

**Before**

# **UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

**Petition No. 25 of 2022**

**In the matter of:**

Petition for review of the Commission's Order dated 22.06.2022 on application for approval of draft Power Purchase Agreement for short term power purchase between Uttarakhand Power Corporation Limited and M/s NTPC Vidyut Vyapar Nigam Limited.

**In the matter of:**

Uttarakhand Power Corporation Ltd.

... Petitioner

**CORAM**

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

**Shri M.K. Jain        Member (Technical)**

**Date of Order : September 19, 2022**

Uttarakhand Power Corporation Ltd. (herein after referred to as "UPCL" or "the Petitioner") has filed a Petition for review of Commission's Order dated 22.06.2022 related to application for approval of draft Power Purchase Agreement for short term power purchase between Uttarakhand Power Corporation Limited (herein after referred to as "UPCL" or "the Petitioner") and M/s NTPC Vidyut Vyapar Nigam Limited (herein after referred to as "M/s NVVNL") under Section 94(1)(f) of the Electricity Act, 2003 (herein after referred to as "the Act"), Regulation 54(1) of the Uttarakhand Electricity Regulatory Commission (Conduct of Business), Regulations, 2014 (herein after referred to as "UERC CBR") and under Section 114 and Order XLVII of the Code of Civil Procedure 1908.

## **1 Background**

1.1 The Commission vide Order dated 22.06.2022, in the matter of Petition filed by UPCL for approval of draft PPA for short term power purchase between UPCL and M/s NVVNL, rejected the Petition as UPCL did not follow the directives issued by the Commission in the Tariff Order and had also contravened the provisions of the applicable Regulations w.r.t.

seeking prior approval of the Commission in case of variation in power purchase quantum or cost exceeding a specified limit vis-à-vis that approved by the Commission.

- 1.2 The Petitioner filed a Review Petition dated 25.07.2022 on the grounds that the Commission while rejecting the Petition filed by UPCL for approval of draft short term PPA vide its Order dated 22.06.2022 should have considered the grave and serious nature of the international factors that were prevailing during the relevant time and how it suddenly affected the supply and availability of coal/gas for generation of electricity. The Petitioner submitted that there is a discovery of new and important matter or evidence in the form of cost benefit analysis information which it was not able to produce earlier at the time of passing of Impugned Order dated 22.06.2022 despite exercising due diligence.
- 1.3 The Petitioner through the current review Petition has requested the Commission to review its Order dated 22.06.2022 and approve the draft Power Purchase Agreement for purchase of power on short term basis entered into by it with M/s NVVNL.
- 1.4 The Commission held a hearing on 23.08.2022 to decide on the admissibility of the review Petition filed by UPCL. The Commission vide its Order dated 23.08.2022 admitted the review Petition filed by UPCL on the grounds that certain facts/justifications have been submitted by the Petitioner through the current Petition which were not submitted earlier.
- 1.5 The Petitioner's submission alongwith the analysis of the Commission is dealt in the subsequent section of this Order.

## **2 Petitioner's submission, and Commission's Analysis and Ruling**

### **2.1 Powers of the Commission and Grounds for Review**

- 2.1.1 Before going into the merits of the Petition filed by UPCL, the Commission first looks into the powers vested in it to review its Orders for taking a view on 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 exercises such powers under section 114 and Order XLVII of the Code of Civil Procedure, 1908 (CPC). The powers available to the Commission in this connection have been defined in Section 114 and Order 47 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.

2.1.2 The application for review has to be considered with great caution to necessarily fulfil 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 is of undoubted character; (2) that it was so material that its absence might cause miscarriage of justice; (3) that it could not be even with reasonable care and diligence brought forward at the time of proceedings/passing of Order. It is well settled principle that new evidence discovered, if any, must be one, relevant, and second, of such character that had it been given during earlier proceedings, it might possibly have altered the Judgment.

2.1.3 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.

2.1.4 With this background on legal provisions related to Review Petition, the Commission has examined the issues raised by the Petitioner to assess whether all or any of the issues raised by the Petitioner qualify for review.

## **2.2 Petitioner's submission**

2.2.1 The Petitioner in the review Petition submitted that due to extraordinary circumstances leading to the rates of gas attaining unprecedented prices there was great difficulty in generation of power from gas power plants. UPCL further submitted that the acute mismatch of the quantum of demand of coal against its availability had led to enormous

hike in its prices and resulted into a shortage of power at the exchanges. UPCL submitted that for the bids being placed at the exchanges to match the prevailing prices, the volume cleared was very less, in some cases to the tune of 8%-10%.

2.2.2 UPCL submitted that it was regularly negotiating with the gas-based sources to get the gas at cheaper rate. The Petitioner submitted that efforts were made to evaluate the cheapest options available for the period of two months based on then prevailing cost of power/energy scenario. UPCL submitted that Shell submitted their commercial proposal for landed price of USD 20.68/MMBTU for the period 25<sup>th</sup> May 2022 to 30<sup>th</sup> June 2022 which translated to appx. Rs. 12.20/kWh as energy charges. UPCL submitted that tie up of gas at such high prices would have resulted in significantly higher tariffs which was not the interest of the consumers.

2.2.3 UPCL submitted that considering the prevailing adverse situation, it endeavoured to attain an adequate minimum quantum of reliable power in order to tackle the daily shortage of 12-14 MUs and also to be able to supply to its consumers to meet universal supply obligation under Section 43 of the Electricity Act. UPCL submitted that to prevent the degradation of the power situation in the State and to safeguard the interest of the consumers, it resorted to short term tender to cater to the emergent situation. UPCL submitted that after considering the offers in light of then prevailing market rates and the non-availability of power in the exchanges an LoA was issued to M/s NVVNL for the months of May, 2022 and June, 2022 at Rs. 12.01/unit for 100 MW RTC power being the best-case scenario at that time.

2.2.4 UPCL submitted that the rates received in the tender were higher than usual and accordingly, UPCL took time to evaluate the same considering the volatile market conditions and also in light of the fact that the CERC on April 1 had capped the DAM rates at Rs. 12/unit. UPCL submitted the summary of IEX purchases for April, 2022 as follows:

S. No.	Date	Quantum for bidding (MU)	Quantum Cleared (MU)	UPCL Cleared Quantum Average Price (RS/MWH)	Percentage Clearance (%)	IEX Average Price (RS/MWH)	IEX Max Price (RS/MWH)	IEX Min Price (RS/MWH)
1	01-04-22	6.655	4.690	11896	70	13760	20000	4200
2	02-04-22	4.810	4.810	7344	100	7410	15000	3190
3	03-04-22	3.419	3.419	4349	100	4500	6420	2700
4	04-04-22	6.951	4.452	5871	64	6410	11920	3230
5	05-04-22	6.483	6.483	4742	100	4970	7620	2860
6	06-04-22	10.557	5.166	5872	49	7260	10600	3300
7	07-04-22	10.148	6.647	6562	66	8480	12000	3190
8	08-04-22	10.501	6.982	9131	66	9960	12000	5500
9	09-04-22	10.487	7.178	8672	68	10130	12000	3430
10	10-04-22	5.822	4.847	7468	83	7960	12000	3190
11	11-04-22	5.051	2.088	10178	41	11040	12000	4260
12	12-04-22	6.171	4.578	10004	74	10950	12000	3830
13	13-04-22	9.826	4.858	9955	49	10900	12000	6000
14	14-04-22	7.228	5.075	7181	70	9350	12000	3520
15	15-04-22	11.893	9.562	8672	80	8600	12000	11000
16	16-04-22	10.917	7.361	8698	67	10180	12000	5000
17	17-04-22	9.150	8.494	6609	93	6950	12000	3070
18	18-04-22	13.059	8.764	9473	67	10600	12000	5500
19	19-04-22	15.148	9.906	9302	65	10490	12000	4500
20	20-04-22	14.972	5.043	10970	34	11440	12000	8000
21	21-04-22	13.404	8.811	11699	66	11840	12000	10190
22	22-04-22	8.562	3.296	12000	39	12000	12000	12000
23	23-04-22	9.171	1.845	12000	20	12000	12000	12000
24	24-04-22	3.012	1.818	12000	60	11340	12000	6000
25	25-04-22	3.444	0.949	12000	28	12000	12000	12000
26	26-04-22	3.866	1.180	12000	31	12000	12000	12000
27	27-04-22	3.747	1.478	12000	39	12000	12000	12000
28	28-04-22	2.373	0.353	12000	15	12000	12000	12000
29	29-04-22	4.184	0.290	12000	7	12000	12000	12000
30	30-04-22	3.743	0.356	12000	10	12000	12000	12000

UPCL submitted that as can be seen from the above table, the average rates were continuously increasing and breaching Rs. 10/unit mark on regular basis, the rates on substantial number of slots were observed at a ceiling rate of Rs. 12/unit and percentage clearance of bid quantum was also going down leading to worry and stress with regard to maintaining the power supply in the State. The Petitioner further submitted that on 22.04.2022 the average rate observed was Rs. 12/unit, i.e. in all 96 blocks the rates were Rs. 12/unit and noticeably the clearance percentage had reached upto 39% only and thereafter on 23.04.2022 the percentage clearance was as low as 20%, i.e. out of total bid placed only 20% got cleared and the supply availability was so grim that more than 7 MU, i.e. almost 25% of total power requirement was short on that day.

UPCL submitted that in the panic situation it had resorted to the offer by M/s

NVVNL, but trader was showing resistance in agreeing for the offer as quite a long time had already been passed but upon insisting the trader agreed with the condition to decide on that date itself and it is only then that the Petitioner had decided to issue the LoI on 23.4.2022 itself. UPCL submitted that rather than rates, it was the assured quantum which was important especially when no relief from any corner was in sight and demand was expected to increase further in the months of May, 2022 and June, 2022. The Petitioner submitted that it deliberately took power for only two months and had not considered purchase beyond that.

2.2.5 UPCL submitted that the LoI dated 23.04.2022 issued by it to M/s NVVNL mentions that the PPA shall be signed only after approval of the Commission, which clearly depicts that the Petitioner had no intent to conclude and culminate any transaction without prior approval of the Commission.

2.2.6 UPCL submitted that it had taken steps for power procurement in grave emergency, and that the continuously heightening cross-border tension prevalent between Russia and Ukraine, among other international factors had major adverse effects on the supply and availability of gas and coal. The Petitioner further submitted that the unexpected early onset of the summer season lead to soaring temperatures and the occurrence of the festive season and Char Dham Yatra saw a considerable rise in the demand for electricity.

2.2.7 UPCL submitted that the emergency situations faced by it during recent past can be categorized as an exception to procurement of power without prior approval of the Commission under Regulation 75(4) of the MYT Regulations, 2021.

2.2.8 UPCL submitted that the Commission may liberally and objectively construe the Regulation 75(4) of the MYT Regulations, 2021 while exercising its regulatory power to recognize and include the emergent situations relating to war driven economic hardship and sudden shortage of power to be one whereby exception to the “prior approval” rule can be accorded.

2.2.9 The Petitioner submitted that it acted towards the fulfilment of the objectives of the Electricity Act and was guided by the objectives of the Electricity Act which seeks to promote the protection of consumers’ interests and supply of electricity to all areas in the

country. The Petitioner submitted that, it being the sole distribution licensee in the State of Uttarakhand, in order to safeguard the interests of the consumers and to be able to effectively supply a reasonable quantum of electricity to the State it had resorted to immediate purchase of power.

2.2.10 The Petitioner submitted that, it being a Distribution Licensee, is under universal supply obligation under Section 43 of the Electricity Act which mandates the Distribution Licensees to compulsorily supply electricity as and when applied for or directed by the Appropriate Commission, and the Electricity Act being parent statute would override the mandate of the MYT Regulations in such emergency conditions and exceptional circumstances.

2.2.11 The Petitioner submitted that the Commission vide its Order dated 22.06.2022 while rejecting the Petition opined that the Petitioner had not given proper consideration towards the cost-benefit analysis of its action and its possible repercussions on the larger scale. The Petitioner submitted that at the stage of hearing in the matter of original Petition, the Petitioner on account of various operational exigencies could not produce the details relating to cost-benefit analysis, however, post passing of that order, the Petitioner is in a position to provide a detailed cost-benefit analysis to satisfy the queries of the Commission. The Petitioner submitted that such cost-benefit analysis was not in the possession of the Petitioner at the time of passing of the Order despite exercising due diligence. The Petitioner submitted the following cost-benefit analysis before the Commission for justifying the procurement of power on short term basis from M/s NVVN.

“

- *NVVN Energy received in actual –135.75 MU (May 74.07 MU & June 2022 61.68 MU; for 100 MW in each month)*
- *Total Cost – Rs.163.04 Cr (135.75 MU x 12.01/kWh / 10)*
- *If this energy was sourced from Gas based stations at a price of Rs.12.20/kWh, the total power purchase cost would have been Rs.165.62 Cr (135.75 MU x Rs.12.20/kWh / 10)*
- *The additional/ excess power purchase cost would have been Rs.2.58 Cr (Rs.165.62 Cr of Gas based stations minus Rs.163.04 Cr of NVVN). Hence Petitioner has saved atleast Rs.2.58 Cr*

*for the consumers of the State by arranging this reliable power on short term basis.*

“

2.2.12 The Petitioner submitted that the Impugned Order dated 22.06.2022 may be reviewed by the Commission in terms of the present Petition.

### **2.3 Commission's Analysis and Ruling**

2.3.1 The Commission analysed the submissions made by the Petitioner. Before going into merits of the Petition, the first question that comes up is whether the instant Petition filed by UPCL is maintainable or not considering the provisions of the Section 114 and Order 47 of the CPC, under which the 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.

As can be seen from above, the review of an order is permitted only if the criteria for review as mentioned above are met and in no other case the Act permits the review of an order of the Commission. The Petitioner filed instant Review Petition on the grounds that the Commission while rejecting the Petition filed by UPCL for approval of draft short term PPA vide its Order dated 22.06.2022 should have considered the grave and serious nature of the international factors that were prevailing during the relevant time and how it suddenly affected the supply and availability of coal/gas for generation of electricity. The Petitioner submitted that there is a discovery of new and important matter or evidence in the form of information of cost benefit analysis which it was not able to produce earlier at the time of passing of Impugned Order dated 22.06.2022 despite exercising due diligence.

2.3.2 In this regard, the Commission observed that the Petitioner had submitted certain additional information which it did not submit earlier during the proceedings of the



Impugned Order dated 22.06.2022 as summarized below:

- Cost-benefit analysis of the costly procurement from M/s NVVNL.
- Summary of IEX purchases during the period April, 2022.

2.3.3 The Petitioner submitted the cost-benefit analysis for costly procurement of power from M/s NVVNL and stated that the same was not in the possession of the Petitioner at the time of passing of the Impugned Order dated 22.06.2022 despite exercising due diligence and, therefore, review Petition be allowed on the said ground. The Commission analysed the cost-benefit analysis submitted by UPCL and observed that it was simply a mathematical calculation which could be produced at any stage of the proceedings related to passing of the Impugned Order. The Commission is of the view that the said submission of the Petitioner does not suffice the grounds of review in the form of form of 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. Hence, the review cannot be allowed on this ground.

2.3.4 Further, the Commission analysed the summary of IEX purchases made by the Petitioner during the month of April, 2022 and observed that the percentage of quantum cleared during the month was varying to a large extent with the clearing percentage on certain days going to as low as 7%. Moreover, the average price in the IEX varied in the range of Rs.9/kWh to Rs. 12/kWh for most of the days during the month of April, 2022. The Commission is of the opinion that the said data provided by the Petitioner has the potential to alter the views taken by the Commission earlier during the proceedings of Impugned Order dated 22.06.2022, and if the same would have produced earlier by the Petitioner the Commission might not have rejected the original Petition for approval of PPA with M/s NVVNL filed by UPCL. The Commission, accordingly, is of the view that said information being produced by UPCL suffices the grounds of review in the form of 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.

2.3.5 The Commission, in view of the above, allows the Review Petition filed by UPCL against

the Commission's Order dated 22.06.2022. The Commission examined the provisions of the draft PPA which appears to be in accordance with the Regulations. UPCL is directed to submit the signed copy of the PPA to the Commission within 15 days of this Order.

2.4 Ordered Accordingly.

**(M.K. Jain)**  
**Member (Technical)**

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