Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Misc. Appl. No. 64 of 2023

In the Matter of:

Petition for reconsideration/Review of an order dated 17.10.2023 passed in Petition No. 30 of 2023, filed under Regulation 54 of the UERC (Conduct of Business) Regulations, 2014 r/w relevant provisions of the Regulations and the Electricity Act, 2003.

And

In the Matter of:

Power Transmission Corporation of Uttarakhand Ltd.

…Petitioner

Vs.

M/s Bhilangana Hydro Power Ltd.

…Respondent

Coram

Shri D.P. Gairola **Member (Law)/Chairman(I/c)**

Shri M.L. Prasad **Member (Technical)**

Date of Hearing: February 01, 2024

Date of Order: February 26, 2024

ORDER

This Order relates to Petition filed by PTCUL (hereinafter referred to as "PTCUL" or "the Petitioner") in the matter of reconsideration/Review of the Order dated 17.10.2023 passed by the Commission in Petition No. 30 of 2023, seeking directions from the Commission to amend the Uttarakhand Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2015 (hereinafter referred to as "Open Access Regulations 2015").

2. Background

2.1 M/s Bhilangana Hydro Power Pvt. Ltd. (hereinafter referred to as "the Respondent) had earlier filed a Writ before the Hon'ble High Court of Uttarakhand challenging the validity of the 3rd proviso to Regulations 20 (1)(b) of the UERC Open Access Regulations, 2015. However, later during the proceedings before the Hon'ble Court, Petitioner requested the Hon'ble Court to permit it to make a representation to the Commission to re-consider/re-examine the 3rd proviso to Regulation 20 (1)(b) of UERC Open Access Regulations 2015 and the Regulations which existed prior to the said Regulation of 2015. Accordingly, the Hon'ble Court vide Order dated 20.06.2023 directed the Counsel for the petitioner to make a representation, which may be considered by the Commission.

2.2 Accordingly, the Respondent filed a Petition before the Commission on 04.07.2023 seeking for appropriate directions from the Commission to amend the Uttarakhand Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2015. Thereafter, the Commission admitted the Petition and vide Order dated 17.10.2023 held the Petition to be maintainable thereby deleting the 3rd proviso of the UERC (Terms & Conditions of Intra State Open Access) Regulations, 2015 under the provision of Removal of Difficulty.

3. Brief Facts of the Case:

3.1 The Petitioner Power Transmission Corporation of Uttarakhand Ltd. (hereinafter referred to as "The Petitioner" or "PTCUL" or "Licensee") is a State transmission utility & also transmission licensee of the State whereas the Respondent is a power generating company which has set up a 24 MW hydroelectric power project (Bhilangana-III or B-III) on River Bhilangana near Village, Ghuttu, Tehsil Ghansali, District Tehri Garhwal, Uttarakhand. Petitioner has been selling all its power outside the State of Uttarakhand under Open Access and is using the 220 kV Double Circuit (D/c) Ghuttu-Ghansali transmission line also represented as 220 kV Bhilangana-III-Ghuttu line which has been established by PTCUL.

3.2 In order to evacuate power from Respondent's power plant and other proposed upcoming generators in the nearby vicinity, PTCUL constructed a 220 kV Double Circuit (D/c) Ghuttu-Ghansali transmission line. This line was planned as an 'integrated transmission system' to serve the purpose of all the upcoming generators which were to establish their respective generating plants in that area where the Respondent's project is located.

3.3 Circumstantially, besides Respondent's Power Plant, no other Plant could come up in time making Respondent a sole user of the aforesaid transmission system, taking power outside the State under Open Access thus making the Respondent liable to pay transmission charges for the Ghuttu-Ghansali transmission line as per the 3rd proviso to Regulation 20 (1)(b) of the UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2015 (erstwhile 2nd proviso to Regulation 21(1)(b) of the UERC OA Regulations, 2010). The said proviso reads as:

> "*Provided further that where augmentation of transmission system including dedicated transmission system used for open access has been constructed for exclusive use of or being used exclusively by an open access customer, the transmission charges for such dedicated system shall be worked out by transmission licensee for their respective systems and got approved by the Commission and shall be borne entirely by such open access customer till such time the surplus capacity is allotted and use for by other persons or purposes.*"

3.4 Aggrieved by the above provision of the Regulations, Respondent had filed a Petition before the Hon'ble High Court and later before the Commission which was disposed by the Commission with the impugned Order dated 17.10.2023.

4. The instant Petition is filed against the aforesaid impugned Order of the Commission on 15.12.2023. A copy of the Petition was forwarded to the Respondent vide letter dated 29.12.2023 and later vide letter dated 12.01.2024 the Commission directed the parties to appear before it for a hearing on 01.02.2024. On the date of hearing, the Commission heard the parties in detail on the

admissibility of the Petition. The submissions of the parties are recorded in the following paras of this order.

5. Submissions by the Petitioner

5.1 The Petitioner has submitted that the impugned Order has been passed beyond the relief sought in the alleged petition or the scope of relief in the principal matter. That the Commission had already expressed its view in the matter before the Hon'ble High Court and that there was no reason for the Commission to accept the representation filed before it. That the Commission was well aware of the legal position that vires of Regulations cannot be challenged before the Commission or the APTEL.

5.2 Further, the Petitioner submitted that, Section 181 of the Electricity Act 2003, is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the Courts. That once the Commission frames a Regulation, it takes the form of sub-ordinate legislation and same cannot be revisited by Commission while exercising its adjudicatory power. That the Hon'ble Supreme Court vide PTC India Ltd. V. Central Electricity Regulatory Commission (2010) 4 SCC 603 has held that the Regulations framed by Regulatory Commission can only be tested by a Court in exercise of judicial review hence, the judicial review of the impugned Regulations undertaken is an error apparent on record.

5.3 Regarding the provision of Removal of Difficulties, the Petitioner submitted that the same is to be exercised only when difficulty is caused due to application of Regulations and therefore exercising the power to remove difficulties by the Commission did not arise in the present case as there is no difficulty in giving effect to the impugned Regulations.

5.4 The Petitioner has submitted that the Ghuttu-Ghansali line is a Transmission Line being solely used by M/s BHPL and hence falls within the meaning of dedicatedly used Transmission System juxtaposed to a dedicated Transmission Line in terms of Section 2(16) of the Act. That the Commission has committed a grave error which is apparent on the record by equating a

dedicatedly used Transmission System which is dedicated Transmission Line.

5.5 The Petitioner has averred that the Commission has bypassed the procedure prescribed under the Act for framing Regulations even when M/s BHPL had specifically prayed for initiation of proceedings under section 181 of the Act for seeking amendment/repeal of the Regulations.

6. Submission by Respondent

6.1 The Respondent has submitted that the present Review Petition is an attempt to reopen concluded findings of the Commission. The facts or grounds stated in the Review Petition a beyond scope of review jurisdiction. That the Petitioner has failed to point out the error apparent and has rather pleaded substantial grounds which makes the present Review Petition nothing but an 'appeal in disguise'.

6.2 The Respondent while submitting its arguments has presented an analysis of a list of judgements of the Hon'ble Supreme Court and stated that:

"16. The principles espoused by the Hon'ble Supreme Court in the aforesaid judgements, are summarized as follows:

i. A review cannot at all be an "appeal in disguise";

ii. The issue raised in the review should not be "reheard and corrected";

iii. If a "process f reasoning" is required to point out an error, the same cannot all be termed as an "error apparent" on the face of the record justifying exercise of review jurisdiction; and

iv. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for a patent error. This means that even for an erroneous decision, a review cannot be filed, and that the only remedy available to an aggrieved party is to file an appeal;".

6.3 That the Commission has rightly exercised its power in order to delete the 3rd proviso to Regulation 20(1)(b) of the Open Access Regulations, 2015. There is no bar under law for a delegatee to amend/repeal its Regulations prospectively.

7. Commission Observation, Views & Decision

7.1 We have read and heard the submissions by the parties. The Petitioner has elaborately pointed out alleged infirmities in the impugned Order where we have observed that only few submissions directly relate to the grounds/scope of review, the rest are general. Respondent too has argued elaborately on all the submissions made by the Petitioner, hence we at the very outset clarify that we shall limit the scope of this Order to the question of maintainability of review. Since, review is governed under Order XLVII Rule 1, CPC we shall limit and encircle scope of this Order to the guidelines enshrined there. In this regard, Order XLVII Rule 1, CPC states that:

> *"1. Application for review of judgment.- (1) Any person considering himself aggrieved, –*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
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> *(b) by a decree or order from which no appeal is allowed, or*
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> *(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.*
>
> *(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."*

7.2 Besides above, we would like to shed some light on the principles of Review which have been summarized in the matter of Kamlesh Verma Vs Mayawati & Ors (2013) 8 SCC 320 which are being reproduced below:-

"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" has been interpreted in Chajju Ram vs. Neki17, and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors.18 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. 25 ,.

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 re-heard 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."

7.3 In consideration of the above and on examining the submissions by Petitioner, it is understood that it is contesting *error apparent* as the basis for seeking review. Regarding this, Petitioner has *inter alia* averred that the impugned Order suffers *error apparent* because the Commission has pronounced its view on the validity of the Regulations in an adjudicatory proceeding which ought to be dealt in a judicial proceeding before the higher Courts. Before delving into the merits of this argument, we need to understand what *error apparent* actually means and how the Courts have interpreted/defined its scope. This clarity shall not only address the above arguments but also all the other arguments made by the Petitioner in this matter.

In Col. Avatar Singh Sekhon v. Union of India and Others (1980) Supp SSC 562, the Hon'ble Supreme Court had observed that a review of an earlier order cannot be done unless the court is satisfied that the material error, which is manifest on the face of the order, would result in miscarriage of justice or undermine its soundness. Further, in the matter of Lily Thomas the Hon'ble Supreme Court had observed that,

> *"…Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence…"*
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> XXX XXX XXX
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> *"…Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. In T.C. Basappa v. T. Nagappa this Court held that such error is an error which is a patent error and not a mere wrong decision…"*

7.4 From the submission of Petitioner it is observed that it is dissatisfied with the decision of the Commission and is mooting it as a wrong decision. In this regard, it is clear from the above quoted judgement that a mere wrong decision cannot be a reason for reviewing the order. Moreover, this is not the first time that Petitioner has agitated this issue before us, even in the principal matter, Petitioner had raised this issue. In this regard, it is relevant

to clarify that a petition of old and overruled arguments is not a platform to reopen concluded adjudication. In S. Madhusudan Reddy Vs V. Narayana Reddy & Ors. Civil Appeal No. 5505 of 2022, the Hon'ble Supreme Court has observed that:

"…In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record…"

7.5 Further, with regard to the submission of Petitioner that the Commission has wrongly applied the provision of Removal of Difficulty that is exercised only when difficulty is caused due to application of Regulations, we agree with the submission of Petitioner that the said provision can be applied only when a difficulty arises in giving effect to the provision of Regulations. However, the cardinal question in the instant matter is whether such 'difficulty' existed. To answer this question, we need to first understand why is there a need for this provision in the first place and what it entails. In this regard it is relevant to mention the judgement of Madeva Upendra Sinai Vs. Union of India (1975) 3 SCC 765 wherein, the Hon'ble Supreme Court has explained the relevance of the provision of Removal of Difficulties. Relevant para of the said judgment is reproduced hereunder:

"To keep pace with the rapidly increasing responsibilities of a Welfare democratic, State, the legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the legislature and the endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is

enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socioeconomic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal, of difficulty clause", once frowned upon and nick-named us "Henry VIII Clause" in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post independence era.

7.6 From the above it is understood that to address a complex situation, certain adjustments can be made in the statute to remove difficulty. However, it is observed that such exercise to remove difficulties should be in line with the sprit/scheme of the mother legislation which in this case is the Electricity Act, 2003. Let us read what the preamble of the Act states:

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and ***generally for taking measures conducive to development of electricity industry****, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto*."

[Emphasis added]

Now, let us go back to what difficulty arised in giving effect to the proviso of aforesaid Regulations. For this we need to revisit the relevant para of the impugned Order of the Commission which is given hereunder:

"5.11 Now that we have examined the implication of this impugned Regulation, we see that it has been invoked only in the matter of Petitioner and is otherwise a dormant provision. In the matter of Petitioner, this provision has not come out as an encompassing law that could serve the interest of all stakeholders involved in just and equitable way, rather, as seen from the above, it has put an unjust burden on the Petitioner which was not the purpose/intent of this impugned proviso or any law enacted. It is unfair, as stated above, to recover transmission charges for the entire 200 MW line from a small 24 MW Renewable Energy generator. Not only is this impugned proviso de jure redundant, it is not in consonance with the provisions of the Act. In view of the above discussed law, we are convinced that dedicated transmission line is not to be constructed by a transmission company."

7.7 In the aforesaid we observe that recovering transmission charges for the entire 200 MW line which is also not a dedicated transmission line as defined under Section 2(16) of the Electricity Act, 2003 read with Section 9 & Section 10 of the said Act from a Small Hydro Plant/ Renewable Energy generator (Respondent) was unfair and such recovery was not a conducive practice for the development of the electricity industry. This unfair recovery ripened injustice to Respondent which led to difficulty in exercise of aforesaid Regulations. Hence, this serious impediment to justice needed to be stricken off. Moreover, we believe, legal technicalities should always pave way to ensure delivery of justice.

7.8 In light of the above, we conclude that the petition is not admissible as the error referred to by Petitioner for seeking review is far from being the 'error' that invokes reviewing jurisdiction. It appears from the Petition that Petitioner's case is not of review but a grievance against the view of the Commission, the Petitioner is dissatisfied with the view of the Commission, such dissatisfaction/disagreement over the view of a Commission cannot be the basis for reopening the matter As rightly pointed out by Respondent, a

Review Petition cannot be an 'Appeal in Disguise'. Therefore, the Review Petition cannot be entertained and is rejected as non-maintainable. The matter is hereby disposed.

Ordered accordingly.

(M.L. Prasad)
Member (Technical)

(D.P. Gairola)
Member (Law) / Chairman (I/c)