

Before

UTTARANCHAL ELECTRICITY REGULATORY COMMISSION

In the matter of:

Misc. Applications dated 15-09-2003 (No. 24/2003) and dated 29-09-2003 (No.27/2003) filed before the Commission by Uttaranchal Jal Vidyut Nigam Ltd, Dehradun

Coram

Sri Divakar Dev Chairman

Date of Order 17th May, 2004

ORDER

An Application was filed before the Commission by Uttaranchal Jal Vidyut Nigam Ltd. (UJVNL) on 15th Sept. 2003 requesting that the time given by the Commission to Uttaranchal Power Corporation Ltd. (UPCL), the distribution licensee, to implement the Tariff order dated 08-09-2003 should be extended by 30 days. The reason given by the applicant for this request made on behalf of another party was, to enable the applicant to file an application for review of the said order. Another application was filed by the same applicant on 29-09-2003 seeking amongst other things review of the Commission's order dated 08-09-2003. Looking at the contents of these applications and the prayers made therein, the Commission decided to hear the applicant before taking a view on their

admissibility. In the meantime Commission's order dated 08-09-2003 was challenged by UPCL before the Hon'ble High Court and it was therefore considered appropriate that Hon'ble High Court's decision may be awaited before taking any view on these applications. Since the matter before the Hon'ble High Court has now been disposed off, these applications are being taken up for decision on their admissibility. The applicant was heard personally in this matter on 15-04-2004.

2. Commission's powers to review its own orders flow from section 94(1)(f) of the Electricity Act, 2003 and are the same as those conferred on a civil court by the Code Of Civil Procedure (CPC). These have been spelt out in section 114 of the Act read with order 47. While number of other provisions of law have been referred to in support of the applicant's request, the same do not in any way enhance the powers of review available to the Commission under the aforesaid provisions of CPC. Therefore for the review application to be admitted, it necessarily has to meet the requirements of section 114 and order 47 of the CPC. As per these provisions, the specific grounds on which an order already passed can be reviewed are:

- (a) If there are mistakes or errors apparent on the face of the record,
- (b) On discovery of new and important matter or evidence which, after due diligence was not within knowledge or could not be produced at the time of the order
- (c) If there exist other sufficient reasons.

Given this unambiguous position of law as spelt out above it has to be now seen whether the application under consideration meets these requirements or not.

3. UJVNL's application dated 29-09-2003 lists out flaws and infirmities perceived by it in the Commission's order. These alleged flaws and infirmities relate to the power purchase price of UPCL; alleged discrimination between UJVNL and small and medium hydro plants; validity of the Power Purchase

Agreement executed between UPJVNL and UPPCL; inconsistency in Commission's standards, practices and policies; discrepancy in application of principles; alteration of rate of cess; tariff applicable to employees of the corporation; scope of Power Development Fund, so on and so forth. The applicant's understanding and views on any or all of these matters are, and can indeed be different from those contained in the Commission's order dated 08-09-2003, which is based on facts and law. Relief against such perceived grievances cannot be granted by the Commission itself reconsidering the issues through review under section 114 and order 47 of the CPC and revising the earlier decision. Such relief, if warranted at all, can be granted only by the appellate authority.

4. Its has been argued that the Commission has erred in not taking in to consideration a letter dated 26-08-2003 which it is admitted did not form part of the record of proceedings in which the order dated 08-09-2003 was given. It is also not denied that the applicant was given ample opportunity to make his submissions and file such evidence as he likes before the Commission and the same was also availed of. In fact submissions were made by the applicant in writing before the Commission by the applicant on 22nd July, 2003 and again on 30th August, 2003 but they do not even mention the letter dated 28-06-2003, what to say of filing it. Further the Commission gave personal hearing to the CMD of UJVNL and during this hearing also no submission pertaining to this letter, on which so much emphasis is being placed now, was made. Further the Commission specifically asked the applicant on 04.08.03 to furnish the basis and the law under which the power purchase price for UPCL was fixed. In response the applicant filed an affidavit, on 11.08.03 which has been considered and dealt with in the order, but again failed to file the said letter or to even refer to it. It appears that the applicant did not consider this particular document to be relevant or important enough to be filed as evidence or even to be referred to in his own submissions made before the Commission. It is therefore totally unreasonable to expect the Commission to seek out on its own and take on record a piece of evidence which inspite of repeated opportunities the applicant himself

failed to file. The applicant's expectation that his own failure to file any evidence should have been made up by the Commission seeking out the document on its own, is indeed strange. Such an action on Commission's part would actually have appeared partisan and improper Commission's action in this regard was therefore proper and correct and does not by any stretch of imagination be called an error in considering or appreciating any piece of evidence, as the document in question was never filed by way of evidence. Such being the case, question of rectification of this alleged error under section 114 of the CPC simply does not arise.

5. It has been further argued that an affidavit filed by the Principal Secretary (Irrigation & Energy) of Uttaranchal Government before the Hon'ble High Court in civil writ petition no. 941(MB) of 2003 is a piece of evidence which the applicant could not produce before the Commission and this therefore is sufficient reason for the Commission to review its order in terms of order 47 of the CPC. Perusal of said affidavit shows that the same was sworn only on 21-10-2003, that is about one and half months after the Commission's order review of which is now being sought. In other words this document did not even exist when the Commission passed the order. Further it is only a submission made before the Hon'ble High Court stating Government's opinion on what should be the charge payable to UJVNL till the same is finally determined by the Commission. This was only Government's opinion on the subject on which the Hon'ble High Court has not passed any order or given any direction. Interestingly, while approving the rate of 60.5 p/unit Government itself had directed that this rate may be got approved from the Commission, which was not done and this part of Government's directions was ignored. It may be pointed out here that the question as to what should be the price payable to UJVNL for power supply to UPCL has been dealt with extensively on pages 102 to 107 of the Commission's order and Government's above view does not in any way change the position. For reasons given above Government's submission before the Hon'ble High Court on this issue contained in the said affidavit does not make material difference and therefore does not, call for any review of the Commission's order.

6. Other flaws and mistake in the Commission's order alleged in the application are substantive in nature and cannot be called mistakes or errors, which are apparent on the face of the record and which can be corrected by the Commission by reviewing its order. Further the government's affidavit or the letter referred to in the preceding paragraphs do not contain any new facts, which if not taken into account at this stage are likely to result in miscarriage of justice Applicant's present emphasis on them appears to be nothing but an attempt to somehow or the other invoke section 114 of the CPC and get the order reviewed.

7. Time and again Hon'ble Supreme Court and Hon'ble High Courts have held that the review jurisdiction is not a substitute for an appeal and cannot be exercised for reconsideration of the issues already decided. The errors or mistakes for correction in review proceedings should be apparent on the face of the record, that is the same should be self-evident. There has to be a patent error, which could be detected without advancing long drawn arguments. Hon'ble Supreme Court in the case of Lily Thomas etc. vs. Union of India and others in AIR 2000 Supreme Court page 1650 has categorically decided this question leaving no room for further doubts or interpretations. This position has been reiterated by the Hon'ble Supreme Court in State of Haryana vs. Mohinder Singh and others on 12.11.2002. None of the flaws alleged by the applicant in the Commission's order is a self evident patent error, but on the contrary are merely applicant's perceptions and conclusions based on his own knowledge and understanding of facts and law which the Commission does not subscribe to.

8. The applicant's counsel has also hid considerable emphasis on the third ground of review under the CPC, namely 'for any other sufficient reason'. It has been argued that even if the application does not meet the first two requirements of order 47, it can and it should be admitted under this particular provision. This is a misconceived contention and is at total variance with the letter and spirit of order 47 of the CPC. It is a well settled principle that the expression "any other sufficient reason" will have a meaning analogous to grounds specified

immediately before. This portion of order 47 cannot be used to nullify the specific requirements stipulated in the earlier portions of the same provision. In this connection the decision of the Hon'ble Supreme Court, again in the case of Lily Thomas etc. vs. Union of India and others in AIR 2000 Supreme Court page 1650 spells out the position unambiguously. In view of this well settled position the scope of the third condition of order 47 of the CPC that is, "any other sufficient reason", cannot be extended to include all other reasons irrespective of whether they are in conformity with the specific requirements stipulated under order 47 itself or not. The Commission does not find any justification whatsoever for admitting the said application for review/modification/rectification etc. for hearing.

9. For reason given as above the application for review/modification/rectification etc. dated 29-09-2003 is not maintainable under section 94(1)(f) of the Electricity Act, 2003 read with section 114 and order 47 of the CPC. The application is accordingly not admitted and stands rejected.

10. The application dated 12-09-2003 seeking extension of time for implementation of Commission's order by the licensee has now become redundant as the licensee has already implemented the said order in compliance of the Hon'ble High Court's directions. The same is also hereby rejected.

**DIVAKAR DEV
CHAIRMAN**