

**Before**

**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

**In the Matter of:**

Petition under Regulation 40(1) read with Regulation 59 & 62 of Conduct of Business Regulation, 2014 for seeking post-facto approval regarding Investment on the project for implementing Integrated Automatic Meter Reading System on 11000 Nos. Consumers (Industrial Category having load 5 KW and above and Commercial category having load 10 KW and above) to be executed on turnkey basis.

And

**In the Matter of:**

Uttarakhand Power Corporation Ltd. (UPCL)

...Petitioner

**Coram**

<b>Shri Subhash Kumar</b>	<b>Chairman</b>
<b>Shri C.S. Sharma</b>	<b>Member</b>
<b>Shri K.P. Singh</b>	<b>Member</b>

**Date of Hearing: February 04, 2015**

**Date of Order: February 25, 2015**

**ORDER**

This Order relates to the Petition filed by Uttarakhand Power Corporation Limited (hereinafter referred to as "UPCL" or "the Petitioner" or "the licensee") under Regulation 40(1) read with Regulation 59 & 62 of Conduct of Business Regulation, 2014 for seeking post-facto approval regarding Investment on the project for implementing Integrated Automatic Meter Reading System on 11000 Nos. Consumers (Industrial Category having load 5 KW and above and Commercial category having load 10 KW and above) to be executed on turnkey basis.

## 1. Background

- (1) UPCL vide its letter No. 2815/UPCL/Com/IAMR/D(P) dated 30.12.2014 had filed an application under Regulation 53(1) read with Regulation 74 & 77 of Conduct of Business Regulation 2004 for seeking post-facto approval regarding Investment on the project for implementing Integrated Automatic Meter Reading System on 11000 Nos. Consumers (Industrial Category having load 5 KW and above and Commercial category having load 10 KW and above) to be executed on turnkey basis.
- (2) The Commission vide its letter No. 1952 dated 22.01.2015 directed UPCL that the Regulations referred in the Petition under which the Petition has been filed are repealed now and the same has been replaced by UERC (Conduct of Business) Regulations, 2014 notified on 20.12.2014, therefore, UPCL should file the same accordingly by 30.01.2015 and hearing for admissibility in the matter was also fixed for 03.02.2015. Due to declaration of public holiday on 03.02.2015 (on account of Guru Ravi Das Jayanti) the hearing was re-scheduled for 04.02.2015.
- (3) UPCL vide its letter No. 327/UPCL/Com/IAMR/D(P) dated 30.01.2015 re-submitted the Petition in accordance with the UERC (Conduct of Business) Regulations, 2014.
- (4) On preliminary examination of the aforesaid application for admissibility, it has been observed that:
  - (a) UPCL has filed the Petition for ex-post facto approval for the proposed investment of ₹5.99 Crore.
  - (b) UPCL has submitted that a Petition in the matter for seeking approval of the Commission was filed earlier on 26.09.2013, which was decided to be closed by the Commission vide its Order dated 28.02.2014 holding that the Petition was not maintainable. UPCL further, submitted that it also filed a Petition dated 07.04.2014 seeking review/reconsideration of the Commission's Order dated 28.02.2014, which was also rejected by the Commission vide its Order dated 16.05.2014.

- (c) UPCL has submitted that before issuance of the Commission's Order dated 28.02.2014, it had issued a LoA dated 22.02.2014 to the firm in anticipation of favorable Order of the Commission and that in the aforesaid proceeding great difficulty arose before it in carrying out the scheme and that the matter came to stand still. Since, the LoA had been issued, the contractual obligation were incurred, which would have vast impact on financial aspect as well as on the goodwill of the Corporation and the same may lead to the litigation. In order to obviate the difficulties, a modified DPR was placed before the Board in 68<sup>th</sup> Board of Directors meeting held on 27.11.2014 and the Board had directed it to seek approval of the Commission on the revised DPR and pursuance to this the present Petition has been filed.
  - (d) UPCL has also submitted that though as per Regulation 40(1), it is required to seek prior approval, however, due to inadvertent mistake and oversight the prior approval in the present matter could not be sought. UPCL further, submitted that the mistake is liable to be excused and renders an apology.
  - (e) UPCL has requested the Commission that it may invoke the inherent power under Regulation 59 and also power to dispense with the requirement of Regulation 62 of UERC (Conduct of Business) Regulations, 2014 and grant post facto approval in the interest of justice as disapproval in the matter would cause great financial hardship and may also lead to future litigation affecting the name and goodwill of the Corporation.
- (5) The hearing was held on the re-scheduled date i.e. 04.02.2015. Chief Engineer Level-1 (Commercial), UPCL represented the case and reiterating the submissions of the Petition, requested the Commission for admitting the same.

## **2. Commission's views and Decisions**

- (1) Earlier, in the matter, the Commission in its Order dated 28.02.2014 was of the view that:

"... filing of the application after more than a year from the date of inviting E-Tender and after more than 04 months from the date of opening of the financial bid for seeking approval for the investment by the licensee, is a clear contravention of the Regulations and Licence Conditions narrated hereunder:-

- (i) Regulation 17(7) of UERC (Terms and Conditions for Determination of Tariff) Regulations, 2011 specifies as under:

"The Transmission Licensee or Distribution Licensees or SLDC are required to file petition for 'in-principle' approval of all projects/schemes whose capital cost is more than Rs. 2.5 Crs in a manner specified in Regulation 23:

Provided that where the Commission has given an 'in-principle' acceptance to the estimated capital cost and financing plan, it shall act as a guiding factor for applying prudence check on the actual capital expenditure."

Further, Regulation 23(2) UERC (Terms and Conditions for Determination of Tariff) Regulations, 2011 provides that:

"Any licensee intending to establish, operate and maintain or augment capacity of a transmission system or distribution system or SLDC shall file an application/petition under affidavit to the Commission in accordance with UERC (Conduct of Business) Regulations, 2004 for 'in principle' approval of the project capital cost and financing plan before taking up a project. ..."

Accordingly, as per above referred Regulations, UPCL was required to file a separate petition for seeking investment approval.

- (ii) Regulation 53(1) of UERC (Conduct of Business) Regulations, 2004 clearly stipulates that "Unless otherwise directed by the Commission, every licensee shall obtain **prior approval of the Commission** for making investment in the licensed business if such investment is above the limits laid down by the Commission in the Licence Conditions."
- (iii) Clause 11.3 of the Licence condition stipulates that "The Licensee shall make an application to the Commission for obtaining **prior approval of the Commission** for schemes involving major investments as per the procedure which the Commission may specify from time to time and demonstrate to the satisfaction of the Commission..."

In view of the above, the Commission in the aforesaid Order had held that:

*“The reason advanced for not adhering to these provisions of assessing actual cost is not valid and cannot be accepted for any relaxation in these binding and statutory provisions. The Commission therefore, holds that this petition is not maintainable and, accordingly, decides to close this petition.”*

- (2) Further, on the review filed by UPCL on the Commission’s Order dated 28.02.2014, the Commission did not find sufficient and sustainable grounds, and, therefore, issued an Order dated 16.05.2014 holding that the review Petition was not maintainable and decided to reject the same.
- (3) Regulation 40(1), Regulation 59 & Regulation 62 of UERC (Conduct of Business) Regulations, 2014 under which the Petition has been filed specify as under:

***"40. Requirement for Investment Approval by the Commission***

- (1) *Unless otherwise directed by the Commission, every licensee and SLDC shall obtain prior approval of the Commission for making investment in its business if such investment is above the limits laid down by the Commission from time to time by a general or special Order.*

*Provided that in case of force majeure events, the Commission may consider relaxing the requirement of seeking prior approval of the Commission for making investment in the business by every licensee and SLDC. However, such events would have to be demonstrated that they were not within the control of the utilities.*

***59. Inherent power of the Commission***

- (1) *Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.*
- (2) *Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Central Act or State Act, a procedure, which is at variance with any of the provisions of these Regulations, if the*

*Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient for dealing with such a matter or class of matters.*

- (3) *Nothing in these Regulations shall, expressly or impliedly bar the Commission to deal with any matter or exercise any power under the Central Act or State Act, for which no Regulations have been framed, and the Commission may deal with such matters or exercise such powers and functions in a manner it thinks fit.*

## **62. Power to dispense with the requirement of the Regulations**

*“The Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties, dispense with the requirements of any of the Regulations in a specific case or cases subject to such terms and conditions as may be directed.”*

- (4) With regard to the filing of the Petition under Regulation 40(1) of CBR, 2014, it has been explicitly specified in the Regulation that prior approval is required to be sought from the Commission, while the Petition is being filed for post-facto approval, which is not in accordance with the provision of the Regulation.
- (5) Further, with regard to exercising the inherent power of the Commission, the Commission is of the view that it is to be exercised in order to subserve the ends of justice and to prevent the abuse of the process of the court in case coming before it. Inherent powers can be invoked when no other remedy is available. It cannot be invoked as a substitute for appeal, revision or review.

At many instances the court has ruled out that the inherent powers cannot be invoked when the remedy is provided and the party is neglecting to avail himself of the same.

In the matter of Western Electricity Supply Co. Ltd. (WESCO) vs Orissa Electricity Regulatory Commission & Ors dated 14 December, 2012 in Appeal No. 137 of 2012, Hon'ble ATE has held:

*“...37. Again, if the Statute has provided for exercise of inherent power which is different from the ‘Power to remove difficulties Clause’ and which is a judicial power, then it can be exercised only to advance the cause of justice and to prevent the abuse of the process of law. Further, such inherent power is not at all exercisable when there is specific provision of law to address a remedy. When there is no specific provision in a given situation inherent power can be exercised. ”*

It is observed from the above case that the inherent power cannot be invoked when there exists a remedy. In the instant Case remedy was an appeal in Hon’ble APTEL. Not only that, instant Case also does not meet the pre-requisites for exercise of inherent power i.e. to advance the cause of justice or to prevent abuse of the process of Law

- (6) Regarding power to dispense with the requirements of Regulation, the Commission is of the view that it is a general provision and is invoked only where the interests of justice can be better served by such action. The provision can be exercised only in the extraordinary circumstances and not every now and then.
- (7) In light of the above discussion, the Commission holds that the Petition is not maintainable and accordingly decides to close it.

**(K.P. Singh)**  
**Member**

**(C.S. Sharma)**  
**Member**

**(Subhash Kumar)**  
**Chairman**