**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION, SHIMLA**

Review Petition No.118/07

In the matter of:-

Review Petition under regulation 63 of the Himachal Pradesh Electricity Regulatory Commission (Conduct & Business) Regulations, 2005, against the Tariff Order (FY 2007-08) passed on 16.4.2007.

and

In the matter of:-

M/s Auro Spinning Mills (A Unit of Vardhman Textiles Ltd) Sai Road, Baddi, Tehsil Nalagarh, Disst. Solan (H.P.)

…(Petitioner)

V/s

Secretary (Power) H.P. Govt. & Others

(Date of decision 1.12.2007)

…(Respondents)

Present: Sh. Satish Mehta
the Chief Engineer of Auro Spinning Mills Ltd.

Sh. Bimal Gupta, Advocate
for Respondent HPSEB

Sh. P.N. Bhardwaj
Consumer Representative
(under section 94 of the Electricity Act, 2003)

**ORDER**

(This petition was last heard on 27.10.2007 and decision thereon was reserved)

This petition, moved on behalf of M/s Auro Spinning Mills, Baddi (hereinafter referred as "petitioner"), seeks the review of the Tariff Order dated 16.4.2007, passed on the application filed by the Himachal Pradesh Electricity Board (hereinafter referred as "the respondent Board") for approval

of the Annual Revenue Requirements (ARR) and the determination of the Distribution and Retail Supply Tariffs, as well as the Generation, Transmission and Bulk Supply Tariffs for FY 2007-08.

2. The brief facts, as made out of the documents placed on record, are that the Vardhman Textiles Ltd. Company, having nine manufacturing units in Himachal Pradesh, is the high user of energy supplied by the respondent Board and these Units come under the category of Large Supply (LS) consumers operating at voltage level of 66 kV. One of the aforesaid nine manufacturing Units of the Company, namely M/S Auro Spinning Mills, Baddi, duly filed its objections against the ARR of the respondent Board and represented itself in the public hearings held during the process of tariff determination for the Board for the FY 2007-08. This Commission, vide Tariff Order dated 16.4.2007, approved the tariff for various categories of consumers including Large Supply Category as reflected in Table 93 of the Tariff Order, and also approved the Low Voltage Supply Surcharge (LVSS) in respect of Large Supply category at the rates specified in Part-I of Annexure-II of the Tariff Order, in case the consumers do not adhere to the standard supply voltage as specified in Part-II of Annexure-II of the Tariff Order.

3. The petitioner has approached this Commission to review the aforesaid Tariff Order on the following grounds:-

(a) that the ARR for the year 2007-08 submitted by the respondent Board did not contain any proposal regarding applicability of LVSS in respect of Large Supply; hence the petitioner was not in a position to file its objections in the matter;

(b) that the Commission, under Chapter-A9 "Tariff Philosophy & Design" has considered the T.D losses at different voltage level (Table No. 76), which indicates that T&D losses are 3.7% for consumers operating at 66 kV and above (EHT) and there is no further differentiation between the consumers getting electricity at 66kV & 132 kV voltage level. There is no reason for levying the LVSS or allowing the High Voltage Supply Rebate (HVSR) in case of consumers already getting electricity at 66 kV voltage level;

(c) that in the Note below Table 76 the T&D loss in case of EHT consumers has been at 3.71% similar to the past year, when the LVSS & HVSR were not applicable to LS category. Thus the circumstances relevant for determination of tariff conditions have not changed as compared to the last year;

(d) that a 66 kV Sub-station was laid and erected according to the Standard Supply Voltage applicable at the time of getting connection with the commitment to provide 28.3 MVA power; and the Vardhman Group of Industries came forward to support the Board financially to set up 66 kV Sub-station at Katha for supply of electricity. Thus the provisions relating to levy of LVSS should not be made applicable to the petitioner as well as other consumers who also had duly fulfilled the conditions relating to the Standard Supply Voltage as prevailing at the time getting connection;

(e) that the changing of supply voltage from LSV to HSV needs complete change of infrastructure at the end of HPSEB as well as other consumers, which involves a huge financial investment and is a time consuming exercise;

(f) that there is no 132 kV system available at Baddi at Katha HPSEB Sub-station and hence the Standard Supply Voltage i.e. 132 kV should not be made applicable;

(g) that it may not be possible to create required infrastructure in less than 2 years time, as delivery period of the equipment, especially, the power transformer is minimum one and a half year from the date of clear order; procurement, erection and commissioning of the bays and allied equipment would also consume substantial time.

4. The Kullu Hotels and Guest Houses Association, Kullu, who were one of the objectors in the tariff determination process, have also supported the review petition saying that in case of the consumers, who had fulfilled the condition relating to the standard supply voltage at the time, when they had got connection from the Board, Standard Supply Clause should not made applicable and it is utterly unjustified and also illegal to levy LVSS on them

when neither the Board has incurred any additional expense nor installed any special equipment or infrastructure for such consumers.

5. The respondent Board in its reply admits that the tariff has been approved by the Commission regarding LVSS, irrespective of submission of the same by the Board. However, the Board, contests the review petition on the ground that the losses will definitely reduce when the high consumption consumers will shift their load to higher voltage. No discrimination can be made in making the tariff applicable for old and new consumers, as it has long term repercussions so the request of the consumer should not be entertained. Further, the financial assistance, if any, given by the consumer to the Board has ultimately benefited the consumers in getting his connection released at an early date and he has already derived benefits from the same. Non-shifting to higher voltage will definitely be encroaching upon the rights of other consumers who come in the category of consumers getting supply at a lower voltage. The Board has a 132 kV system in the vicinity of the consumer i.e. 132 kV double circuit line which is feeding Brotiwala from 220/132kV Sub-Station, Kunihar and a solid tap from one of these lines can feed the consumer on 132 kV. The consumer is to bear the total cost of the 132 kV line. The consumer is not entitled for any additional benefits or has any right to demand additional benefits against the tariff announced by the Commission. The Commission has approved ARR of the Board, keeping in mind the recovery of various surcharges, including LVSS from LS category and as such if the request of the consumer is acceded to, then the Board will suffer revenue loss. It will send a wrong signal to other consumer categories of the State and similar representations are likely to be received for deferring this surcharge.

6. In the rejoinder, the petitioner has reiterated its submissions made in the review petition and has submitted that losses are reduced at high voltage, but losses at 66 kV and above are lower percentwise, in comparison to, losses at voltage level below 66 kV and for that reason the Commission in the tariff order for the FY 2007-08, indicated T.D. losses at 3.7% for consumers at 66 kV and above (EHT). The petitioner further submits that at time of release of the electrical connection the petitioner had spent huge amount for setting up the respondent Board's 66 kV Sub-Station at Katha and laying of 66 kV lines

(including 66 kV Sub-Station equipment at consumer's premises and the Board made a commitment to provide 28.3 MVA power on 66 kV. As such the petitioner pleads that the LVSS be made applicable to the prospective consumers only. With regard to the contention that the respondent Board has 132 kV system at Barotiwala, it is stated that it is at an approximate distance of 8 to 9 km from the petitioner's premises, besides so many industries mushroomed on the periphery of Barotiwala to Katha Sub-Station and in the vicinity of petitioner's factory premises, may further increase the line route distances. At present 66 kV line route distance is approximately 1.72 km from Katha Sub-Station when 132 kV line would come from Barotiwala Sub-Station at a distance of 8 to 9 kms, the conductor resistance would increase more than four times whereas the current would reduce to half only at 132 kV against current 66 kV. In view of this there would not be any line loss reduction. It is denied that the Board would suffer any revenue loss as the Commission has approved tariff irrespective of the submission for LVSS by the Board in the ARR for the year 2007-08. In view of these facts the petitioner has stressed that –

(a) the LVSS and HVSR may be made applicable to prospective consumers only and not to the existing consumers, who have already contributed to the Board in creating the required infrastructure as per the supply voltage condition applicable at that time;
(b) the Commission may allow reasonable time of not less than two years for creation of suitable infrastructure so as to allow the consumers to shift from Lower Voltage Supply to Higher Voltage Supply smoothly.
(c) the consumers once having incurred the infrastructure cost for setting up of 66 kV Sub-Station should not be charged for any additional cost for shifting from 66 kV supply to 132 kV supply.

7. Before the Commission clinches the point in issue it would be desirable to spell out the scope of the power of the Commission to review the tariff determined. The scope and authority of review is derived from the section 94(1)(f) of the Electricity Act 2003 and regulation 63 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, read with order 47 rule 1 of the Code of Civil Procedure,

1908 (“CPC”). A person aggrieved by an order, from which no appeal has been performed or no appeal is allowed may prefer a review on the following grounds:-

(a) discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time when the order was passed or made, or

(b) mistake or an error apparent on the face of the record, or

(c) any other sufficient reason

8. In terms of settled precedents, the principles which have driven the Regulatory Commissions and the Appellate Tribunal for Electricity in India, while interpreting the power of review have been set out below (of a “civil court” under Order 47, Rule 1., CPC.

(a) discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time when the order was passed or made.

In an application for review on this aforesaid ground the applicant has to show that the evidence was so material that the absence might cause miscarriage of justice and that it could not with reasonable care and diligence be brought forward at the time of the order. It is well settled that new evidence discovered must be relevant and of such character that it has clear possibility of altering the judgment/ order.

(b) Mistake or an error on the face of the record.

As mistake(s) or an error(s) apparent on the face of record cannot be defined precisely and exhaustively and there is an element of indefiniteness inherited in the terms, it is left to the discretion of the Court to determine the same judicially on the basis of facts of the case. However, the error must be one that speaks for itself and is difficult to be ignored. However, the exercise of review is not permissible in the case of an erroneous order so as to render the order as” reheard and corrected”. The law has made clear distinction between what is an erroneous decision and an error apparent on the face of the record. While the first can be corrected by only a higher forum, the latter can be corrected by exercise of power of review. A power of review is

not to be confused with appellate power which may enable an appellate Court to correct all errors committed by the Subordinate Court. Although the scope of review would be driven by the review power under Order 47 of CPC the discretion which a Commission would exercise, while ascertaining whether there is a mistake or an error apparent on the face of the record in a regulatory proceeding, would differ from that exercise by a civil court in a civil proceeding in as much as in a regulatory proceeding the power of review would be wider as much as the powers exercised by the regulatory Commission are wider than that of a civil court. While a civil court is duty bound to confine itself to the pleadings and evidence on record, a Commission is expected to exercise wider powers and consider other elements under the regulatory framework before allowing or disallowing costs in a tariff fixation process.

(c) Any other sufficient reasons

Under order 47 of the CPC this would mean a reason sufficient on grounds analogous to those specified immediately previously in that order. The grounds for review are the discovery of new matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time when the decree was passed or order made, or the review is asked for on account of some mistake or error apparent on the face of the record.

9. The scope of review has been settled by Hon'ble Supreme Court in the case of Parsion Devi V. Sumitri Devi, (1997) 8 SCC 715, Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma AIR 1979 SC 1047, Raja Shatrunji V. Mohd. Azmat Azim Khan (1971)2SCC 200, Smt. Meera Bhanja Vs. Nirmala Kumari Choudhury AIR 1995 SC 455 and has also been followed by the Appellate Tribunal for Electricity in its orders (dated 17.11.2006) in Appeal no.40 of 2006, dated 23.11.2006 in appeal NO.80 to 197 of 2006 & Appeal No.226 of 2006. The Hon'ble Commission is in no way restricted in exercising its powers to conclude that the order suffers from a mistake of fact or law and review its order.

10. In Aribam Tuleshwar Sharma V/S Aribam Pishak Sharma (AIR 1979 SC 1047), followed in case Meera Bhanja V. Smt. Nirmal Kumari Chaudhary (AIR 1995 SC 455), and in Haridas V/S Usha Rani Banik (AIR 2006 SC

1634), it has been reiterated that an error apparent on the face of the record of acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in the case of Satyanarayan Laxminarayan Hedge V. Mallikarjun Bhavanappa Tiruymale (AIR 1960 SC 137) are also noted:-

> "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 the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

11. Relying upon the judgments in the cases of Aribam's (supra) and Smt. Meera Bhanja (supra) the Hon'ble Supreme Court in the case of Parsion Devi V. Sumri Devi (1997(8)SCC 715) observed as under:

> "Under Order XLVII, Rule 1, CPC a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered, has a limited purpose and cannot be allowed to be an appeal in disguise."

12. In another recent case in Rajender Singh V/s Lt Governor, Andaman & Nicobar Islands & Others (AIR 2006 SC 75), the Division Bench of the Hon'ble Appex Court has ruled that "Law is well settled that the power of judicial review of its own order by the High Court inheres in every Court of plenary jurisdiction to prevent miscarriage of justice". It would be useful to reproduce para 16 of the said judgment ,which reads as under:-

> "The power, in our opinion, extends to correct all errors to prevent miscarriage of justice. The courts should not hesitate to review its own earlier order when there exists an error on the face of the record and the interest of the justice so demands in appropriate cases. The grievance of the appellant is that though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction. In

> our opinion, the High court's order in the revision petition is not correct which really necessitates our interference".

13. To sum up, the power of review, legally speaking is permissible where some mistake or error apparent on the face of record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. A review cannot be equated with the original hearing of a case. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim of the applicant, cannot be ignored. The Commission has to apply the principles of review applicable in civil cases differently to tariff matters. Unlike civil disputes which are between individuals and where the power of civil court is limited to the pleadings and evidence on record, in a tariff proceeding (which is not primarily a dispute) but is proceedings to arrive at a conclusion on what is the reasonable and prudent cost for providing a service, the power of the Commission is greater than a civil court. Accordingly the Commission's power of review is to be interpreted in a manner so as to ensure that all reasonable and prudent expenses incurred by a generating company are allowed in terms of the contractual understanding between the parties in question and keeping commercial prudence in mind.

14. Arguments were advanced by the Learned Counsels for the parties. Written submission were also made by both. Though number of points raised at the hearing, discussion was confined to the sole basic question whether the impugned order suffers from a mistake of a fact or an error apparent on the face of the record and such mistake or error is so material that it may cause miscarriage of justice; and further there is ample justification to review the previous order.

15. After having taken stock of documents and material available on record in this case it can be safely concluded that in case of the EHT/LS consumers, the T.D. loss has been similar to the past year, when the LVSS & HVSR were not applicable to L.S category. The circumstances relevant for

determination of tariff conditions have not yet changed as compared to the last year. Besides this it also escaped the notice of this Commission that it may not be possible to create required infrastructure in short duration say, less than 2 years time, as the delivery period of the equipments and installation and commissioning of the bays and the allied equipments by both parties i.e. the consumers as well as the Board may further consume some more time.

16. With this background and the circumstances of this case, the Commission, is of the view that even though a fair approach was adopted and the impugned tariff order was passed after much deliberation yet a mere glance at the record reveals that there is an error apparent on the face of the record and the interest of justice necessitates the Commission to exercise of the power of review. The Commission, therefore, orders that after Table below item I, in Part I of Annexure-2 of the impugned tariff order, the following Note shall be deemed to have been inserted, namely:-

> "Note: - LVSS will not be applicable to existing EHT (66kV and above) consumers. Further extension of load if sanctioned to these consumers after the 1st Dec; 2007, will however be subjected to the prescribed limits of connected load of 10 MW for consideration of standard voltage as $\geq$ 132 kV as per schedule (LS) applicable and accordingly shall be liable for LVSS"

In case there are any financial implications arising from this order the respondent Board shall be at liberty to take up the matter by way of truing up petition for the year.

Announced in open Court.

Case file be consigned to record room.

(Yogesh Khanna)
Chairman