

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Misc. Appl. No. 03 of 2019

In the matter of:

Review Petition filed by UJVN Ltd. under section 94(1) (f) of the Electricity Act, 2003 read with Regulation 54 of UERC (Conduct of Business) Regulations, 2014 seeking review of the Order dated 19.06.2018 read with letter no. 1144 dated 06.11.2018 on *Suo moto* proceeding regarding handing over of distribution business to UPCL.

And

In the matter of:

UJVN Ltd.
"UJJWAL", Maharani Bagh, GMS Road,
Dehradun

..... Petitioner

&

In the matter of:

Uttarakhand Power Corporation Ltd. (UPCL),
VCV Gabar Singh Urja Bhawan, Kanwali Road,
Dehradun

....Respondent

CORAM

Shri Subhash Kumar Chairman

Date of Hearing: February 11, 2019

Date of Order: March 07, 2019

Order

This Order relates to the Review Petition filed by UJVN Ltd. (hereinafter referred to as "Petitioner") seeking review of the Order dated 19.06.2018 read with letter No. 1144 dated 06.11.2018 of the Commission on a *Suo moto* proceeding initiated by the Commission in the matter of handing over of distribution business to UPCL (hereinafter

referred to as the 'Respondent' or 'UPCL'), under section 94(1) (f) of the Electricity Act, 2003 read with Regulation 54 of UERC (Conduct of Business) Regulations, 2014.

Background

2. With the advent of the Electricity Act, 2003 (the Act), distribution of electricity became a licensed activity under section 14 read with section 12 of the Act. With this, UPCL became the sole distribution licensee of the State under the aforesaid provisions of the Act. However, the Commission took cognizance of the fact that UJVN Ltd. is involved in distribution of electricity to the sundry consumers residing in nearby areas of the plant colonies is not only *ultra vires* but violative of section 12(b) of the Electricity Act, 2003 which stipulates that:-

Section 12. (Authorised persons to transmit, supply, etc., electricity):

No person shall

(a) transmit electricity; or

(b) distribute electricity; or

(c) undertake trading in electricity,

unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.

Accordingly, the Commission vide its Tariff Orders dated 10.05.2011, 04.04.2012, 06.05.2013, 10.04.2014, 11.04.2015, 05.04.2016 & 29.03.2017 has been continuously directing UJVN Ltd. to handover the electricity distribution business to the State Distribution Licensee namely Uttarakhand Power Corporation Ltd. (UPCL).

3. Observing non-compliance by the Utilities, despite the explicit directions in the aforesaid Orders, the Commission initiated a *suo moto* proceeding against the Managing Directors and the Nodal Officers of both the Utilities and issued Show Cause Notices vide letters dated 22.12.2017.
4. Subsequently, the Commission conducted hearing in the matter on 19.06.2018 and ordered that,

- “1. Both the respondents have failed to comply with the specific directions of the Commission issued with regard to Section 12 of the Electricity Act, 2003.*
- 2. Despite the Commission’s persistent directions in the matter since 2011, both the utilities are involved in shifting the blame of their own incompetency on each other and have shown a reckless attitude in ensuring the compliance in totality, which prima facie appears to be a deliberate defiant on the part of the utilities.*

Giving final opportunity, the Commission hereby directs the Managing Directors of both the utilities to personally ensure the compliance in toto latest by 30.09.2018 and submit compliance report before the Commission latest by 10.10.2018, failing which they shall be personally held responsible for non-compliance of the directions being issued by the Commission since 2011.

The Commission will take a final view in the matter based on the compliance reported.”

5. Subsequent to the aforesaid Order dated 19.06.2018, the Petitioner & Respondent submitted partial compliance report before the Commission vide letter No. 1314/UJVNL/02/D(O)/B-6 dated 08.10.2018 & No. 3841/UERC/UJVNL dated 17.10.2018 respectively and requested time extension for submitting the compliance upto 31.01.2019. The Commission taking lenient view in the matter, vide letter dated 02.11.2018, allowed time extension upto 31.01.2019 directing both the utilities to submit compliance with the Commission by 11.02.2019.
6. Meanwhile, the Petitioner made an additional submission before the Commission vide letter No. 3663/UJVNL/01/MD/U-6 dated 25.09.2018, wherein the Petitioner requested to exempt handing over of 33 kV Lakhwar-Vyasi transmission lines & feeders along with 33/11 kV Hathiyari & Lakhwar Sub-stations to UPCL in view of specific use of these lines & feeders particularly for construction power & thereafter for auxiliary power of Vyasi HEP and Lakhwar HEP.
7. In response to the aforesaid letter dated 25.09.2018 of the Petitioner, the Commission upholding to its earlier views in the matter, communicated the same to

Petitioner vide letter No. 1144 dated 06.11.2018, relevant paras of which are reproduced hereunder:-

"...it is pertinent to highlight that under section 12 of the Electricity Act, 2003, UPCL is the sole distribution licensee in the State who is authorized to distribute electricity to the consumers in the State including Supply to the consumers having temporary connections allowed for Construction purposes under Temporary category rate of charge. Further, it is also to remind that in post Electricity Act, 2003 scenario as per the electricity (Removal of Difficulty) Fourth Order, 2005, the scope of supply of electricity by a generator is limited to the housing colonies of its operating staff. Therefore, under prevailing provision of the Electricity Act, 2003 your aforesaid request is unacceptable.

In this connection, you are directed to ensure the compliance in accordance with the direction issued vide Commission's Order dated 19.06.2018 read with Commission's letter No. 1134 dated 02.11.2018."

8. However, instead of ensuring compliance of the aforesaid directions, UJVN Ltd. has now filed the instant Review Petition against the Order dated 19.06.2018 read with letter dated 06.11.2018 of the Commission vide reference No. 75/UJVNL/02/D(O)/B-8 letter dated 23.01.2019.
9. Further, the Commission decided to conduct a hearing on admissibility of the petition on 11.02.2019 and accordingly issued notices for hearing to the parties namely UJVN Ltd. and UPCL. On the scheduled date of hearing both the parties were present mooting their side of arguments before the Commission.
10. During the hearing, the Petitioner reiterated its submission made in the Petition and stated that:-
 - (1) The Commission while denying exemption of handing over of the 33 kV Lakhwar-Vyasi transmission lines & feeders along with 33/11 kV Hathiyari & Lakhwar Sub-stations to UPCL entirely over looked the fact that these lines & feeders were constructed by the Petitioner in 1980s for the specific purpose of providing construction power supply to its Lakhwar & Vyasi Projects.

- (2) At present the Petitioner is ensuring un-interrupted construction power supply through aforesaid feeders and lines, so that the pace of construction of said Hydro Power Projects is not disrupted.
- (3) By handing over of the 33 kV Lakhwar-Vyasi transmission lines & feeders to the Distribution Company may result in frequent interruptions in construction of the projects thereby hampering/delaying pace of construction as UPCL may further utilise these lines for providing power supply to its other category consumers e.g. domestic, commercial and industrial etc.
- (4) The 33 kV transmission lines & feeders for Lakhwar-Vyasi Projects were constructed way back in 1980s and are dedicated for project construction & auxiliary consumption and not for distribution business, and therefore do not fall in the category of distribution business.
- (5) The Commission has not taken cognisance of the fact that the Petitioner incurred cost in construction of lines and feeders. The Petitioner has also undertaken Renovation work of 33/11 kV Hathyari Sub-station in 2015-16 by incurring an expenditure of Rs 124.00 Lac. Further, the renovation work of 33/11 kV Lakhwar Sub-station is in progress.
- (6) On handing over of aforesaid feeders & lines to Distribution Company the cost incurred by the Petitioner for the purpose of construction and renovation of said feeders & lines will not be booked in the capital cost of the project(s) which will cause monetary loss to the Petitioner.
- (7) Further, the Petitioner *inter alia* requested that the Commission may kindly consider the submissions of Petitioner that could be at variance with the orders and regulations of the Commission, but are nevertheless fully justified from a practical viewpoint.

11. The Respondent submitted that:-

- (1) The present Petition is for claiming relief which is totally against the provisions of the Electricity Act, 2003 and also against the License conditions and cannot be granted in law, hence is liable to be rejected.

- (2) The present Petition is filed under section 94 (1)(f) of the Electricity Act, 2003 and Regulation 54 of UERC (Conduct of Business) Regulations, 2014 and same are not applicable in the matter as there is no ground for review as per law, nor there are any circumstances requiring the Commission to exercise its inherent power. Further, the Respondent submitted that where there are specific legal provisions regarding any remedy, the inherent power cannot be exercised.
- (3) The Petitioner in his Petition has failed to show any ground for review as permissible under law. That nowhere the Petitioner has put up a single line that justifies or qualifies the same being the review Petition and hence the same is more of the sort of an appeal in disguise rather than a review Petition.
- (4) The Petition does not have any cause of action.
- (5) The Petition is barred by time and the justification of delay as given in the Petition is totally inadequate and legally not acceptable.
- (6) The Petition is basically an appeal in form of a review Petition and requires application of mind and reassessment of the issues and facts which have already been adjudicated by the Commission.

Commission's observations, views & decision

12. The Commission heard the Petitioner and Respondent in the matter and based on the submissions made, therein, observed that the Review Petition under consideration before the Commission has to be examined under the governing laws of review and the principles laid out by the Hon'ble Supreme Court through its various judgements. For a Review Petition to be admitted, the party raising the said Petition must prove that the grounds raised in the Petition qualify the grounds of Review provided in Section 114 read with Order 47, Rule 1 of the Code of Civil Procedure (in short CPC). The grounds on which review can be sought are enumerated in Order 47, Rule 1 of CPC, which reads as under:

"1. Application for review of judgment (1) 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.” [Emphasis added]

Hence, the circumstances when review lies are:

- a) cases in which appeal lies but not preferred,
- b) cases in which no appeal lies,
- c) decisions on reference from Court of Small Causes; and

The grounds for review are:-

- i) discovery of new and important matter or evidence, or
- ii) mistake or error apparent on the face of the record, or
- iii) any other sufficient reason.

13. Further, the Hon’ble Supreme Court in *Kamlesh Verma Vs. Mayawati & Ors*, 2012 8 SCC 106 (*Writ Petition (Crl.) No. 135 of 2008*) has elaborated on the cases where review can be allowed or disallowed. The relevant extracts of the said case are being reproduced hereunder:

“20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him; (ii) Mistake or error apparent on the face of the record; (iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram v. Neki*, AIR 1922 PC 112 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius & Ors.* (1955) 1 SCR 520, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors.*

20.2. When the review will not be maintainable:

- i. A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- ii. Minor mistakes of inconsequential import.
- iii. Review proceedings cannot be equated with the original hearing of the case.
- iv. Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
- v. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
- vi. The mere possibility of two views on the subject cannot be a ground for review.
- vii. The error apparent on the face of the record should not be an error which has to be fished out and searched.
- viii. The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
- ix. Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

14. Since the Petitioner in its Petition has not reasoned any specific ground under which review falls, therefore, the submissions made by Petitioner are being examined in totality in light of the above principles of review as under:-

(1) The submission of the Petitioner that the Commission has overlooked the fact that the lines & feeders are constructed for a specific purpose i.e. for providing construction power supply to its Lakhwar & Vyasi Projects, therefore, the same may be exempted for being transferred to the distribution utility is incorrect. In this regard, it is relevant to revisit the letters dated 25.09.2018 & 06.11.2018 of the Petitioner and the Commission respectively, wherein, in the former the Petitioner had elaborated upon the purpose & utilisation of the line and in the latter the Commission had rejected the said request of the Petitioner for such exemption. Relevant extract of the said letter of the Commission is reproduced hereunder,

"...it is pertinent to highlight that under section 12 of the Electricity Act, 2003, UPCL is the sole distribution licensee in the State who is authorized to distribute electricity to the consumers in the State including Supply to the consumers having temporary connections allowed for Construction purposes under Temporary category rate of charge. Further, it is also to remind that in post Electricity Act, 2003 scenario as per the electricity (Removal of Difficulty) Fourth Order, 2005, the scope of supply of electricity by a generator is limited to the housing colonies of its operating staff. Therefore, under prevailing provision of the Electricity Act, 2003 your aforesaid request is unacceptable.

In this connection, you are directed to ensure the compliance in accordance with the direction issued vide Commission's Order dated 19.06.2018 read with Commission's letter No. 1134 dated 02.11.2018."

From the above it is amply clear that the contention of Petitioner that the Commission has overlooked the purpose of the line is so to say incorrect. Further, on the question of review, neither does this construe to be error apparent nor new evidence for the purpose of review.

- (2) Further, with regard to the submission of the Petitioner that by handing over of the 33 kV Lakhwar-Vyasi transmission lines & feeders to the Distribution Company/UPCL, it may result in frequent interruptions of power to the projects site thereby hampering/delaying pace of construction of the projects as UPCL may also utilise these lines for providing power supply to other consumers namely domestic/commercial/industry etc. The Commission is of the view that such assumption of the Petitioner is its own imagination as the distribution licensee/UPCL is bound by specific Codes and Regulations to ensure Standard of Performance (SoP) and accordingly is obligated to supply quality/reliable power efficiently to its end consumers. Assuming that the distribution licensee would fail to supply power efficiently and therefore a self-sufficing network be relied upon is contravening to the fundamental spirit/structure of the Electricity Act, 2003/conditions of the Licence. Moreover, a system runs in confirmation/consonance to the prevailing laws and not as per the convenience of individual entity.
- (3) Further, the Petitioner's claim that the lines and substations had been constructed by it, is not true as the same were constructed by the unbundled entity of the State, i.e. erstwhile UPSEB. However, post unbundling of the Electricity Boards and enactment of the Act, the scenario has completely changed. And now, in any case continuing with the same shall be in contravention to Section 12 (b) of the Act and accordingly, the same was communicated to the Petitioner in the impugned letter dated 06.11.2018 of the Commission.
- (4) With regard to the submission of the Petitioner that the lines & feeders for Lakhwar-Vyasi Projects are dedicated lines & feeders constructed by the Petitioner and that the Petitioner has incurred expenditure for renovation work is neither a new fact nor an error which the Commission ought to consider under review. The view of the Commission in the matter is explicit and firm since 2011, and is an extension of the provisions of the

Act/conditions of the Licence, therefore, such submission as above shall not be a subject of review.

- (5) With respect to the concern of the Petitioner that on handing over of aforesaid feeders & lines to Distribution Company the cost incurred by the Petitioner for the purpose of construction and renovation of said feeders & lines will not be booked in the capital cost of the project(s). It is known that the Petitioner has been successfully transferring the assets to the distribution licensee since 2011, as per direction of the Commission. Therefore, treatment of the assets to be transferred and accounting with respect to the same is ought to be conducted in the same manner as earlier for such transfer of assets. The submission seems to be a manufactured apprehension as this is not the first instance where Petitioner has to transfer its assets. However, the Commission would examine this aspect while carrying out the prudence check of the capital cost of the upcoming projects relevant in the matter.
 - (6) Besides above, and in agreement with the submission of the Respondent that the Petitioner nowhere in the Petition has shown any ground that justifies review. The Petitioner has not invoked any grounds for review and has simply filed the Petition reiterating its submissions tendered before the Commission in the original matter. Since the Petitioner has not invoked any grounds for review nor has the Petitioner been able to justify its submissions to qualify review as there is no error or mistake, no new evidence, no sufficient reason impressing to alter parent decision of the Commission.
15. Therefore, in light of the provisions in the Statutes, the facts of the case, the submissions of the Petitioner and precedents set by the Hon'ble Supreme Court, it is clear that the grounds stated by the Petitioner for review do not satisfy the grounds for review under the Code of Civil Procedure as there is no error apparent or mistake in the impugned Order. Therefore, the instant Review Petition brought before the Commission is rejected and disposed off.

16. Both the Petitioner and Respondent are directed to sit together and mutually resolve the issue within a reasonable time with a liberty to both the parties to approach the Commission in case of any dispute.

Ordered accordingly.

(Subhash Kumar)
Chairman