

UTTARANCHAL ELECTRICITY REGULATORY COMMISSION

Misc. Applications dated 12.09.2003 (No. 23/2003) and dated 19.09.2003 (No. 26/2003) filed by The Uttaranchal Power Corporation Ltd. seeking review and changes in the Tariff Order for the year 2003-04 issued by the Commission on 08.09.2003 and extension of time for its implementation.

Coram

Sri Divakar Dev

Chairman

Date of Order 1st October 2003

Order

1. These applications have been filed by Uttaranchal Power Corporation Ltd. (UPCL, the applicant) the sole transmission and distribution licensee in the State seeking review and / or modification and / or rectification of errors in the Commission's tariff order dated 08.09.2003 passed on the licensees petition no. 1-ARR/2003 pertaining to the aggregate revenue requirement and tariff determination for the financial year 2003-04. While the application dated 12.09.2003 sought deferment of implementation of the above order dated 08.09.2003 so as to enable the applicant to file a review petition, the application dated 19.09.2003 seeks review, rectification and modifications in the said order. Both the applications were taken up for preliminary hearing on admissibility on 29th September 2003. Sri Amit Kapoor, Advocate represented the applicant and presented his arguments in support of the applications.

2. The application dated 19.09.2003 seeks relief by invoking provisions of sections 93, 86, 181 and 185 of the Electricity Act, 2003; sections 1, 10, 11, 24 and 52 of Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification Order, 2001 read with section 87 of Uttar Pradesh Reorganization Act, 2000; sections

114, 151 to 153 and order 47 of the CPC; and regulations 139, 148 to 151 of Uttaranchal Electricity Regulatory Commission Conduct of Business (COB) Regulations, 2002.

3. Brief facts of the matter before the Commission are that a petition for approval of the aggregate revenue requirement (ARR) and revision of tariffs for the year 2003-04 was filed by the applicant on 14/30.05.03. After examination of the material furnished by the petitioner and hearing objections filed by different stakeholders, the Commission passed the final order in the matter on 08.09.2003 dealing at length with the various issues pertaining to the ARR and tariffs payable by different categories of consumers of electricity in the State. The present application seeks number of changes in the above order for reasons listed out in the application dated 19.09.03. The first question that arises in this connection is whether such an application can be entertained under law and whether the Commission is empowered under law to reconsider its earlier order and make changes in the same. Submissions on this issue were made on behalf of the applicant by their advocate Sri Amit Kapoor during the hearing on 29.09.2003.

4. Of the large number of sections referred to in the application, section 94(1)(f), (not section 93 as claimed in the application) of the Electricity Act, 2003, section 114 and order 47 of the CPC and regulation 139 of COB deal with the specific issue of Commission's powers to review its order. A combined reading of these sections shows that the powers available to the Commission in this connection are limited and have been defined in section 114 and order 47 of the CPC. While number of other provisions have been quoted in the application a reading of the same and that of the application clearly establishes that the relief that is being sought through these provisions inevitably involves review and amendments in the Commission's order dated 08.09.2003. Therefore for the application to be maintainable under law, it has to necessarily meet the test of fulfilling the requirements of section 114 and order 47 of CPC. As per the above provisions the specific grounds on which review can be made are (a) if there is a discovery of a new and important matter of evidence which after the exercise of due diligence was not within the knowledge or could not be earlier

produced; (b) there are mistakes or errors apparent on the face of the record; and (c) if there exist other sufficient reasons. Certain clerical errors and typing mistakes in the order have already been corrected by the Commission through a corrigendum on 29.09.2003.

5. As laid down by the Hon'ble Supreme Court and Hon'ble High Courts in number of cases the review jurisdiction is not a substitute for an appeal and cannot be exercised for reconsideration of the issues. The errors or mistakes should be apparent on the face of records namely it should be self-evident. There has to be a patent error, which could be detected without advancing long drawn arguments. It is also a settled principle that the expression "any other sufficient reason" should be given a meaning analogous to those specified immediately before, namely error or mistake apparent on the face of the record. Reference in this connection be made to the decision of the Hon'ble Supreme Court in the case of Lily Thomas V. Union of India reported at (2000) 6 SCC 224 cited by the applicant's counsel and authorities referred to in the said decision.

6. The counsel for the applicant has argued that decision of the Commission needs to be reviewed on number of grounds. These have been set out in Annexure B to the written submissions filed by the applicant. In support of the above the applicant has also relied on the decision of the Hon'ble Supreme Court in the case of Lily Thomas (supra) and other cases extracts of which have been given in Annexure A to the Written Arguments. The authorities cited by the counsel for the applicant give the specific circumstances where the review has been allowed as under:

- a) Decision does not effectively deal with and determine an important issue or matter (Moran Catholias and another V. Most Rev. Mar. Poulouse Athanasius and others AIR 1954 SC 526)
- b) An omission to consider the entire contents of an exhibit which was a material document, or failure to consider or deal with important documentary evidence (Naurate & others V. Anokha AIR 1954 Pepsu 85; Burmah Shell Oil Storage

Distributing Company India Limited V. Labour Appellate Tribunal AIR 1955 Cal 92; Karutha Kritya V. Ramalinga Raju AIR 1960 AP 17; Kishal lal V. Mohan Lal and others AIR 1952 Ajmer 1; and Shewakram Moolchand V. Brij Mohal Lal AIR 1951 Ajmer 55)

- c) Where the view expressed (i) is contrary to the well established rule or relevant provision of law, or (ii) ignores an important provision of law, or (iii) has been passed due to non consideration of the provision of the applicable law or notification, which the court is obliged to take judicial notice of (Shakutaklabai V. State of Maharashtra AIR 1986 Bombay 308; Hari Shankar Pal V. Ananth Nath Mitter AIR 1949 FC 106; Kamta Choudhary V. Lal Chandran Pratap Bahadur AIR 1945 Allahabad 284; State Bank of Travancore V. Vinayachandran and another AIR 1989 Kerala 302, Mohamammad Mumtazuddin Khan V. Fatima Begum AIR 1956 Hyd 164, Tinkari Sen V. Dulal Chandra Das AIR 1967 Cal 518
- d) Judgment proceeds on an erroneous assumption as to the material facts or a misconception of facts or law. (Lily Thomas V. Union of India (2000) 6 SCC 224)
- e) Too stringent a view overlooks the substantial rights of the parties (Maung Pu V. Ma Yip AIR 1930 Rangoon 162)
- f) Where there was an obvious lack of jurisdiction (Bomma Devara V. Lanka Venkata AIR 1939 Madras 293. Gameral V. Ram Narayan AIR 1956 Madhya Bharat 240, Lily Thomas V. Union of India (2000) 6 SCC 224)
- g) In the face of possibilities of cases arising in which obvious injustice would be worked by strict adherence with the terms of the judgment, as originally passed (Naraindas and others V. Chiraji Lal AIR 1925 Allahabad 364 and Lily Thomas V. Union of India (2000) 6 SCC 224)

7. On examination of the application filed, the oral submissions made and written submissions filed by the applicant the Commission does not find any merit in the contention of the applicant that there are any errors of law or fact or circumstances warranting exercise of the review jurisdiction on the principles laid down by the Hon'ble Supreme Court and the Hon'ble High Courts in their decisions. In this context

some of the important grounds for review given in the application are briefly discussed below:

8. The principal contention of the applicant stated in the review application is that the Commission has disallowed a sum of Rs 273.19 crore, as detailed below, from the Aggregate Revenue Requirements of the applicant.

	(Amount in crore)
a) Employee cost	Rs 32.27
b) Repair & Maintenance (R&M)	Rs 20.24
c) Administration & General (A&G)	Rs 5.25
d) Interest & Financing	Rs 58.90
e) Provision for bad and doubtful debts	Rs 32.76
f) Depreciation	Rs 43.77
g) Collections from arrears	Rs 80.00
TOTAL	Rs 273.19

The above issues have been dealt with in Annexure B to the written submissions. Collection of Rs. 80 crore indicated at item (g) above is not a cost element and therefore the expenses actually disallowed by the Commission are much less as given on Page 134 of the Tariff Order.

9. In its order dated 08.09.2003 the Commission has considered the applicant's claim with respect to each of the above items and given its detailed reasons for not allowing them to the extent claimed. For instance while dealing with the employee cost the Commission has advised the applicant to get a proper manpower study done before recruiting additional 500 odd employees. Certain increased liabilities claimed on account of division of assets and liabilities between UP and Uttaranchal were not substantiated with proper agreements or orders and in absence of the same the Commission has not accepted these claimed liabilities for the current year. At the same time the Commission has as a measure of abundant caution provided for a Transitional

Contingency Reserve of Rs. 188.77 Crore to take care of any such liability if it does actually devolve on the applicant. Similarly the licensee has been advised to evolve and adopt a clear and transparent policy for identifying and writing off bad and doubtful debts before any expenditure can be recognised on this account. Collection of Rs. 80 Crore out of arrears of more than Rs. 900 Crore is not an item of expenditure and by any standards is a modest target set for liquidation of these arrears. Unlike preparation of accounts, ARR is a projection of the likely revenue and expenses during the year. Therefore, sanctity of fundamental accounting principles is not being violated in taking into account all likely revenue of applicant, including that from unrealized arrears. In short for each of these items the Commission has drawn its conclusions after due deliberation. Commission's detailed reasoning for each such conclusion is given in the tariff order and it is not correct to say that some or all of these conclusions have been reached due to any error or oversight calling for review and correction.

10. It is pertinent to mention here that the aggregate revenue requirements of the applicant as approved by the Commission is Rs 572.52 crore. The Revenue of the petitioner from the tariff and non-tariff incomes is expected to be Rs 681.29 crore, resulting in excess revenue of Rs. 108.77 crore. As mentioned above the petitioner will also have an additional revenue of Rs 80 crore due to recovery of past arrears. These have been used to create a Transitional contingency reserve of Rs 188.77 crore. As stated earlier this reserve has been created to take care of liabilities which the petitioner has not been able to establish at present but which could possibly emerge with division of assets and liabilities between them and UPPCL or which the petitioner may be able to substantiate in future.

11. The applicant has contended that the tariff order cannot be implemented as there are errors of law or otherwise the directions given are contrary to law. In this regard the applicant has referred to (a) denial of the benefits investments made and investment proposed to be made (b) interest cost of payment obligation of old REC loans; (c) jurisdiction of the Commission to deal with the tariff at which the Power Purchases be made from UJVNL; (d) disallowances of certain non tariff income,

electricity duty and the consumer security deposit; (e) disallowances of concessional tariff to employees and pensioners; (f) Not following the accounting standards and double accounting of income of Rs 80 crore and not allowing the provision for bad and doubtful debts. These are referred to in Annexure B of the written submissions.

12. The Tariff Order does not deal at all with the electricity duty. The levy of the electricity duty or any other tax is fully within the jurisdiction of the State Government. The Commission has not in any way interfered with levy of such duty by the State Government. The electricity duty is not tariff or charges for the supply of electricity. There is therefore no question of the Commission exercising the powers to levy tax or cess in violation of Article 265 of the Constitution.

13. During the tariff proceedings the Commission had specifically called upon the petitioner to disclose the revenue from all charges including the non-tariff charges. Such non-tariff charges as were disclosed by the petitioner in the tariff petition and approved by the Commission have been included in the Schedule of charges contained in page 207 of the Tariff Order. The additional items now mentioned in the Review Application were not disclosed to the Commission and were also not claimed during the tariff proceedings. Their non-inclusion clearly is on account of the petitioner's failure to disclose full and correct facts to the Commission and not on account of any error or mistake in the Tariff Order. The right course for the petitioner may still be to file a separate application for claiming non tariff charges, which the petitioner now wishes to include in the Schedule of Miscellaneous charges for consideration of the Commission in accordance with law.

14. In so far as the Consumer Security Deposit is concerned the Commission has not prohibited the applicant from taking security against credit sales as per the practice prevalent but any change or modification in the same would require prior approval of the Commission.

15. The applicant has contended that the Commission has disallowed Investments claimed by the applicant other than those funded by Accelerated Power Distribution Reform Program (APDRP) and Prime Minister Gramin Yojna scheme. These aspects have been dealt by the Commission in the Tariff order in section 5.15. The investments as claimed by the applicant (other than those pertaining to projects costing less than Rs. 2.5 crore, those started before 31.03.2002 and those covered by APDRP and PMGY schemes) was not allowed fully as the applicant has not so far obtained the approval of the Commission for such investments as stated in section 4.6 of the Tariff Order. There is no discrimination and violation of Article 14 of the Constitution in the above matter, as the investments from APDRP and PMGY would have already been scrutinized by Government of India before sanction and therefore stand on different footing in comparison to sporadic investments being made by the applicant from internal accrual and other sources. In section 4.8 of the Tariff Order the Commission has provided for a Transitional Contingency Reserve, amongst others, to deal with the costs related to such investments if on proper scrutiny the same are found to be in order and approved by the Commission. In any event there is no obvious error or mistake in disallowing these expenses as stated by the applicant.

16. As regards the power purchases from the State Generating Company the applicant has contended that the Commission has not allowed the full cost and has also wrongly directed the creation of power development fund. These aspects have been dealt in sections 5.6 and 4.7. of the Tariff Order. The petitioner has to take the consent of the Commission for the power purchase agreement and the procurement of power from the generating company. The petitioner has so far not obtained such approval. Accordingly the Commission has allowed an adhoc tariff (as approved by UPERC) for payment to the generating company pending the consideration and approval of the power purchase agreement.

17. The Commission has given the reasons for creation of the proposed Power Development Fund. The Commission has given detailed reasoning for the creation of this fund and the amount to be contributed to this fund has been allowed as a pass

through in the Tariff. The applicant is not affected by the above direction. The applicant will in fact be the beneficiary of the fund, which will be in the larger interest of the state and the consumers. There is again no question of any inadvertent error or mistake in making this recommendation which has been done with due deliberation and in exercise of Commission's powers.

18. The other issues sought to be raised by the applicant such as concessional tariff on the supply of electricity to employees including pensioners of the applicant, unachievable targets, merit order dispatch, allocation of power purchase cost to trading etc. have all been dealt in detail by the Commission in the tariff order dated 8.9.2003 and there is no error of law or facts apparent on the face of record for the Commission to exercise the review jurisdiction.

19. The Commission does not find any merit in the contentions of the applicant that there are errors or mistakes in the order or for that matter that there are grounds calling for reconsideration of the tariff order dated 8.9.2003. The review application is not maintainable under law and is accordingly dismissed. The application for extension of time filed by the applicant is also rejected consequent to the rejection of the Review application. As already directed in the order dated 08.09.2003, the applicant shall give effect to the Tariff determined for the year 2003-04 with effect from 20th September 2003.

Divakar Dev
Chairman