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**BEFORE  
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION,  
LUCKNOW**

**Petition No.: 1461 / 2019**

**Present:**

- (1) Shri Raj Pratap Singh, Chairman
- (2) Shri Kaushal Kishore Sharma, Member

**IN THE MATTER OF:**

Review petition under Regulation 150 of UPERC (Conduct of Business) Regulations, 2004 read with Section 94(2) and other related provisions of the Electricity Act, 2003 seeking review of Tariff Order dated January 22, 2019 in the Petition No. 15SM / 2018.

**AND**

**Petitioner**

M/s Rimjhim Ispat Ltd. 123/360, Near UP Rolling Mill Compound, Fazal Ganj, Kanpur, Uttar Pradesh 208012.

**Respondent**

1. The Managing Director, U. P. Power Corporation Ltd., 7th Floor, Shakti Bhawan, 14, Ashok Marg, Lucknow – 226001.
2. The Managing Director, Dakshinanchal Vidyut Vitran Nigam Ltd., Urja Bhawan, 220KV Sub-Station Mathura bypass Road, Agra - 282007.

The following were present:

1. Shri Nihar Varshney, Vice President, Rimjhim Ispat Ltd.
2. Shri Rajiv Srivastava, Advocate, UPPCL
3. Shri R. S. Mathur, EE RAU, UPPCL
4. Shri Sayed, EE RAU UPPCL
5. Shri Shailesh Verma, Counsel, Petitioner



## ORDER

(Hearing- August 06, 2019)

1. M/s Rhimjim Ispat Ltd. (herein referred as 'Petitioner') had filed a Petition in the matter of "Review petition under Regulation 150 of UPERC (Conduct of Business) Regulations, 2004 read with Section 94(2) and other related provisions of the Electricity Act, 2003 seeking review of Tariff Order dated January 22, 2019 in the Petition No. 15SM / 2018."
2. The Petitioner in its Review Petition has sought review on the computation of Cross Subsidy Surcharge (CSS) approved in Tariff Order dated January 22, 2019 on account of following:
  - a. The Total Transmission Losses (Intra State and Inter State Transmission Losses) of 4.96% have been considered for FY 2018-19 (Refer Table 7-15 of Tariff Order dated January 22, 2019).
  - b. The 'L' in the Cross-Subsidy Surcharge formula denotes system losses i.e. both transmission and distribution losses. The Commission has considered system loss of 4% for HT category of consumers above 11 kV for the computation of CSS based on the submissions made by the Discom.
  - c. As per the submission the system losses, which will comprise of both transmission and distribution losses, cannot be less than transmission losses.
  - d. The submission of the licensee of 4% loss at above 11 KV and 8% for the rest is actually a breakup of its distribution losses only and not system losses. However, often the distribution licensees when referring to the distribution losses of their distribution system used the term system losses
  - e. The approved consolidated distribution losses of licensees for FY 2018-19 in MYT Order dated November 30, 2017 is 15.91%. Thus the 4% and 8% submission of the licensees is also wrong.
  - f. Because of this error the Petitioner has been paying inflated CSS. The Hon'ble Commission should recompute the values of CSS and till that time stop the levy of CSS charges as excess CSS charges have already been collected by Discom.



- g. It is submitted that the Commission in its Order dated 03.11.2015 kept the open access surcharge for FY 2014-15 and FY 2015-16 in abeyance. However, the Commission in its Tariff Order for FY 2016-17 dated 01.08.2016, simply on the submission made by the UPPTCL that it is going to increase its transmission capacity shortly to address the problem of inter-state transmission and considering the reply of Discom on applicable system loss removed the abeyance and approved CSS for consumers above 11kV at 4% system losses. The Petitioner further submitted that there has been no material change in open access scenario in the State and still the petitioner and other willing consumers are being denied inter- state transmission access.
3. The first hearing of the Petition was scheduled on July 02, 2019 but the Counsel of the Petitioner submitted an application for the adjournment of hearing. The Commission ordered for adjournment of hearing. The next hearing was scheduled for August 06, 2019. UPPCL in their submission dated August 02, 2019 have mentioned that the petition is comprehensively outside the scope of the review jurisdiction of this Hon'ble Commission. The petition is not in conformity with the Law of Review and therefor, is misconceived and is liable to be dismissed by the Hon'ble Commission. In support to this, Section 94(1) of the Electricity Act has been quoted as below:
- "The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely (f) reviewing its decisions, directions and orders"*
4. UPPCL further submitted that Section 114 of Civil Procedure Code, 1908 and order 47 Rule 1 have been referred for application/ petition for review. As per this, an application for review would lie when the order suffers from an error apparent of the face of the record and permitting the same to continue would lead to failure of justice. Power of review can also be exercised in the event of discovery of new and important matter.
5. In the hearing on August 06, 2019 the Counsels of the Petitioner and Respondents argued on the maintainability of the Petition. Subsequently Petitioner made a written submission on August 09, 2019 wherein grounds for the maintainability of the Petition have been provided. The Petitioner has quoted various Orders and arguments in this regard. The petitioner has relied his case mainly on



following judgements to bring out that his review petition is maintainable before the Commission. These are being reproduced below:

- a. "34. While exercising its power of review so far as alterations or amendment of a tariff is concerned, **the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof.** Its jurisdiction, in that sense, as submitted by Mr. Gupta, for the aforementioned purposes would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto." - (U.P. Power Corpn. Ltd. v. NTPC Ltd., (2009) 6 SCC 235)
  - b. "3. **But merely because an application for police protection was filed only under Section 151 CPC invoking the inherent jurisdiction, it cannot be a reason for the High Court to reject it and hold that the application should have been filed under Order 21 Rule 32 CPC. The crucial question is whether the executing court has jurisdiction. That is not disputed. The only thing is that an exact provision was not invoked. That by itself shall not be a reason for rejecting the application** - (Raja Venkateswarlu v. Mada Venkata Subbaiah, (2017) 15 SCC 659, *Municipal Corpn.*)
6. Before analysing the case, it would be prudent to place following observations of the Commission, as captured in its two orders viz order dated 03.11.2015 in Review Petition 995 of 2014 and order dated 22.05.2018 in Review Petition No. 1282 of 2018 respectively passed in the cases of the present petitioner, while he agitated against similar issue in above two petitions -

*"While determining the issue of cross subsidy surcharge, held that "provisions made in tariff orders for F.Y. 2014-15 and 2015-16 regarding open access CSS have failed in operationalization of open access in the state despite power prices being low in power exchanges. Therefore, to promote open access in the state, the Commission directs that provisions regarding open access surcharge made in the tariff orders for F.Y. 2014-15 and 2015-16 be kept in abeyance.." (Order dated 03.11.2015 in Review Petition 995 of 2014)*

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*"While determining the issue of the value of L while calculating CSS held that the issue "being a policy matter and interpretation of regulations needs detailed consideration and hence should be dealt by the full bench of the Commission with respect to the MYT Order dated 30.11.2017" (Order dated 22.05.2018 in Review Petition No. 1282 of 2018)*



Further, the petitioner has also preferred appeals before Hon'ble APTEL, New Delhi in form of appeal no. 311 of 2016 against the Tariff Order of the Commission dated 1<sup>st</sup> August 2016 for FY 2016-17 & appeal no. 325 of 2018 against MYT Tariff Order for FY 2017 dated 30<sup>th</sup> November 2017 containing similar grounds.

## 7. Commission's Analysis:

As far as maintainability the present review petition is considered, the Commission is of considered view that the present petition is not maintainable within the framework of review as it is neither a case of "discovery of new and important matter of evidence" nor it is covered by a "error apparent on the face of record ". It has already been established by Hon'ble Supreme Court in catena of judgements that the scope of review is very narrow and should be exercised with abundant caution. As far as "error apparent on the face of record is concerned" Hon'ble Supreme Court has held in series of judgements as under –

*"An error apparent on the face of record must be such a patent error which in one glance can be detected without advancing long drawn arguments on either side"*

*"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of record"*

*"Decision wrong in law is not error apparent on the face of record"*

*"The power of review cannot be exercised on the ground that the decision was erroneous on merits because that would be within the province of a court of appeal and will not be within the scope of review"*

*"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"*

*"It does not give the right anew to the party to agitate the matter further nor does it confer jurisdiction on the Court itself to further probe the correctness of the decision arrived at; review of a judgement cannot be held on the basis of the liberty. The circumstances under which review can be had are*



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*provided under Order 47 of the Code of Civil Procedure. In any event, law is well settled on this score that the power to review is not any inherent power and it must be conferred by law either specifically or by necessary implication."*

Based on above and many similar findings of the Hon'ble Supreme Court in the case of "error apparent on the face of record", it can be decisively concluded that the case of the petitioner does not fall within "error apparent on the face of record" because the Commission has given a Tariff Order, reasoning of which is being challenged by the petitioner time and again but as it can be seen from the above orders of Hon'ble Supreme Court that if petitioner wishes to challenge the reasoning behind any specification of Tariff Order or any other order, it has to be through an appeal and not by the means of review.

8. Similarly, the present petition does not fall within the realm of "discovery of new and important matter of evidence" because application for review on this ground, as per Hon'ble Supreme Court, should be considered with great caution and should not be granted lightly. Hon'ble Supreme Court lays down that for this purpose an applicant should show that (1) such evidence was available, and of undoubted character; (2) that it was so material that its absence might caught miscarriage of justice; (3) that it could not with reasonable care and diligence have been brought forward at the time of decree. Obviously, the present petition does not fall under this category as it does not claim any new or important evidence, which could have changed the course of judgement.
9. Accordingly, the present review petition is not maintainable before the Commission on the grounds of review. As far as the findings of Supreme Court in case of UP Power Corporation Ltd. Vs NTPC Ltd., as submitted by the petitioner in his support, is concerned, it is based on completely different premise. It says that Central Commission would not be barred in terms of Order 2 Rule 2 of CPC but the present case is not covered by Order 2 Rule 2 of CPC, which merely says that a petitioner should assail all his claims in one go rather than adopting a serial approach, which is not the case in the present petition. Similarly, the second judgement cited by the petitioner in the case of Raja Venkateswarlu v. Mada Venkata Subbaiah is totally distinguishable as there is no issue of invoking the inherent jurisdiction of the court since the review petition falls flat on its face on the grounds of review alone.

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10. Therefore, the present review petition is adjudged as non- maintainable before the Commission. It would also not be out of context to mention that the petitioner has already filed two appeals in the similar matter before Hon'ble APTEL, which are *sub-judice* before it. Notwithstanding the status of appeals, the present review petition is being dismissed on the grounds of maintainability alone.

(Kaushal Kishore Sharma)

Member

(Raj Pratap Singh)

Chairman

Place: Lucknow

Date: 4/9/2019

