



---

**BEFORE**  
**THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION**  
**LUCKNOW**  
**Petition No.1302/2018**

**(Date of Hearing: 27.04.2018)**

**PRESENT:**

1. Hon'ble Sri Suresh Kumar Agarwal, Chairman
2. Hon'ble Sri Kaushal Kishore Sharma, Member

**IN THE MATTER OF:** In the matter of Review Petition against UPERC order dated 07.03.18 Lalitpur Power Gen Co. Ltd. in Pet No.1075/15

**Petitioners :**

UP Power Corporation Limited.  
(through its Chairman)  
7<sup>th</sup> Floor, Shakti Bhawan,  
14 Ashok Marg, Lucknow  
Varanasi.

**Respondent:**

**Lalitpur Power Generation Company Ltd. (LPGCL)**  
Registered Office: B-10, Sector-3,  
Jamnalal Bajaj Marg, Noida-201 301  
Local Office: B 2/335 Vishal Khand II,  
Gomtinagar, Lucknow-226 010

**In the Presence of**

1. Sri S.N.M. Tripathi, Director LPGCL, Ltd
2. Sri Govind Mahshwari, CEOLPGCL, Ltd.
3. Sri Amrendra Tripathi, Sr. Manager, LPGCL Ltd.
4. Sri V.K. Ashtana, CE, PPA,UPPCL
5. CA Manish Garg, Consultant, UPPCL
6. Sri Rajeev Srivastava, Adv., UPPCL
7. Sri Pawan Awasthi, Advocate, UPPCL



8. Sri Apoorva Tewari, Advocate
9. Sri Amit Pandey
10. Sri Upendra Prasad
11. Sri Anand Singh

**ORDER**  
**(Date of hearing 27.04.2018)**

UPPCL has filed Petition No. 1302/2018 seeking review of this Commission's Order dated 07.03.2018 in Petition No. 1075/2015, under Section 94(1)(f) of the Electricity Act, 2003 read with regulation 150 of UPERC ( Conduct of Business) Regulation, 2004.

2. In this petition the petitioner has sought the review of aforesaid order on the following grounds:

- (i) That the petition for determination of provisional tariff for Unit-2 cannot be the medium for agitating against the order of the Commission in which provisional tariff for Unit-1 was determined. The Petitioner has stated that Commission's understanding that there cannot be two rates of fixed charges as the energy supplied was not unit-wise, is erroneous as each unit has a separate meter and works independently.
- (ii) The generator has filed the application for fixation of provisional tariff for Unit-2 but without a fresh application by the Generator, the tariff for Unit-3 has also been determined which allegedly is a breach of procedures laid down in Regulation 4(1) and Regulation 5(3).
- (iii) No mention is made in the order regarding exclusion of return on equity from fixed charges as per earlier orders of the Commission.
- (iv) The interpretation of SHAKTI Scheme by the Commission is erroneous.

3. The Respondents M/s Lalitpur Power Generation Co. Ltd. has filed their counter affidavit on 16.4.2018. In this Counter Affidavit the respondents have raised certain issues regarding maintainability of the review petition. The respondents have stated that;

- A. That Section 94 of the Electricity Act 2003 relating to proceedings before commission envisages as under:

“The appropriate Commission shall for the purpose of any enquiry or proceeding under this Act, have the same powers as are vested in civil court under the Code of Civil Procedure 1908 (5 of 1908) in respect of the following matters namely:-

- a) .....
- b) .....
- c) .....
- d) .....
- e) .....
- f) Reviewing its decisions, directions and orders;

B. That Section 114 of Code of civil Procedure code 1908 makes following provisions:

**114. Review:-**

*Subject as aforesaid, any person considering himself aggrieved-*

- (a) by a decree or order from which an appeal is allowed by this Code, 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, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.*

C. That, Rule 1(1) of the Order 47 of the Civil Procedure Code, 1908 further provides:

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.*

D. That the grounds/the causes stated by the Petitioner (UPPCL) in the said instant review petition are neither in the nature of self-evident error nor any new evidence has been discovered by them. Therefore, the review does not fall under the section 114 rule 1(1) of the order 47 of the code of civil procedure 1908. In view of above ground, the said review petition is not legally maintainable, thus liable to be dismissed.”

4. The respondents have further made the following submissions:

- (a) That the Petitioner (UPPCL) has not submitted any new facts/ground which were not earlier in their knowledge. The Petitioner has reiterated the same arguments which were filed in their counter affidavit when the matter of provisional tariff was being considered. The Commission has already taken on record, in its order dated 7.3.18, all that which has been stated in the review petition.
- (b) The Provisional tariff for Unit-1 was decided on the basis of investment made up to December 2014 which has increased to Rs.14916 crore by 30 Sep 2015. The recovery of legitimate fixed cost was not possible on the basis of provisional tariff of Unit-1. Therefore amendment of tariff of Unit-1 at par with Unit-2 was requested.
- (c) Regulation 4 & 5 of UPERC (Generation tariff) Regulation 2014 nowhere categorically bars the re-determination of provisional tariff.
- (d) In the Counter Affidavit filed by the respondents during the course of proceedings for determination of Provisional tariff of Unit-2, they have also cited judgments of CERC/UPERC regarding redetermination/revision of Provisional tariff namely SIPAT Thermal Power Station, Udipi Thermal Power Station by CERC and in case of Bajaj Energy Private Limited by UPERC.
- (e) The respondents have claimed the actual expenditure up to 30.09.2015 as Rs.14916 crore for all the three units. If UPERC would have deducted the apportioned capital cost of Unit-1 and would have considered the remaining capital cost for determination of tariff for Unit-2 and Unit-3, the tariff for Unit-2 and Unit-3 would have become very high. It would have resulted in differential tariff for Unit-1 vis-à-vis the other two units. It would have caused energy accounting problem because of common metering at interfacing point. Regarding filing of a separate petition for determination of tariff for Unit-3 the Respondents have stated that they had prayed to the Commission for a specific relief to condone any inadvertent omission/errors/shortcomings/delay and

permit to Petitioner to add/change/modify/alter their petition and make further submissions as may be required at a later stage. The Respondents had made an amendment application in their original Petition vide affidavit dated 23.02.2018 for determination of tariff for Unit #3 also on the basis of actual expenditure incurred up to 30.09.2015.

(f) Regarding omission of earlier orders regarding admissibility of RoE, the respondents have stated that this matter is under consideration of the Commission under Review Petition No.1155/2017.

(g) Regarding application of SHAKTI Scheme the respondents have stated that no new fact has been brought in the petition and there is no erroneous interpretation of 'SHAKTI' Scheme by the Commission.

5. The Matter was heard on 27.04.2018. Petitioner's Consultant Sri Manish Garg raised four issues mentioned herein before and also incorporated in their petition. He stressed that as per the Regulations the provisional tariff of Unit #1 should not have been changed. Further he pleaded that the Respondents had not applied for fixation for provisional tariff for Unit #3 therefore, the Commission without completing the formalities should not have approved the Provisional Tariff for Unit #3. He further stressed on the point that the Commission's order should have clearly incorporated the decision of the Commission regarding admissibility of RoE and should have considered the SHAKTI Scheme in true spirit to keep the tariff low.

6. Sri Apoorva Tewari, Advocate appearing on behalf of the Respondents started his arguments on the maintainability of the review petition. He pointed out that all the four issues raised in the review petition have been adequately dealt with in the order of the Commission. He pointed out that the Commission's power of review are limited. He stated that as per Section 94 of Electricity Act 2003 the Commission has the same powers as are provided in Code of Civil Procedure 1908 (5 of 1908). Section 14 of Code of civil Procedure code 1908 and Rule 1(1) of the order 47 of the Civil Procedure Code, 1908 allows the review against an order of a court only on the following grounds:

- i) *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*
- ii) *on account of some mistake or error apparent on the face of record*
- iii) *for any other sufficient reason, desires to obtain a review of the decree passed or order made against him.*

7. The Respondents' Advocate stated that all the four grounds of the review petition had been adequately dealt with in the Commission's order dated 7.3.2018. Further, no new fact has been brought in and there is no mistake apparent on record, therefore, the review petition is not maintainable. Advocate Shri Aorva Tewari also submitted the following case laws decided by Hon'ble Supreme Court:

- (a) Parison Devi v. Sumitri Devi (1997) 8 SCC 715, para 9, 10**
- (b) Suramanian Swamy v. State of Tamil Nadu (2014) 5 SCC 75, para 52**
- (c) Lily Thomas v. Union of India (2000) 6 SCC 224, para 58**
- (d) Union of India v. Sandur Manganese & Iron Ores Ltd.**
- (e) Inderchand Jain v. Motilal (2009) 14SCC 663, para 10 and 11**
- (f) Haridas Das v. Usha Rani Banik, (2006) 4 SCC 78, para 13-18**

8. The Commission has perused the orders submitted by the Advocate of the Respondents and noted that the apex court has clearly demarcated the boundaries within which a review can be considered. The Apex Court has held that as long as a point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. Further the Apex Court has held that a review petition has a limited purpose and cannot be allowed to be an appeal in disguise.

#### **Commission's View:**

1. After hearing the arguments of both the parties the Commission is of the view that as per UPERC (Generation Tariff), 2014 the Commission has the powers to determine the Provisional Tariff stage-wise and unit-wise. In the instant case the Commission found that the respondents have incurred certain costs till the commissioning of all the units, which is not disputed by the Petitioner, then the Commission had two options, first is to decide the provisional tariff on the basis of capital cost of all the units to which the updated cost relates and the second option is to reduce the already apportioned capital cost of Unit#1 from the updated capital cost and determine the provisional tariff of Uni#2 and #3 on the basis of remaining cost. The second option would have had two provisional tariffs and the tariff for Unit2 & 3 would have been much higher than what is decided for the 3 units. The Commission did not find it appropriate to keep different tariffs for two sets of machines as it would have caused problem in scheduling, dispatch and billing.
2. Regarding metering of individual units it has been informed that each unit has a meter but during the arguments it was admitted by the petitioner that meter reading of energy supplied is done on the basis of a single meter installed at the bus-bar. Further the availability is also declared for all the three machines

combined and one bill is raised for all the three units without going into the details of generation of individual unit. In such a situation the stand taken by the Commission in its order dated 7.3.2018 is vindicated and the order of the Commission regarding apportionment of updated capital cost of all the three units is fully justified. Further it facilitates the smooth billing and payment. CERC in the three cases mentioned herein above has also followed the same principle. The respondents are eligible to get the fixed charges on the capital cost which they have incurred and which has not been disputed by the Petitioner. However, this is subject to determination of final tariff after prudence check. The petitioner has to pay interest on the difference between the final determined cost and provisional cost. Therefore it is not in the interest of the consumers to defer the liability of the Petitioner and permit them to bear the interest at a later date. Therefore revision of tariff of Unit#1 on the basis of the updated cost also helps the petitioner in mitigating their future liability in the form of interest.

3. Regarding determination of provisional tariff for unit # 3 the Commission has very clearly mentioned in its order that the respondents had prayed to the Commission to decide the tariff of Unit #3 also. Before the hearing for determination of provisional tariff for Unit-2 started, 3<sup>rd</sup> Unit had also been commissioned and the Respondents stated that the updated cost up to 30.9.2015 covers the cost of Unit-3 also and they do not want to make any additional submission regarding the Capital Cost. Since the respondents were asking provisional tariff for Unit#3 on the cost which they have submitted for determination of provisional tariff of Unit#2 the Commission found it reasonable in the given framework to determine the provisional tariff for Unit#3 also. The Petitioner has raised only a technical objection which monetarily does not give them any advantage.
4. Regarding admissibility of RoE the Commission need not reiterate all its earlier orders which are in operation. However, the Commission would like to clarify that regarding admissibility of fixed cost earlier orders of the Commission will be applicable.
5. Regarding implication of SHAKTI Scheme the matter has been dealt with very clearly in the order dated 7.3.2018 and nothing more remains to be dealt with by the Commission on this issue.
6. The Commission has considered the arguments placed in the review petition and has examined the issues both on legal and factual perspective and decides that the review is allowed only in respect of clarification of the fact that



---

computation of fixed cost will be governed by the earlier orders of the commission dated 21.09.2016 and 18.01.2017, in this regard.

9. The petition is accordingly disposed of.

(Kaushal Kishore Sharma )  
Member

(Suresh Kumar Agarwal)  
Chairman

Place: Lucknow  
Dated: 03.05.2018