

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Petition to waive the token Penalty of Rs. 10000 imposed on MD, UPCL under section 142 of the Electricity Act, 2003 vide Order dated 09.09.2014 in the matter of non-compliance of the Commission's Order dated 26.04.2014 on the review petition filed by UPCL on Commission's Order dated 05.05.2014 on the application seeking of releasing additional 6 MVA load of 33 kV to M/s Birla Tyres, Unit-II, Khedimubarak, Lakshar, Haridwar.

And

In the matter of:

Director (Project), Uttarakhand Power Corp. Ltd.

....Petitioner

CORAM

Shri Subhash Kumar Chairman

Shri C.S. Sharma Member

Shri K.P. Singh Member

Date of Hearing: November 28, 2014

Date of Order: 22 December , 2014

The Order relates to the Petition dated 13.09.2014 filed by Uttarakhand Power Corporation Limited (hereinafter referred to as "Petitioner" or "licensee" or "UPCL") for review of the Commission's Order dated 09.09.2014 to waive off the token penalty of Rs.10,000 imposed under section 142 of the Electricity Act, 2003 in the matter of non compliance of the Commission's Order dated 24.06.2014.

1. Background & Submissions

- 1.1. A Petition was filed by M/s Birla Tyres seeking approval for release of additional 6 MVA load (Total load of 20 MVA) at 33 kV supply voltage. In its Petition M/s Birla

Tyres had submitted that it was having a sanctioned load of 20 MVA and against the same, initially a load of 10 MVA was released to it at 33 kV supply voltage as the 132 kV line was under construction. However, considering the inordinate delay in construction of 132 kV line, the Commission allowed to release four (4) MVA load on the existing 33 kV line vide Order dated 08.04.2010 as a stop gap arrangement, pending completion of the requisite 132 kV line and associated works. As the erection of 132 kV line could not take place even after a lapse of more than three years, M/s Birla Tyres approached the Commission to direct UPCL to release additional 6 MVA load (Total 20 MVA) on 33 kV supply voltage till 132 kV line is ready.

- 1.2. The Commission heard the matter on 23.04.2014, which was further posted to 05.05.2014 on the request of UPCL. The hearing was held on the said date and the Commission issued an Order dated 05.05.2014 directing UPCL to release a load of 4 MVA in addition to the contracted load of 14 MVA. The relevant portion of the Order is reproduced hereunder:

“The Commission allows now release of 4 MVA load in addition to the contracted load of 14 MVA (Now Total 18 MVA) from the existing 33 kV line supplying to the consumer till completion of the pending 132 kV works and directs Respondent No. 1 namely- UPCL to conduct a meeting with the Petitioner within 15 days from the date of this Order and chalk out an Action Plan for carrying out the required modifications in the existing 33 kV line/system for releasing additional load of 02 MVA through this 33 kV line considering the compliances of safety rules and submit a report to the Commission latest by 26.05.2014.”

- 1.3. UPCL filed a Review Petition against the Commission’s Order dated 05.05.2014. The Commission decided to hold a hearing for admission of the said review Petition on 24.06.2014. The hearing was held on the scheduled date 24.06.2014 and during the hearing, the representatives of UPCL sought adjournment and it was informed that compliance of the Order dated 05.05.2014 was not yet made. The Commission allowed the adjournment and posted the hearing for 01.07.2014. The Commission took cognizance of this non-compliance and issued an Order dated 24.06.2014 directing MD, UPCL to *“...comply with the said order immediately and report compliance of the order on affidavit to the Commission on or before 30.06.2014. Non-compliance of the Order will render the Managing Director of licensee liable for appropriate punitive action under Section 142 of the Electricity Act, 2003.”*

- 1.4. Further, the scheduled hearing on review Petition was held on 01.07.2014, the Commission heard the Petitioner & Respondent and issued an Order dated 08.07.2014. Along with other directions in the Order, the Commission directed its staff to issue a show cause notice to MD, UPCL under Section 142 of the Electricity Act, 2003 for non-compliance of the Commission's Order dated 24.06.2014.
- 1.5. Accordingly, show cause notice dated 16.07.2014 was issued to MD, UPCL, to submit its reply by 30.07.2014 and thereafter, to personally appear before the Commission on 12.08.2014. Meanwhile, MD, UPCL submitted a reply dated 30.07.2014, vide which adjournment was sought for 30 days. On the scheduled date of hearing, i.e. 12.08.2014, MD, UPCL again did not appear before the Commission during the hearing.
- 1.6. The Commission issued an Order dated 12.08.2014, in which the Commission did not consider MD, UPCL's request of adjournment and directed him to indicate any two dates by 19.08.2014, convenient to him for personal appearance before the Commission. The Commission in the said Order had also specifically held that: *"In case MD, UPCL again remain absent on the scheduled date of hearing, the matter would be decided by the Commission ex-parte."*
- 1.7. In compliance to the above Order, a reply was received on 20.08.2014 from MD, UPCL, requesting the Commission that he may appear before the Commission on 02.09.2014 or 03.09.2014 in case there are no emergency calls from higher-ups. Accordingly, the Commission fixed the date of hearing as 02.09.2014 and issued final notice to MD, UPCL intimating the date of hearing fixed on 02.09.2014 giving him the second opportunity to explain as to why penalty be not imposed on him for non-compliance of orders of the Commission.
- 1.8. Earlier, the Commission vide its Order dated 21.08.2014 in the matter of Notice issued to MD, UPCL under Section 43(3) of the Electricity Act, 2003 for violation of the provisions of Section 43(1) of the Electricity Act, 2003 in pursuance to the Commission's Order dated 08.07.2014 on the review Petition filed by UPCL against Commission's Order dated 05.05.2014 had directed that:-

“

1. MD, UPCL to ensure release of 4 MVA load in addition to the contracted load of 14 MVA (Total 18 MVA) from the existing 33 kV line supplying to the consumer till completion of the pending 132 kV works w.e.f. May 05, 2014 in accordance with the Commission's order dated May 05, 2014.
2. MD, UPCL is also directed to ensure release of additional 02 MVA load by 01.11.2014 thereby releasing entire 20 MVA load already sanctioned by UPCL, through this 33 kV line after carrying out the required modifications in the existing 33 kV line/system, if any, and duly considering the compliances of safety rules or by completing construction of the 132 kV line. Non-compliance of the above direction would attract a penalty of Rs. 500/- per day thereafter.”

1.9. The hearing was held on the scheduled date, i.e. 02.09.2014, however, despite being afford a final opportunity, MD, UPCL again did not appear before the Commission.

1.10. Meanwhile, two letters bearing reference No. 1908 and 1909 dated 01.09.2014 were received from Chief Engineer, UPCL to the Commission regarding the request for condoning the absence of MD, UPCL and reporting of compliance of the Commission's Order dated 05.05.2014 in the matter, respectively. UPCL in its letter no. 1909 dated 01.09.2014 had submitted that: “... UPCL has released 04 MVA load (Total of 18 MVA) from the existing 33 kV line to M/s Birla Tyres, Unit-2 on dated 30.08.2014. Further, UPCL is in the process and under discussion with M/s Birla Tyres, Unit-II, Laksar for the release of additional 02 MVA load.”

1.11. The Commission after examining the complete facts and circumstances of the case, issued an Order dated 09.09.2014 directing UPCL as under:

- (1) “MD, UPCL to deposit the penalty of Rs. 10,000/- imposed on him under Section 142 of the Act within 15 days of the date of order.
- (2) The directions issued by the Commission vide its Order dated 05.05.2014 in the matter are applicable from the date of the said Order i.e. 05.05.2014 and accordingly MD, UPCL is directed to release 4 MVA load (Total 18 MVA) from the existing 33 kV line w.e.f. 05.05.2014.

- (3) *The directions issued by the Commission vide its Order dated 21.08.2014 in the matter to release the remaining 2 MVA (Total 20 MVA) by 01.11.2014 shall be complied by MD, UPCL by the stipulated date.*
- (4) *UPCL shall submit the compliance report along with the documentary evidence under affidavit on sub-para (2) above by 15.09.2014 and on sub-para (3) above by 07.11.2014. Failure to do so shall be construed as continued default and shall render him liable for additional penalty of Rs. 500/- per day for each day such default continues."*

1.12. The present petition has been filed by Director (Projects), UPCL on behalf of MD, UPCL under Regulation 68 read with regulation 74 of UERC (Conduct of Business Regulations) 2004 for review of the Order dated 09.09.2014 to waive off the penalty imposed under proceedings held under section 142 on MD, UPCL. The Petitioner contended that there was just cause to reconsider and to review the order. The Petitioner gave excuses for non appearance of MD, UPCL personally and authorizing Chief Engineer Level-I to show cause on his behalf for seeking review of the Order dated 09.09.2014, despite the lenient view taken by the Commission granting him three occasions to show cause and appear personally and that too when the date was fixed as per his own convenience.

The contentions of the Petitioner in this regard are reproduced hereunder,

"That if the token penalty of Rs. 10,000/- imposed vide Order dated 09.09.2014 is not waived it would be very disheartening for the officers and employees of UPCL as even when the Order of the Hon'ble Commission are honored by even giving up the statutory remedy available to UPCL then also the honest effort in complying with the Order of the Hon'ble Commission are awarded with penalty.

That there are just and sufficient cause for reconsidering order dated 09.09.2014 and token penalty of Rs. 10,000/- vide order dated 09.09.2014 be waived.

That inability of the Petitioner to comply with the orders of the Hon'ble Commission was not an act of deliberate non compliance but was due to peculiarity of situation, the Petitioner is bound to follow and comply with each and every direction of the Commission, any in advertent non compliance by the Petitioner on the orders of the Hon'ble Commission is liable to be excused."

1.13. The hearing in the matter was fixed on 27.11.2014 but due to non-appearance of MD, UPCL, the hearing was again postponed to 28.11.2014 and the Commission directed MD, UPCL to be present personally for the hearing.

1.14. MD, UPCL appeared personally on 28.11.2014. The Commission heard the Petitioner during the hearing held on 28.11.2014. The Petitioner reiterated its submissions made in the review petition.

2. Commission's Views and Decision

2.1 Powers of Commission and Grounds for Review

2.1.1 Before going into the maintainability of the review petition the Commission first examines the *locus-standi* of Director (Projects), UPCL to file a review petition on behalf of the MD, UPCL. The proceedings under section 142 of the Electricity Act were penal proceedings against the MD, UPCL for non compliance and were not against the company. MD, UPCL was given sufficient opportunities for being present personally to show cause reasons for non-compliance of the directions and orders of the Commission. MD, UPCL rather than himself seeking a review, authorized Director (Projects), UPCL to file a review petition on his behalf. Only the aggrieved party has the *locus-standi* to file a review petition against the Order of the Commission imposing penalty under section 142 of the Electricity Act and the authority to file the review cannot be transferred to Director (Projects).

2.1.2 After having taken a view on the *locus-standi* of the petitioner and before going into the merits of the Petition on various issues, the Commission first looks into the powers vested in it to review its Orders in order to establish the maintainability of the Petition. In this regard, reference is drawn to section 94(1)(f) of the Act which specifically empowers the Commission to undertake review, which can be exercised in the same manner as a Civil Court would exercise such powers under section 114 and Order XLVII of the Code of Civil Procedure, 1908 (CPC).

2.1.3 The powers available to the Commission in this connection have been defined in section 114 and Order XLVII of the CPC. Under the said provisions, review of the Order is permitted on three specific grounds only, namely:

- (a) Discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time of passing of the Order.
- (b) Mistake or error apparent on the face of the record; or
- (c) Any other sufficient reasons.

2.1.4 The application for review has to be considered with great caution to ensure that it fulfill one of the above requirements to be maintainable under law. On the discovery of new evidence, the application should conclusively demonstrate that (1) such evidence was available and was of undoubted character; (2) that it was so material that its absence might cause miscarriage of justice; (3) that it could not be with reasonable care and diligence brought forward at the time of proceedings/passing of Order. It is well settled that new evidence discovered, if any, must be one, relevant, and second, of such character that had it been given, it might possibly have altered the judgment.

2.1.5 With regard to mistake or error apparent on the face of the record, the error should be apparent enough to be noticed and presented before the Court to take cognizance of the same during review proceedings. However, if it is a case that the Petitioner was not able to properly explain a legal position at the time of proceedings, it does not make a ground for a review.

2.1.6 With regard to any other sufficient reason, the Courts have interpreted these words that such reasons should be at least analogous to those specified immediately above the clause. The courts have interpreted this phrase on the facts and circumstances of each case. It is a well-settled law that a review of the Orders of the Court/Commission should be used sparingly after examining the facts placed before the Court. An erroneous view or erroneous judgment is not a ground for review, but if the judgment or order completely ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in the review. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for a patent error. A review can only lie if one of the grounds listed above is made out.

2.1.7 The above legal position emerges out of various judgments of Supreme Court, notably, Smt. Meera Bhanja Vs. Smt. Nirmala Kr. Chaudhary [(1995) 1 SSC 170], Ajit Kumar Rath Vs. State of Orissa and others [(1999) 9 SSC 596] and Devendra Pal Singh Vs. State and another [(2003) 2 SSC 501]. With this background on legal provisions of the Review Petition, the Commission has examined the issues raised by the Petitioner to ascertain whether the issues raised by the Petitioner qualify for review or not.

2.1.8 The submission of the Petitioner that the non appearance of MD, UPCL was due to unavoidable reasons on the date of personal hearing or the Commission did not consider the authorization of the Chief Engineer Level I (UPCL) to show cause in his place the reasons for non-compliance of the Orders of the Commission is not a ground for filing a review petition as these grounds have already been dealt with in the earlier orders of the Commission and no new grounds, evidence or mistakes apparent on the face of record were raised by the Petitioner and thus, it is concluded that the three grounds for review are not fulfilled in any way.

2.1.9 The contention of the Petitioner is for waiver of the penalty of Rs.10,000/- imposed on MD, UPCL under regulation 68 read with 74 of the UERC (Conduct of Business Regulations), 2004. However, the same has to be in accordance with section 94(1)(f) of the Electricity Act, 2003 that allows the Commission to take up review but in the same manner as specified under section 114 and Order XLVII of the Code of Civil Procedure. However, from the contentions of the Petitioner that,

“if the token penalty of Rs.10, 000 imposed vide Order dated 09.09.2014 is not waived it would be disheartening for the officers and employees of UPCL as even when the Order of the Commission are honored by even giving up the statutory remedy available to the UPCL then also the honest effort in complying with the Order of the Hon’ble Commission are awarded with penalty.”

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to follow and comply with each and every directions of the Commission, any inadvertent non-compliance by the petitioner of the Orders of the Commission is liable to be excused."

It is clear that none of the grounds raised in the petition meet the grounds laid down under the Code of Civil Procedure for review of an Order.

2.1.10 Based on the above analysis, the Commission decides that the petition for review is not maintainable. Accordingly, the Review Petition filed by UPCL, being not maintainable, is hereby dismissed.

2.2 Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Subhash Kumar)
Chairman