

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 24 of 2016

In the matter of:

Petition for review of the Order dated 5th April, 2016 issued by the Commission on approval of Business Plan and determination of Multi Year Tariff for the second Control Period FY 2016-17 to FY 2018-19, True up of FY 2014-15 and Annual Performance Review for FY 2015-16 for Power Transmission Corporation of Uttarakhand Ltd.

AND

In the matter of:

Power Transmission Corporation of Uttarakhand Ltd. ...Petitioner

AND

In the matter of:

Uttarakhand Power Corporation Ltd. ...Respondent

CORAM

Shri Subhash Kumar Chairman

Shri K.P. Singh Member

Date of Hearing: June 21, 2016

Date of Order: July 11, 2016

This Order relates to the Review Petition filed by Power Transmission Corporation of Uttarakhand Ltd. (hereinafter referred to as "PTCUL" or "Licensee" or "Petitioner") seeking review of the Tariff Order issued by the Commission on 05.04.2016 in the matter of approval of Business Plan and determination of Multi Year Tariff Petition for Control Period FY 2016-17 to FY 2018-19, True up of FY 2014-15 and Annual Performance Review for FY 2015-16 for PTCUL.

1. Petitioner's Submission

1.1 The Commission, vide its Tariff Order dated 05.04.2016, had carried out the final Truing-

up for FY 2014-15 based on the audited accounts for FY 2014-15 and approved the Business Plan & determined the Annual Transmission Charges for the second Control Period, i.e. FY 2016-17 to FY 2018-19 for the Petitioner.

1.2 The Petitioner subsequently vide its Petition dated June 01, 2016 sought review of the Tariff Order dated 05.04.2016 on the following grounds:

1.2.1 Capitalisation of LILO of 132 kV Almora-Pithoragarh line for 220 kV S/s Pithoragarh (PGCIL) under REC New Scheme

- a. The Petitioner submitted that in the true up petition it had claimed a total capitalisation in FY 2014-15 of Rs. 9.03 Crore for the said project. However, the Commission did not allow the cost escalation in the construction of the project and had only considered the allowable cost of Rs. 5.07 Crore including IDC of Rs. 1.05 Crore for the project on the ground that there was no practice of recording the cost escalation during the execution nor the Contract Agreements were revised.
- b. The Petitioner also submitted that the Commission had granted Investment Approval for the project in 2007 for an amount of Rs. 4.02 Crore. The Contract Agreement dated 12th March, 2010 provided for $\pm 20\%$ variation in quantity and price. Accordingly, contract price could only have been finally ascertained upon completion of the work. Further, in the execution of the said project work there was variation in the quantity which was within the limit prescribed in the Contract, hence, the variation as per the provisions of the Contract did not require Contract Agreement to be amended.
- c. The amount of Rs. 9.03 Crore claimed by Petitioner as capitalisation for the project included both the price variation and quantity variation. The Petitioner vide its submission dated 20-01-16 before the Commission gave the reasons for the delay in commissioning of the project which primarily were (i) Severe Right of Way problem; (ii) Re-routing of line due to ROW problems. The Petitioner submitted that the District Magistrate vide letter dated 13-08-10 directed for the shifting/re-routing of line after a joint meeting of all the stakeholders. Subsequently, the resurvey work was conducted and consequently the alternate

route was adopted. Hence, the forest clearance was again required to be obtained and the same was granted vide letter dated 15-04-11. After the grant of forest clearance, the land transfer was informed for the said line vide letter dated 29-02-12. Hence, the delay and resulting increase in cost due to price variation was not attributable as within the reasonable control of PTCUL as the Petitioner had made all the possible efforts to sort out the ROW problems and major reasons in delay of the project were due to force majeure situation and for reasons beyond the control of the Petitioner.

1.2.2 Capitalisation of 2 No. 220 kV Bay at 400 kV S/s Kashipur under REC V Scheme

- a. The Petitioner submitted that the Commission did not consider the capitalization amount of 2 No. 220 kV Bay at 400 kV S/s Kashipur for Rs. 4.27 Crore in FY 2014-15. The Commission while observing that the first time capitalisation of projects claimed in FY 2014-15 were part capitalisations in comparison to the approved cost and thus had not approved such part capitalisation of the schemes in FY 2014-15 in accordance with the directions in the previous Tariff Orders.
- b. The Petitioner submitted that it had provided relevant document pertaining to commissioning of the said bays and also certificate of the Electrical inspector dated 14-11-13 in the tariff petition, from which it was apparent that the capitalisation of Rs. 4.27 Crore sought against the approved cost of Rs. 5.78 Crore was not the part capitalisation but was infact based upon the executed cost of the work which was less than the approved project cost.

1.2.3 RoE on GoU contribution from PDF

- a. The Petitioner submitted that it had claimed a recovery of Rs. 114.84 Crore in the proposed Annual Transmission Charges for FY 2016-17 on account of the RoE on GoU contribution from PDF for past years which was disallowed by the Commission for the following reasons:-

“With regard to the reference of the Order dated May 15, 2015 of Hon’ble ATE in the matter of M/s BHPL and PTC, the Commission reiterates its views expressed at Para 5.3.3 of this Order that the aforesaid Order issued in R. P. No. 2 of 2015 in Appeal No. 163 of 2015 have been issued on a different matter and, accordingly, Return on Equity on the Government

contribution from PDF has not been allowed for the past years till FY 2013-14. The Petitioner also submitted that the Order of Hon'ble ATE referred by the Petitioner has been stayed by the Hon'ble Supreme Court of India. Nevertheless, the Hon'ble ATE in its Order had nowhere directed the Commission to reopen the Commission's Orders for the Petitioner for the previous years. Hence, the Commission does not find the claim of the Petitioner in this regard as tenable."

- b. The Petitioner submitted that there was an error apparent on record considering the facts recorded in the order of the Hon'ble APTEL and the finding therein because of which the reason of refusal has been against the record causing an error. PTCUL further submitted that the Commission had held that Hon'ble ATE in its Order had nowhere directed the Commission to reopen the Commission's Orders which showed that the Commission itself was considering the matter as per general principle and independently of the same, yet has refused to consider the law and the principle determined by the Hon'ble APTEL by stating that no specific directions were issued to the State Commission to re-open the Commission's order for previous years. PTCUL submitted that no specific directions are required for applying the law of land or the principles determined by the Hon'ble APTEL. Further, no such orders could have been passed in the said matter and the Commission should have considered the same independently as per the clarity given by the Hon'ble APTEL regarding grant of RoE in the said order.
- c. The Petitioner further submitted that in case the Commission was of the view that the matter was subject to adjudication before the Hon'ble Supreme Court of India and it was not proper to dwell upon the said issue, then in such case it was not proper to have kept the matter in abeyance and not to decide the matter till the decision of the Hon'ble Court but passing a specific and express Order on the issue thereby disallowing the ROE was an apparent error.

1.3 The Commission held a hearing in the matter on 21.06.2016 wherein both the Petitioner and the Respondent were heard. UPCL during the hearing submitted that if any claim of PTCUL is accepted by the Commission the same may also be allowed to it through appropriate increase in tariffs so that it may pay the claim to PTCUL.

2. Commission's view and Decision

- 2.1 The Commission before determining the issues raised by the Petitioner, shall clarify whether the review under the provisions of Code of Civil Procedure, the Electricity Act, 2003 and Regulation 54 of the UERC (Conduct of Business) Regulations, 2014 is maintainable on the issues raised in the Petition. The Commission has repeatedly held in a catena of Orders that the jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is a new evidence which after exercising due diligence could not be brought up during the time of proceedings or if there is an error apparent on the face of the record. Addition of new facts already available with the Petitioner during the course of proceedings, a mere repetition through different counsel, of old and overruled arguments, a second trip over ineffectually covered grounds or minor mistakes of inconsequential import is obviously insufficient ground of review.
- 2.2 For further clarity the relevant provisions of the Code of Civil Procedure are reproduced as hereunder:

“Order XLVII, Rule 1(1) of the Code of Civil Procedure, 1908, provides for an application for review which reads as under: “Any person considering himself aggrieved

- a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
- b) by a decree or order from which no appeal is allowed, or*
- c) by a decision on a reference from a Court of Small Causes, 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 decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.”*

It is well settled that there are definitive limits to the exercise of the power of review;

Order XLVII, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important matter or evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

It is obvious that there cannot be re-hearing of the matter during review and an error, which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying exercise of review power.”

2.3 Moreover, the Hon'ble Supreme Court in *Sow Chandra Kante & Anr. vs. Sheikh Habib* (1975) 1 SCC 674, held as under:

"1. Mr Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a rehearing. May be, we were not right in refusing special leave in the first round; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

2.4 An erroneous decision cannot be reheard and corrected. The object behind review has been well explained by Supreme Court in "*S. Nagaraj v. State of Karnataka*", 1993 Suppl. (4) SCC 595, wherein their Hon'ble Apex Court held as under:

"Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to any one..... If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice."

2.5 In the light of the said legal position, it would now be appropriate to examine as to

whether any error or mistake has crept in the order dated 05.04.2016 and if yes, whether the error has led to miscarriage of justice and whether a review is warranted in any of the issues raised by the Petitioner.

2.6 Having examined the submissions of the Petitioner, the following issues arise before the Commission for consideration and decision:

- A) Restricting the Capital cost of “LILO of 132 kV Almora-Pithoragarh Line for 220 kV S/s Pithoragarh (PGCIL)” at Rs. 5.07 Crore against the Actual expenditure of Rs. 9.03 Crore;
- B) Disallowance of capital expenditure pertaining to “2 No. 220 kV Bay at 400 kV S/s Kashipur” by considering the expenditure as part capitalization;
- C) Disallowance of the Return on Equity on the PDF amount.

2.7 The Commission following the provisions of the Civil Procedure Court and in line with the laws applicable has dealt with the Petitioner claims issue wise as under:

2.7.1 Restricting the Capital cost of “LILO of 132 kV Almora-Pithoragarh Line for 220 kV S/s Pithoragarh (PGCIL)” at Rs. 5.07 Crore against the actual expenditure of Rs. 9.03 Crore.

2.7.1.1 In this regard, it would be pertinent to mention that the Commission had accorded investment to the said project vide its Order dated October 23, 2007 wherein the Commission directed PTCUL as under:

“10...

c) After completion of the project the Petitioner shall submit the completed cost of each of the works.

d) The additional cost burden, if any, arising from out of the cost or time over runs or variation in the scope of implementation of the project and shortfalls in the revenue estimates or on any other account shall not be reflected in the Annual Revenue Requirement of the licensee nor shall be allowed to be passed on to the consumers. “

2.7.1.2 The Commission had directed the Petitioner to submit the completed cost of each of the works after completion of the project. However, the Petitioner had been negligent of ensuring compliance of the said directions of the

Commission. The Commission agrees with the submission of the Petitioner that as per the Contract, the contract price could only have been finally ascertained upon the completion of the work. In the present case the date of commissioning of the said line was 02.04.2014, however, the details of the said work was submitted in the Petition dated 30.11.2015. The Petitioner had sufficient time to approach the Commission for the approval of the escalated Capital cost of the project.

2.7.1.3 Further, in respect of the time overrun, the Petitioner had submitted that vide its submission dated 20.01.2016, it had furnished the reasons for the delay of the project which were attributable to: i) Severe Right of Way problem; ii) Re-routing of line due to ROW problems. The Petitioner further submitted that consequent to the District Magistrate letter dated 13.08.2010 directing it for shifting/re-routing of line after a joint meeting of all the stakeholders and consequently the resurvey work was conducted and the alternate route was adopted. The fresh forest clearance was granted vide letter dated 15.04.2011. After the grant of forest clearance, the land transfer was informed for the said line vide letter dated 29.02.2012. Accordingly, the Petitioner submitted that the delay and resulting increase in cost due to price variation was not attributable to any fault within the reasonable control of PTCUL.

2.7.1.4 It is also pertinent to mention that the Petitioner during the Technical Validation Session held on 12.01.2016 was directed to submit the justification for the cost overrun and the details of IDC giving breakup of the same up to Schedule date of completion (SCOD) and from SCOD to actual date of completion, if cost overrun was due to the delay in commissioning of the project. In response, the Petitioner vide submission dated 20.01.2016 submitted that the escalation in cost was due to the ROW issue and submitted the document for the same.

2.7.1.5 From the above Paras, it is clear that the Petitioner has brought the new facts regarding time overrun to the notice of the Commission which cannot be the ground of review as the same information/facts was available with PTCUL and

could have been produced by it during the tariff proceedings. However, the Commission has observed that the Petitioner vide submission dated 29.01.2016 and 10.02.2016 had submitted the details of the price variation for the projects commissioned under REC-II Scheme (also referred as “REC New Scheme”) as per the directions of the Commission. The same were not considered by the Commission inadvertently while finalizing the Tariff Order dated 05.04.2016 and the same satisfies the condition of error apparent on the face of record.

2.7.1.6 Further as stated in *Medical & Dental College V Nagaraj* reported in AIR 1972 Mysore 44:

“.....Where there is an error apparent on the face of the record, the question as to how that error occurred, is of no relevance for the purpose of review, and that it is immaterial whether such effort occurred by reason of the counsel’s mistake or had crept in by reason of oversight on the part of the court”. As stated by Wadsworth J.. in Vantatarayulu Naidu v. Rattamma Garu, AIR 1939 Mad 293, Where there is an error apparent on the face of the record, it should be corrected at the earliest possible time without driving the parties to the expense of an Appeal or Revision Petition to which there would be no answer”

2.7.1.7 In accordance with Regulation 23(3) of UERC (Terms and Conditions for Determination of Tariff) Regulations, 2011, the approved Capital Cost shall be considered for tariff determination and if sufficient justification is provided for any escalation in the Project Cost, the same may be considered by the Commission subject to prudence check. The Petitioner vide its submissions dated 29.01.2016 and 10.02.2016, submitted that there was an escalation in the capital cost of the said transmission line due to price variation amounting to Rs. 1.57 Crore. Accordingly, the Commission decides to review the capital cost of the said transmission line to the extent of price variation.

2.7.2 Disallowance of capital expenditure pertaining to “2 No. 220 kV Bay at 400 kV S/s Kashipur” by considering the expenditure as part capitalization.

2.7.2.1 The Petitioner submitted that the Commission did not consider the capitalization of 2 No. 220 kV Bay at 400 kV S/s Kashipur for Rs. 4.27 Crore under the capitalisation approved for REC V Scheme in FY 2014-15. The

Commission had observed that the first time capitalisation of projects claimed in FY 2014-15 were part capitalisations in comparison to the approved cost and thus had not approved such part capitalisation of the schemes in FY 2014-15 in accordance with the directions given in the previous Tariff Orders and had kept them to be considered only during the year by which significant capitalisation with respect to the approved cost was recognised in the books of accounts of the Petitioner in accordance with the directions of the Commission issued in the previous Tariff Orders.

- 2.7.2.2 The Petitioner had submitted the relevant document pertaining to commissioning of the said bays and also certificate of the Electrical inspector dated 14.11.2013, from which it was apparent that the capitalisation of Rs. 4.27 Crore was sought against the approved cost of Rs. 5.78 Crore which was not the part capitalization but was in fact based upon the executed cost of the work which was less than the approved project cost.
- 2.7.2.3 The Commission vide its deficiency letter dated 12.02.2016 had directed the Petitioner to submit the reason for claiming part capitalization for FY 2014-15 in case of first capitalization under various schemes (REC IV, REC-V, PFC-09303005, PFC-09303006, PFC-09303007, PFC-09303008 and PFC-09303012) such as (i) under REC IV scheme, the Petitioner had claimed capitalization of Rs. 16.77 Crore against the approved cost of Rs. 24.93 Crore for 132 KV S/S Haridwar Road Dehradun (80 MVA), (ii) under PFC-09303005 scheme, the Petitioner had claimed capitalization of Rs. 0.37 Crore against the approved cost of Rs. 4.79 Crore.
- 2.7.2.4 The Petitioner was given an opportunity to clarify the status of all the projects under aforementioned scheme during the Technical Validation Session. However, in reply, the Petitioner submitted the clarification only with regard to the illustrations given by the Commission. Further, as far as certificate of Electrical Inspector is concerned, such certificates are technical proof of charging of the asset and not the proof of full capitalization.

2.7.2.5 In this regard, the Hon'ble Apex Court had in S Bhagirathi Ammal Vs. Palani Roman Catholic Miss 2008 SC 719/MANU/ SC/8177/2007 held as under:

"...An error contemplated under the Rule must be such which is apparent on the face of the record and not an error which as to be fished out and searched. In other words, it must be an error of inadvertence. It should be something more than a mere error and it must be one which must be manifest on the face of the record. When does an error cease to be mere error and becomes an error apparent on the face of the record depends upon the materials placed before the Court. If the error is so apparent that without further investigation or enquiry, only one conclusion can be drawn in favour of the Appellant, in such circumstances, the review will lie..."

2.7.2.6 No grounds for review in this issue are satisfied as submission that the plant was complete and fully capitalized is a new fact brought up for first time in the review Petition and new facts which were known and could be produced before the Commission during the course of proceedings does not form grounds for review. Therefore, the Commission decides not to consider the capital cost for the redetermination of the tariff. However, the Petitioner is advised to raise the same during the next tariff proceedings.

2.7.3 Disallowance of the Return on Equity on the PDF amount.

2.7.3.1 The Petitioner has submitted that it had claimed the recovery of Rs. 114.84 Crore in the proposed Annual Transmission Charges for FY 2016-17 on account of the RoE on GoU contribution from PDF which was not considered by the Commission in the previous years. The Petitioner submitted that the Hon'ble ATE in its Order dated May 15, 2015 in R.P. No. 2 of 2015 in Appeal No. 163 of 2015 ruled in favor of the Petitioner. Further, the Hon'ble Supreme Court of India vide its Order dated 12.10.2015 has stayed the Order of the Hon'ble ATE dated 15.05.2015. The Petitioner submitted that it was hopeful of receiving the clarification and removing the stay in the current financial year and hence, requested the Commission to allow the Return on Equity on GoU contribution from PDF for REC Old, NABARD and REC IV Schemes not considered by the Commission in the previous years.

2.7.3.2 However, during the hearing on admission of the Petition, the learned counsel of the Petitioner agreed with the view of the Commission to take a view on the issue of RoE on the PDF once the Hon'ble Supreme Court pass its judgment in this matter. Further, deciding on the issue of Return on equity on PDF while the case is pending in the Supreme Court is barred under Section 11 of the Code of Civil Procedure, 1908 of the Code of Civil Procedure. The Section is reproduced hereunder:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

Accordingly, the Commission also clarifies that raising the issue again in the Commission while it is pending in the Hon'ble Supreme Court amounts to Res-Judicata and is not maintainable. The Commission would wait for the Apex Court's Orders on the issue and would decide accordingly.

2.7.3.3 Hence, out of the three issues, only one issue to the extent of capitalization on account of Price Variation of the Transmission Line, i.e. LILO of 132 kV Almora-Pithoragarh Line for 220 kV S/s Pithoragarh (PGCIL)” is legally valid for review.

2.8 As discussed above, the Commission has reviewed the capitalization allowed for the FY 2014-15 in respect of “LILO of 132 kV Almora-Pithoragarh Line for 220 kV S/s Pithoragarh (PGCIL)” in which impact of price variation could not be considered inadvertently. Based on the revised capitalisations, for the true up year FY 2014-15 and for FY 2016-17, the Commission has redetermined ARR for these years in accordance with the MYT Regulations, 2011 and MYT Regulations, 2015. While doing so, the Commission has followed the approach and methodology consistent with the Tariff Order dated 05.04.2016 in the matter of truing up of FY 2014-15 and MYT for FY 2016-17 to FY 2018-19. Accordingly, the incremental Annual Transmission Charges approved by the Commission for FY 2014-15 works out to Rs. 0.11 Crore which alongwith carrying cost upto FY 2016-17 works out to Rs. 0.13 Crore. Further, on account of the said revision in

approved capitalisation, there is an overall increment in Annual Transmission Charges approved by the Commission for FY 2016-17 to the tune of Rs. 0.45 Crore (including the true up expense of Rs. 0.13 Crore as discussed above). Hence, PTCUL is entitled to recover this approved incremental charge in addition to Annual Transmission Charges approved earlier, vide Tariff Order dated 05.04.2016 for FY 2016-17, from its beneficiaries in accordance with the provisions of the Regulations.

2.9 The approved revenue of UPCL against the approved ARR for FY 2016-17 left a surplus of Rs. 0.95 Crore which has been allowed to be retained with UPCL and the same is adequate to cover the above incremental charge payable to PTCUL.

2.10 With this the Petition filed by PTCUL stands disposed.

2.11 Ordered accordingly.

(K.P. Singh)
Member

(Subhash Kumar)
Chairman