018. Therefore, the Orders are itself in Nullity and there is no question of limitation in such cases.

- b. There is error apparent from the face of the record in the Orders and hence as per Regulation 34(1), 40 & 43 of the AERC (Conduct of Business) Regulations, 2004 the Condonation of Delay may be allowed by exercise of the power of the Commission under Regulation 40 and 43 of aforesaid regulations.
 - c. The Petitioner submitted that Delay is due to deliberation at the Government of Assam level. The Learned Counsel of the Petitioner quoted extensively and relied heavily on the judgment of Hon'ble Supreme Court in **Criminal Appeal No. 484 of 2005** dated 01 April, 2005 in the matter of *State of Nagaland vs Lipok AO & Others [(2005) 3 SCC 752]*, for justifying the delay in filing of petition mainly highlighting the manner of functioning of the Government.
6. After scrutiny of the Petition and Hearing the Learned Advocate, the Commission observed the following:
- a. The Regulation 34 (1) of the AERC (Conduct of Business) Regulations, 2004, clearly states that irrespective of the reason, Review against a particular order of the Commission may be filed within 60 days, the relevant para is reproduced below:
“34. Review of the decisions, directions and orders:-
(1) Any person aggrieved by a decision or order of the Commission, from which no appeal is preferred or allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decision/ order was passed by the Commission or on account of some mistake or error apparent from the face of record, or for any other sufficient reason, may apply for review of such order within 60 days of the date of decision/ order of the Commission.”..(emphasis added)
 - b. The Commission is not going to discuss on the contention of the Learned Advocate of the Petitioner regarding the Orders being Nullity, as that is a matter of interpretation. The relevant para of the Hon'ble Supreme Court in judgment dated 12.04.2018 in **Civil Appeal No. 14697 of 2015** (State of Gujarat & Others Vs Utility users welfare associations and others) is reproduced below:

“The real adjudicatory function is only provided in sub-clause (f) whereupon the Commission has the option of adjudicating the disputes between the licencees and generating companies, or to refer such disputes to arbitration.”.. (emphasis added)

As per the above order, the Commission in absence of person of law as Member of the Commission, exercised the option of referring the dispute to an Arbitrator vide Orders dated 21.09.2018 and 06.10.2018. The Commission is of the view that act of referring the matter to an arbitrator is of administrative nature.

Furthermore, as stated by the Petitioner, Arbitration process has already started, and both parties are participating in the said process. The question of grave injustice also doesn't arise because both parties are having equal opportunities to present their side before the Arbitrator.

- c. The Petitioner didn't present any substantial material for delay, rather relied heavily on the events subsequent to the internal communication dated 12.07.2019 of Government of Assam. It is to be noted that, APDCL is an independent company, not a Government department. Further, the Hon'ble Supreme Court Order dated 24.02.2012 in the **Appeal No 2474-2475 of 2012** in the matter of Office of the Chief Post Master General & Ors Vs Living Media India Ltd & Anr, clearly observed that no special consideration to be made for Government or Government entities in terms of condonation of delay.
- d. Further it is observed by the Hon'ble Supreme Court in its judgment made in **Ajit Singh Thakur Singh & Anr vs State of Gujarat in Criminal Appeal no 329/1979 dated 09.01.1981**, that sufficient cause must be established that because of some event or circumstances arising before limitations expired, it was not possible to file the appeal/review within time. No event or circumstances arising after the expiry of limitations can constitute such sufficient cause. The relevant para is reproduced below:

“it is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause”..

(emphasis added)

In the instant matter, petitioner herein even after knowing the order and judgment simultaneously had neither raised any objection against the order nor took any endeavor to approach before the Commission to review of its order within stipulated time. It appears that there is no event or circumstances to substantiate the delay, which occurred prior to 12.07.2019 which is much beyond the period of limitation as specified in Regulation 34(1) of the AERC (Conduct of Business) Regulations, 2004. The event after 05.12.2018 cannot constitute sufficient cause.

7. In view of observations and discussions above, it is evident that, the Petitioner APDCL has failed to establish any sufficient, reasonable and valid ground for condonation of delay in filing the Review Petition.
8. The Petition No 02 of 2020 for condonation of delay is, therefore, dismissed and consequently the petition no 03 & 04 of 2020 are not admissible as they are barred by limitation of time and hence dismissed.

s/d
(S.C.Das)
Chairperson, AERC

s/d
(S.N. Kalita)
Member, AERC

s/d
(B. Borthakur)
Member, AERC