

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION
Misc. Application No. 07 of 2022

In the Matter of:

Review/Reconsideration petition filed under Regulation 54 of the UERC (Conduct of Business) Regulations, 2014 for removal of difficulty and review of the Order dated 22.09.2021 passed by UERC in the matter of Hon'ble APTEL Order dated 02.03.2020 in Appeal No. 18 of 2016 pertaining to 22.5 MW SHP of M/s Swasti Power Ltd.

And

In the Matter of:

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

...Petitioner

&

In the Matter of:

M/s Swasti Power Limited.

...Respondent

Coram

Shri D.P. Gairola

Member (Law)/Chairman(I/c)

Shri M.K. Jain

Member (Technical)

Date of Hearing: January 03, 2023

Date of Order: March 01, 2023

ORDER

This Order relates to Review Petition filed by Uttarakhand Power Corporation Ltd. (hereinafter referred to as "the Petitioner" or "Distribution Licensee" or "UPCL") under Regulation 54 of the UERC (Conduct of Business Regulations), 2014 for removal of difficulty and review of the order dated 22-09-2021 passed by the Commission in the matter of Hon'ble APTEL's Judgment dated 02.03.2020 in Appeal No. 18 of 2016 pertaining to 22.5 MW SHP of M/s Swasti Power Limited (hereinafter referred to as "M/s SPL" or "the Respondent").

As per sub-Regulation (4) of Regulation 54 of the UERC (Conduct of Business) Regulations 2014, a review application, if being rejected, is required to be disposed within 30 days from the date of hearing, however, in the instant matter, the same could not be done due to the ongoing tariff proceedings at Commission and unavailability of the Commission due to personal reasons. Hence, the order got delayed and same is regretted.

2. Background

- 2.1 The Petitioner has filled the instant Review Petition vide letter dated 24.01.2022, seeking review of the Commission's Order dated 22.09.2021, whereby the Commission has determined deemed generation claims of M/s Swasti Power Ltd. in compliance to the directions of the Hon'ble Appellate Tribunal for Electricity (APTEL) dated 02.03.2020.
- 2.2 Earlier, a dispute was filed before the Commission by Respondent in the matter of recovery of loss of generation on account of frequent outages & inadequate transmission line capacity for evacuation of power from the project and adjudication of the disputes. The Commission vide order dated 21.10.2015, inter alia, decided to reject the claims of Respondent w.r.t deemed generation. However, the said Order of Commission was later challenged before the Hon'ble APTEL which on the issue of deemed generation, remitted the matter back to the Commission with direction to determine deemed generation claims. Accordingly, the Commission vide the Impugned Order has determined the deemed generation claims.
- 2.3 Vide the instant Review Petition, UPCL has sought review in the impugned Order of the Commission. The said review of impugned order is filed under Regulation 54 of the UERC (Conduct of Business) Regulations 2014, which mandates that a review application must be filed within a period of 60 days from issuance of the Order, whereas, in the instant case, Petition is filed after 125 days of issuance of the impugned Order i.e., with a delay of almost 65 days. Taking cognizance of this, the Commission vide letter dated 03.02.2022, directed Petitioner to file a separate Petition for condonation of delay. Subsequent to this, a letter dated 09.06.2022 was received from UPCL requesting the Commission to take up the matter. In the said letter, UPCL did not mention/comment on the earlier letter of the Commission dated

03.02.2022 vide which directions were issued to file separate petition for 'Condonation of Delay'. To this, the Commission vide letter dated 22.06.2022 reminding UPCL of it's letter dated 03.02.2022, directed it to again file a separate Petition on condonation of delay.

2.4 Since UPCL did not file any Petition for condonation, the Commission decided to give an opportunity to the parties to argue on admission of the Review Petition on 03.01.2023 and communicated the same vide letter dated 21.12.2022. Meanwhile, M/s SPL submitted its reply on the admission of Petition vide letter dated 01.12.2022.

2.5 On the scheduled date of hearing, i.e., on 03.01.2023, the Commission heard the parties in detail and later decided to reserve its judgement. All submission written & oral, made by the parties, have been taken on record and are placed and discussed in the following paras:

3. The Petitioner has submitted that:

3.1 Delay in filing the instant Petition occurred because a detail study was required in the impugned Order by its officers who had analyzed the impugned Order and decided that certain issues in the said Order needs to be challenged before the APTEL, however, later, on discussion with the local counsel and counsel at APTEL it was concluded that review be sought in the impugned order. This period of consultation and discussion delayed filing of the instant petition.

3.2 It had filled its objections against the claim raised by M/s SPL which are recorded in the impugned Order and they may also be considered as a part of the Review Petition.

3.3 There are certain difficulties in implementing the impugned Order and there are error apparent on the face of record.

3.4 M/s SPL has taken synchronization time in its calculation and it appears that the same has escaped the notice of the Commission and has been included in total hours determined for the purpose of deemed generation. The Regulations do not prescribe for including the same, nor the same can be included in the said manner.

4. The Respondent has submitted that:

- 4.1 The Review Petition is liable to be rejected as the same is beyond the prescribed period of limitation i.e., 60 days and has not given any reasonable explanation for such delay.
- 4.2 The instant Review Petition is devoid of any merits as there are no error apparent on face of record and the grounds raised by the Petitioner can only be raised before the Hon'ble APTEL in an appeal. The grounds/objections raised by Petitioner would require re-hearing of the entire matter and re-appreciation of the documentary evidence including the calculations submitted by the respective parties in support of their claims. The ground raised would also require re-examination and interpretation of the relevant Regulations as well as reconsideration of the calculation of deemed generation.
- 4.3 The error sought to be pointed out by UPCL, in fact, has to be fished out and searched, which cannot be a scope of exercise of jurisdiction by Commission in a review petition.
- 4.4 UPCL is deliberately bringing up an entirely new issue that outages of each feeder are to be considered separately. There is no such provision in the Regulations which support the submissions made in this regard. Such issues are being raised to delay the matter to cover up lack of any attention by UPCL to this important matter as also other submissions made to UPCL since commissioning of the project.
- 4.5 Respondent has already filed an appeal before the Hon'ble APTEL against the impugned Order and same is pending adjudication, therefore, UPCL instead of filing of the Review Petition ought to have challenged the order before Hon'ble APTEL in case of any grievance.
- 4.6 The UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012, nowhere specifically provides that synchronization time cannot be considered for calculation of deemed generation, thus, the impugned order does not suffer from any infirmity.

5. Commission Observations, View & Decision

5.1 This Order pertains to the admissibility of the Review Petition and the hearing conducted on 03.01.2023 was also on admissibility, hence, we shall be dealing arguments/submissions only w.r.t admissibility of this matter. 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, –

(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.*

(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."

[Emphasis Added]

5.2 From the submissions of Petitioner, it is understood that it is contesting error apparent as the basis for seeking review. Besides this, Petitioner has requested for removal of difficulty in the Order. Since petition is primarily a request for review therefore, our concern too is to find out if error apparent exists in the impugned Order. The error apparent argued by Petitioner in the impugned

Order is regarding consideration of synchronization time. Petitioner has submitted that the synchronization time given is not uniform and the calculation would be possible only when Regulation provided for some standard time which is uniform and that neither the Regulations nor in the past decisions such time was ever permitted. In this regard, it is to clarify that consideration of synchronization time by the Commission in the impugned Order cannot be considered as error apparent on the face of record for the reason that the Commission has consciously approved/permitted the synchronization time claimed by M/s SPL and is not a mistake. Moreover, this view is in sync with the past practices and the decisions of the Commission in the earlier Orders. In the matter of adjudication of dispute between Uttar Bharat Hydro Power (P) Ltd (UBHP), a generating company and Uttarakhand Power Corporation Ltd., a distribution licensee with regard to 10.5 MW Small Hydro Power Project of UBHP under Section 86(1)(e) of the Electricity Act, 2003 the Commission vide Order dated 11.03.2020 has also allowed the synchronization time to the generator. This view is taken to protect the generator from any loss of generation so synchronization time has been included in the total outage time of the machine. This view of the Commission is not an error for seeking review. We are bent to agree with the Respondent that an error is not something which has to be fished out. 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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"...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...”

- 5.3 Besides above, Petitioner in its submissions has requested that all of its objections raised against the claims of M/s SPL in the main matter be considered again. In this regard, we would like to clarify that a petition of old and overruled arguments is not enough 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...”

Petitioner vide the instant petition is requesting the Commission to reconsider and hear settled arguments which from the above ruling is clearly out of the scope of review. In continuation to this, we would like to throw light on the principles of review i.e. as to when a review is maintainable and when not, which is succinctly 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 Poulouse 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.*

5.4 From the above, it is clear that Petitioner's case does not fall under the scope of Review. The relief of review sought by the Petitioner points to a dissatisfaction /disagreement with the view of the Commission in the impugned order. Mere dissatisfaction over the view of a Court or disagreement with the view of the Court in a matter does not open doors to seek review which has a very narrow/limited scope.

5.5 Further, there is a glaring issue of 'limitation' in the matter. As per sub-Regulation (1) of Regulation 54 of UERC (Conduct of Business) Regulations, 2014 mandates for a Review Petition to be filed within 60 days from the date

of Order against which review is being sought, however review in the instant matter was filed in 125 days from the date of impugned Order i.e. with the delay of almost 65 days. The Commission had directed the Petitioner to file a separate Petition for condonation of delay and justify the reason for delay in filing Review Petition which Petitioner has not paid any heed to and did not file any separate Petition as if it does not care for the fate of this Petition. Although, Petitioner in its Petition has submitted the reasoning for delay and has stated that the delay occurred because it was seeking advice from its legal counsels that took time, does not sound like a very solid/justified reasoning for condoning delay on two counts firstly, the reason quoted for delay seems frivolous and secondly, the directions to file a separate petition was completely ignored by the Petitioner. For these reasons, delay cannot be condoned.

- 5.6 Besides above, we have been informed that the impugned Order has been challenged before the Hon'ble APTEL by Respondent. In such circumstances where the matter is pending in a higher court, it will not be very judicious of us to review the impugned Order. On this score too, admissibility of petition loses its force.
- 5.7 In light of the above, we conclude that the petition is not admissible as the issue therein is directly/indirectly pending before Hon'ble APTEL, is barred by law of limitation, and error referred to by Petitioner for seeking review is far from being the 'error' that invokes reviewing jurisdiction. Therefore, the Review Petition cannot be entertained and is rejected as non-maintainable.

The matter is hereby disposed.

Ordered accordingly.

(M.K. Jain)
Member (Technical)

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