

ORDER

1. The review petition has been filed by the Chairman of Madhyanchal Vidyut Vitran Nigam Limited, Poorvanchal Vidyut Vitran Nigam Limited, Paschimanchal Vidyut Vitran Nigam Limited and Dakshinanchal Vidyut Vitran Nigam Limited on 20th June, 2007 for review of order dated 10th May, 2007 in petition No. 369, 370, 371 & 372 of 2006 in the matter of Application of Aggregate Revenue Requirement in FY 2006-07 and tariff order under section 64 of the Electricity Act, 2003. The aforesaid review of the order has been filed in relation to following issues
 - a. In the tariff order dated 10th May, 2007, the Commission has specified free supply of Electricity of 100 units per month for the metered consumers under rural supply schedule in LMV-1, LMV-2 and LMV-5 category. Since section 65 of the Electricity Act provides that free electricity or subsidized electricity can only be provided when the government agrees to compensate the utility for the loss suffered on this account. In this case the Hon'ble Commission has not worked out as to how many consumers will opt for metering and will avail the free supply of electricity upto 100 units. The Government has also not issued any directive for free supply of electricity to any class of consumers. As per Electricity Act, 2003, every consumer has to be metered within a given time frame. Therefore, the provision of free supply of electricity to metered category of consumers in rural areas will be against the spirit of the law and the National electricity Policy. In view of this, we request the Commission to kindly amend the tariff order and remove the provision of free supply of electricity up to 100 units.
 - b. For other un-metered category in LMV-1 class, Hon'ble Commission has provided 3 levels of tariff, based on actual hours of supply of electricity to this category of consumers. In this connection, it is to be submitted that in every Division the consumers are billed on the basis of different billing cycles. In some divisions, the meter reading and billing is being done through hand held billing machines. Therefore, the billing date does not relate to a uniform period of 30 days for all the consumers. In such

situation, collecting the data of actual hours of supply to different consumers for a given time period is a most difficult task. Further, the feeder-wise indexing of all the consumers is still in progress and will take at least one year to complete. In such a situation, it is suggested that the three levels of tariff suggested by Hon'ble Commission may be based on supply schedule and the adjustment of rebate/surcharge can be done at the end of the year on the basis of average supply per day from the particular feeder. The adjustment can be done within two months of the close of the financial year on the basis of actual average supply viz-a-viz the scheduled supply. This will help in achieving the objective of the commission and the Distribution Companies will be able to implement it without any difficulty.

- c. In LMV-3 category, Hon'ble Commission has substantially reduced the fixed charges for metered supply but the Kwh rate for energy charge has not been specified in the rate schedule. It is requested that along with fixed charge, appropriate energy charge should also be prescribed for supply to LMV-3 category. Since we don't get any subsidy from Government for supply to LMV-3 categories, therefore, we request the Commission to fix the energy charges and fixed charges in such a way that we are able to recover our cost of service.
- d. In LMV-8 category, Hon'ble Commission has reduced the rate of fixed charge on both un-metered and metered category. Since the payment of this category is made by the State Government on a centralized basis from the State Budget, we would like to request that the tariff for this category should be revised in such a way that we are able to recover the cost of service.
- e. The Hon'ble Commission has increased the rebate for HV-2category consumers from 5% to 7.5% for supply between 22:00 hrs to 06:00hrs. and has also reduced the surcharge during peak hours from 20% to 15%. Hon'ble Commission will appreciate that the above distribution companies had requested for no change in tariffs despite the fact that without subsidy

the revenue gap of Rs. 5294 Crores was expected and the actual revenue gap has been of the order of Rs. 5242 Crore. In such a situation any increase in rebate or reduction in surcharge will increase revenue gap of the above utilities. Hon'ble Commission would appreciate that the cost of service has also increased during the past 2 years and we have not increased any tariff for HV-2 category for the last 2 years. Therefore, it is requested that the revision in rebate and surcharge is withdrawn.

- f. As the Commission has approved two different tariffs for HV-2 category consumers getting supply on 11 kV, this anomaly needs to be rectified.
2. Review on above accounts has been filed chiefly on the basis that as the ARR on the basis of which the said tariff order has been passed, was based on the estimates of income and expenditure of 2006-07 and as the financial year was already closed before the issuance of the order and as there is a material difference between the numbers on which the ARR has been approved and the actual numbers of 2006-07 therefore, the order needs to be reviewed with respect to issues raised in point No. 1 of this order. In support of this contention, the review applicant has also submitted following table:

COMPARATIVE STATEMENT OF UPERC APPROVED A ACUAL ARR FY 2007 DATA			
Description	As per Tariff Filing	Actual FY 2006-07	Approved Tariff Order FY 2006-07
Power Purchase (MU)	50603	51101	50603
Power Purchase Cost (Rs. Cr.)	11466	10826	10779
Revenue from Tariff (Rs. Cr.)	9184	8719	9992

3. Subsequent to the submission of above review application, on 28th June, 2007, the review applicant also filed a supplementary affidavit praying that the submissions given in supplementary affidavit may be taken into consideration while disposing off the review petition filed on 20th June, 2007. The supplementary affidavit dealt with only three issues viz the application of hourly

tariff, provision of first 100 units free of cost for the un metered consumers on rural schedule in LMV-1, LMV-2 & LMV-5 category consumes and revision in TOD rates for HV-2 category consumers. The grounds of review as given in the supplementary affidavit are as under :

- a. “Since application of hourly tariffs based on actual supply hours critically depend on feeder wise consumer indexing (because unless there is proper indexing, application of actual supply hours would be digressed from reality) and as feeder wise indexing of consumers is likely to take at least one year to complete, accordingly, the scheme cannot be implemented within three months. Here we have to submit that at point No. 11 of general provisions under rate schedule, wherein, while discussing incentive/disincentive for reducing distribution losses, the Commission has stated that the scheme would be launched by all the licensees in at least one of their major cities in the first go immediately after completing the consumer indexing and three months time has been provided to licensee for submitting a scheme in this respect obviously prior to launching the scheme in one major city. Since Hon’ble Commission itself feels that consumer indexing in only one of the major cities would take three months and therefore, application of hour based tariffs on the entire State cannot be expected to be effectively applicable before one year i.e. the time being sought by way of this affidavit to complete consumer indexing. Accordingly, the Commission is requested to review the provision of actual hour based tariff application in light of its own time limit provided for completing consumer indexing in one of the major cities as this appears to be an error apparent on the record. Hon’ble Commission is requested to link the tariff with supply schedule with adjustment of rebate/surcharge at the end of the year depending on actual supply availability or allow merely the application of base rate tariff, while suspending its three level structures till the completion of consumer indexing.”
- b. “With respect to the Rural metered tariffs for LMV-1, LMV-2 & LMV-5 category consumers wherein, the Commission has made first 100 units

free of cost and above that at a subsidized rate of Rs. 2/unit, the Commissions order 10-05-007 does not provide clear cut allocation of GoUP subsidy between these two sub categories viz metered & un-metered thereby justifying the out of proportion revision of their respective tariffs. This is fact staring on the face of record and due to which it would be difficult to pursue with the State Government to advance subsidy, the order is requested to be reviewed.”

- c. “That the drawl of power from central pool has increased during the night hours and UP has to pay extra money in the form of UI Charges to meet the demand. In his regard graphs showing schedule and actual drawl of power for few days of last six month are enclosed for Commission’s kind perusal. Similar graph for other days can be seen on the NRLDC website if needed ([www. Nrldc.org](http://www.Nrldc.org) under report and trends). The Commission shall appreciate that supplying power to the industries at lower rates while utility making higher payment in the form of UI Charges does not justify increasing the rebate to industries during night hours. Keeping in view the acute power shortage in the northern grid, the utilities do not want to allow any rebate to the industries during night hours. It is requested that the rebate to industries for power supply during non peak hours in the night should be done away with.”
4. Subsequent to the supplementary affidavit dated 28th June, 2007, the content of which have been discussed in para 3 of this order, the review applicant again filed a second supplementary affidavit in continuation of review petition dated 20th June, 2007 and supplementary affidavit dated 28th June, 2007 vide which, the review applicant has requested the Commission to bring the entire concept of hourly linked tariff for all relevant categories i.e. LMV-1, LMV-2, LMV-4, LMV-6 and 11 kV consumers of HV-2 category under review in place of the earlier request, which was limited to only LMV-1 category.
5. Before discussing the maintainability issue of the review petition and its treatment, it would be prudent to recall the brief facts of the case. The ARR/tariff application of the review applicant for year 2006-07, seeking no tariff revision,

was admitted by the Commission on 1st December, 2006. Through the admittance order dated 1st December, 2006, the Commission also directed the review applicants to advertise the salient features of their ARR/Tariff petitions in at least two newspapers widely circulating in their area of supply within seven days from the issuance of the order, inviting objections/suggestions/comments from the interested parties and the State Government. The Commission, in order to achieve the twin objective that has been conferred upon it under the Act i.e. “to observe transparency in its proceedings and functions” and “to ensure fair deal to consumers”, has always attached paramount importance to the objections/suggestions/comments of public on the ARR/Tariffs petitions submitted by the licensees. The process gains significant importance in a “cost plus regime”, where the entire cost allowed to the licensee gets transferred to the consumer. In order to broad base the public participation and also to render transparency to the process of tariff determination, the Commission conducted several public hearing from January 11, 2007 to February 4, 2007 at different places in the State to get the views of the various stakeholders on the proposals submitted by the licensee. At all these places, the proposal was presented by the officials of licensees/review applicants and the objections raised by public were duly taken note by these officials and responses, if any, provided by these officials were taken into cognizance by the Commission. The Commission has also considered various objections/suggestions/comments received from various stakeholders through post while disposing the ARR/Tariff petitions filed by the licensees. Whereas, the licensee is supposed to respond to objections/suggestion submitted by the consumers at its own as a copy of all suggestions/objections are directly sent to the licensees, still in view of absence of any communication from the licensee, the Commission, from its side, collated different consumer representations and categorized them issue wise for getting categorical reply from review applicant. Accordingly, the tariff order was passed in complete compliance of the provisions of section 64(3) of Electricity Act, 2003. In fact, the complete procedure of pronouncing the tariff order and disposal of ARR application was based on providing as much opportunity to the stakeholders including the review applicants to air their views as possible within the statutory time limit of 120 days. Further, it requires mention that the decision of the Hon’ble Supreme Court in famous Cynamide India Ltd. Case, in which the court

has examined under the nature of function of price fixation, and also the questions of applicability of natural justice and scope of judicial review in such matters, has expressly declared that price fixation is a legislative activity and the question of observing principles of natural justice does not arise unless the statute provides for a notice and a hearing. It has been further held that if the legislature is silent, or has chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity. Further, the observance of principles of natural justice would stand complied if the statutory requirement of a notice and hearing has been met in the manner provided in the statute. In this backdrop, it would be in order to reproduce section 64(3)(a) of Electricity Act, 2003, which provides for issuance of tariff order – *“The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and **after considering all suggestions and objections received from the public** – issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order”*. As is obvious from the foregoing discussion in this para, the requirement of considering suggestions and objections from the public has been more than met before issuing the tariff order dated 10th May, 2007.

6. After establishing that the tariff order issued by the Commission was strictly in accordance with section 64(3)(a), one needs to deliberate on the principles of maintainability of review before applying these criteria on each of the points on which review has been sought by the review applicant. In accordance with section 114 and Order XLVII of Civil Procedure Code (CPC), any person considering himself aggrieved by an order against which no appeal has been preferred, may apply for a review for the order to the court, which passed such order on any of the following grounds –
 - (i) discovery by the applicant of new and important matter of 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
 - (ii) on account of some mistake or error apparent on the face of the record, or
 - (iii) for any other sufficient reason.

Before putting the points of review on above touch stones, it would be in order to broadly refer the legal understanding associated with each of these points in view of various Hon'ble Supreme Court and Hon'ble High Court orders –

- (i) **“Discovery of new and important matter of evidence”** – Application of review on the ground of discovery of new evidence should be considered with great caution and should not be granted very lightly [Nandalal Vs. Panchanan, 45 C 60; Chiranji V.Tulsi, 47 C 568, ; Hriday V. Jogesh, A 1959 C 150]. An applicant should show that (1) such evidence was available, and of undoubted character; (2) that it was so material that its absence might cause a miscarriage of justice;(3) that it could not with reasonable care and diligence have been brought forward at the time of the decree [kunja V. Kristo, A 1939 C 42; 1938, 2 Cal 361]. It is well-settled that the new evidence discovered must be (i) relevant and (ii) of such a character that had it been given it might possibly have altered the judgment. A party must not be given a chance of trying his luck once again on the plea of discovery of additional evidence [Ramasami V. Shanmugha 1959, 2 MLJ 201]. The expression “new and important matter “ in order 47 rule 1 refers to evidence or other matter in the nature of evidence and not the legal authority that may or may not have been in existence and not brought to the notice of the Court on the given date [Sanjeev Sarin V. Rita Wadhwa, 2002 AIHC 628(629) (Del)]. A judgment rendered in ignorance of a binding decision of the Court cannot be said to be an error apparent on the face of record, nor it can be said to be discovery of a new material. [National Insurance Co. V. Mohd Sultan Asim, 2005 NOC 318: 2005 AIHC 1616 (DB) (J&K). A court’s power to review depends on a ground which existed on the date when the order was made and cannot be exercised on ground which had come into existence subsequently [Nathumal V. Raghubar, A 1926 A 50; Kotagiri V. Vellanki, 27 IA 197: 24 M I]. There can be no review of an order which was right when made on the ground or the happening of some subsequent event [A C Estates V. Serajuddin, A 1966 SC 935; fold in Bd of Rev V. P K. Syed, A 1973 K 285; G S Gupta V. Basheer, A 1977 Kant

193]. Absence of negligence is to be strictly proved [Kessowji V. GIPR, 31 B 381 PC; see or 47 r 4(1)(b)].

- (ii) **“Mistake or error apparent on the face of the record”** – An error apparent on the face of the record must be such a patent error which is one glance can be detected without advancing long drawn arguments on either side ;[D. Thimappa Sheika V. State of Karnatak, 2000 AIHC 979 (980) (Kant – Db)]. Erroneous decision even if there be any cannot be categorized as an error apparent on the face of record. [Pramila Dfas Vs. Pranti Sarkar, AIR 2004 Cal 22 (23) (DB)]. In review the court can only consider the errors apparent on the face of record in its judgment [Niranjan jSarkar V. Swapna Dam , AIR 2001 Gau 92(95)], fresh substantial question of law cannot be considered [Niranjan Sarkar V. Swapna Dam, AIR 2001 Gau 92(95)].

There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, clear case of error apparent on the face of the record would be made out [Tungabhadra & CV Govt, A 1964 SC 1372; Usha Rani Banik V. Haridad Das, AIR 2005 Gauh 1 (3)]. An error can be said to be one apparent on the face of the records only when such error is patent and can be located without any elaborate argument without any scope for any controversy with regard to such error, which as if, at a glance stares at the face [Lakshman Bhowmik V. Satya Narayan Chakraborty, (1995) 2 CHN 490, 492 (DB)]. Failure to raise a plea, of whatever nature, does not constitute an error apparent on the face of the record, or a ground for review. [Mohd. Yousuf Magray V. Haji Ghulam Hassan, 1998 SLJ 180, 189 (DB)]. If there is no error apparent on the face of the record review petition is not maintainable [Kailash Talkies V. State of Rajasthan, 1998 AIHC 2401 (Raj)]. If a finding has been arrived at as a result of misapprehension of true state of facts or erroneous assumption of fact resulting from ignoring of material pleadings or material facts having escaped to be noticed by the court then that may be a case for

interference [C. Rangatah V. Asstt Commissioner, 1997 AIHC 4136, 4139 (Kant)].

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 . [Co-op. Ag. Rural Devp. Bank Ltd. V. Smt Basanti Swain, 96 (2003) Cut LT 159 (164)(DB) (Orissa)]. Mere erroneous decisions are not liable to be reviewed and only errors apparent on the face of the record are liable to be reviewed and such errors must stare one in the face, where no elaborate arguments are necessary to pin-point those errors [Chandrakant Jagannath Manjrekar V. Shripad Vaikunth Naik, A 1989 Bom 91, 95].

- (iii) **“Any other sufficient reason”** – The words “any other sufficient reason” have been interpreted (a decision of seven judges) to mean “a reason sufficient on grounds at least analogous to those specified immediately previously”. i.e. , excusable failure to bring to the notice of the court new and important matters, or error apparent on the face of the record [Chhajjoram V. Neki, 49 ia 144: a 1922 pc 112: 26 cwn – 697; Bisheshwar V. Parath. 39 CWN 1 : 61 IA 378 : A 1934 PC 213; Harishankar V Anath, A 1949 FC 106 106, 110, 111; Moran Mar & C.V. Mar Poulouse, A 1954 SC 526; Shambhubhai Jethalbhai Patel V. State of Gujrat AIR2004 Guj 155(156)].

Decisions prior to Chhaju’s case are no longer good law, in so far as they are not consistent with the interpretation given to the words ”any other sufficient reason”. This restricted meaning virtually limits the grounds of review, for practical purposes to the two grounds specified in the rule.

6. After discussing the legal contours of review maintainability, we examine the issues stated in review application, as given in para 1 of this order viz review of hour linked tariff due to implementation problem, review of the provision related to first 100 units free of cost in LMV-1, LMV-2 & LMV-5 rural metered consumers,

prayer for specifying reasonable energy charges for LMV-3 connections, prayer for restoring the tariff for LMV-8 to previous level, reversal in TOD charges under HV-2 category and correcting the anomaly in the tariff of 11 KV consumers on ground given in para 2 of this order i.e. on the basis of material difference between the numbers on which the ARR has been approved and the actual number of 2006-07. Subsequently, through the supplementary affidavit, the review applicant has submitted additional reasons of review for hour linked tariff, provision related to first 100 units free of cost for rural metered consumers and restoration of TOD charges as applicable to HV-2 category consumer.

7. First of all, we would examine the ground given for review in the review application filed on 20th June, 2007 i.e. difference between the numbers on which the ARR has been approved and the actual numbers of 2006-07, as discussed in detail in para 2 of this order. As is obvious this evidence is a subsequent phenomena to the issuance of tariff order as a tariff order is invariably issued on the basis of projected figure to be trued up subsequently on the basis of actuals therefore, there is bound to be a difference in projected and actual figures, which cannot be made a basis for review. For the purpose, the findings of Hon'ble Supreme Court as well as Hon'ble High Courts are reproduced to give clarity on the matter.

“A court’s power to review depends on a ground which existed on the date when the order was made and cannot be exercised on ground which had come into existence subsequently [Nathumal V. Raghubar, A 1926 A 50; Kotagiri V. Vellanki, 27 IA 197: 24 M I]. There can be no review of an order which was right when made on the ground on the happening of some subsequent event [A C Estates V. Serajuddin, A 1966 SC 935; fold in Bd of Rev V. P K. Syed, A 1973 K 285; G S Gupta V. Basheer, A 1977 Kant 193].”

Further, there are two crucial dates with the tariff order 2006-07 viz 30th March, 2007 i.e. the date on which the order was duly complete for issue (also the date on which the statutory time limit was expiring with reference to the admittance of ARR/tariff petitions on 1st December, 2006) and 10th May, 2007 i.e. the date of issuance of the tariff order, as the same was held back on the advise of the

Election Commission since 30th March, 2007. Now if the discovery of actual numbers, as submitted vide review petition dated 20th June, 2007, is analyzed for the purposes of new and important evidence, the same would be inadmissible on an order of 30th March, 2007 as it has come into existence after the order was made and if the same is processed with respect to 10th May, 2007, it can be reasonably assumed that this evidence would have been easily available with the review applicants before 10th May, 2007 i.e. 40 days after the closer of financial year, and accordingly it is more than obvious that review applicants did not do due diligence in bringing forward the evidence before the issuance of the order, which is the fundamental requirement of review in accordance with Civil Procedure Code.

Accordingly, if this evidence is taken in to account to review the order, it would amount to transferring the jurisdiction in dealing with the review petition as if the Commission was hearing original application thereby re-appreciating the entire evidence. The findings of Hon'ble Supreme Court in the case of Meera Bhanja V. Nirmala Kumari Chaudhary and Parison Devi & others Vs. Sumitri Devi & others are reproduced to exhibit the limited nature of review maintainability, which is applicable on the evidence in question also –

“In our view the aforesaid approach of the Division Bench dealing with the review proceedings clearly shows that it has overstepped its jurisdiction under Order 47 Rule 1 C.P.C. By merely styling the reasoning adopted by the earlier Division Bench as suffering from a patent error, it would not become a patent error or error apparent in view of the settled legal position indicated by us earlier. In substance, the review Bench has re-appreciated the entire evidence, sat almost as Court of appeal and has reversed the findings reached by the earlier Division Bench.”

“Under Order 47 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 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 47 Rule 1 CPC. In exercise of the jurisdiction under

Order 47 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”.

Accordingly, the Commission in view of above findings is of the opinion that the evidence related to “material difference between the numbers on which the ARR has been approved and the actual numbers of 2006-07” is not maintainable for the purposes of review therefore, the issues raised under para 1 of this order cannot be reviewed on the basis of above evidence.

8. Having established that the chief reason for review, as given in the review petition dated 20th June, 2007, cannot be held as maintainable, we would like to examine the reasons given in the supplementary affidavit dated 28th June, 2007 with respect to maintainability.

a. **Hour linked tariffs** – the ground given by the review applicant for the purpose, as already stated in para 3(a) of this order, is being reproduced for further discussion.

“Since application of hourly tariffs based on actual supply hours critically depend on feeder wise consumer indexing (because unless there is proper indexing, application of actual supply hours would be digressed from reality) and as feeder wise indexing of consumers is likely to take at least one year to complete, accordingly, the scheme cannot be implemented within three months. Here we have to submit that at point No. 11 of general provisions under rate schedule, wherein, while discussing incentive/disincentive for reducing distribution losses, the Commission has stated that the scheme would be launched by all the licensees in at least one of their major cities in the first go immediately after completing the consumer indexing and three months time has been provided to licensee for submitting a scheme in this respect obviously prior to launching the scheme in one major city. Since Hon’ble Commission itself feels that consumer indexing in only one of the major cities would take three months and therefore, application of hour based tariffs on the entire State cannot be expected to be effectively applicable

before one year i.e. the time being sought by way of this affidavit to complete consumer indexing. Accordingly, the Commission is requested to review the provision of actual hour based tariff application in light of its own time limit provide for completing consumer indexing in one of the major cities as this appears to be an error apparent on the record.”

Subsequently through second supplementary affidavit, the scope of review in this context i.e. with reference to hour linked tariffs was broadened to include LMV-2, LMV-4, LMV-6 and 11 kV consumers of HV-2 category, whereas, initially it was targeted only at metered consumers of LMV-1 category.

An error is said to be one apparent on the face of the records only when such error is patent and can be located without any elaborate argument without any scope for any controversy with regard to such error, which as if, at a glance stares at the face. In the present case also if we compare the provision regarding applicability of hour linked tariffs for aforesaid categories within 3 months of the application of the tariff order viz-a-viz the relevant portion of point No. 11 of the General Provisions of Rate Schedule, as reproduced *“the licensee may make this provision (incentive/disincentive scheme for reducing distribution losses) applicable **after three months** of the issuance of the tariff order..... The scheme would be launched by all the licensees in the distribution divisions of at least one of their major cities in the **first go immediately after completing the consumer indexing**”*, it appears to be an error in the order, which can be made out without any substantial arguments that the time taken for consumer indexing of the entire State cannot be same as that required for only four or five major cities, as given in the order accordingly, it is a case of patent mistake being committed in terms of specifying tariffs linked with hours in urban metered category consumers.

- b. Rural Metered tariff providing first 100 units free of cost** - the ground given by the review applicant on this issue, as already stated in para 3(a) of this order, is being reproduced :

“With respect to the Rural Tariffs for LMV-1, LMV-2 & LMV-5 category consumers wherein, the Commission has made first 100 units free of cost and above that at a subsidized rate of Rs. 2/unit, the Commissions order 10-05-007 does not provide clear cut allocation of GoUP subsidy between these two sub categories thereby justifying the out of proportion revision of their respective tariffs. Since this is fact staring on the face of record and due to which it would be difficult to pursue with the State Government to advance subsidy, the order is requested to be reviewed.”

Before appreciating this evidence / fact for the purposes of review, it would be in order to reproduce the relevant paragraph of tariff order 2006-07 (Para 8.17), which discusses about the philosophy of allowing first 100 units free of cost in metered LMV-1, LMV-2 and LMV-5 category consumers.

*“It is an open fact that despite categorical provision under Electricity Act, 2003 to necessarily achieve 100% metering, large chunk of rural consumers are still un-metered in most of the States. In Uttar Pradesh also, predominant proportion of rural consumers either in domestic category (LMV-1) or in commercial (LMV-2) and pump set (LMV-5) category continue to be billed under un-metered category. The situation cannot be changed overnight however, the Commission feels that unless very clear incentives and disincentives are build into the system, the vision of universal metering would remain merely a wishful and glorious intention of the legislature. In fact, the billing of rural consumers by the licensee is a glaring example of “to lay all ones crime at others door”. Whereas, at one end the licensee attempts to hide some of its commercial loss in the name of excess supply to these categories having fixed tariff and at the other, it enjoys the flexibility to reduce sales to these categories as it does not reduce its revenue but it reduces its power purchase, which being based on merit order principle curtails power purchase from costliest generating stations thereby resulting in large savings for the utility. **Therefore, in order to have proper energy accounting and taking out the licensee from its false comfort zone, the Commission has given distinct tariff signals favoring metered categories to the extent of allowing a specified number of units free of cost.** For consumers on rural schedule under LMV-1 and LMV-2 the fixed charges for un-metered categories have been significantly increased*

and for metered category although the fixed charges have been slightly increased but the energy charges have been removed by allowing 100 units free of cost. Therefore, impetus to metering is at the nucleus of present rate design.”

Further, it would also be in order to mention that the tariff order in para 8.147 mentions that with the Government Support of Rs. 1512 crores, efficiency improvement of Rs.772.66 crores and balance of Rs. 1151.27 crores from the short term loans from financial institutions, the licensees are able to meet their full ARR for FY 07. Accordingly, the requirement through short term loan, as per the calculation of the Commission, is much less than that committed by the State Government under this head i.e. Rs. 2500 crore. It is pertinent to mention here that as year 2006-07 was already passed by the time tariff order 2006-07 could be issued on account of continuous and sustained default of the licensees to submit ARR applications on time, the proposed tariff structure of the licensee was already implemented and the new scheme was futuristic keeping in view the issues related to ground reality, consistency with requirement of Electricity Act and tariff policy and the direction in which licensees were expected to move in the regulatory regime. All these issues have been discussed in detail under para 8.41 of the tariff order. Accordingly, the scheme of keeping first 100 units free of cost for metered rural LMV-1, LMV-2 and LMV-5 consumers was designed to give distinct tariff signals, as is evident from the language of tariff order. The Commission is duly aware that it cannot create an incentive mechanism on the basis of subsidy commitment of the State Government as the subsidy commitment is complete prerogative of the State Government and the tariff rates for the targeted categories may not be worked out to the disadvantage of these categories despite categorical allocation from the State Government. However, the exclusive power of the State Government to impart subsidy does not exclude the jurisdiction of the Commission to built in incentive schemes for these categories in order to achieve the objectives of the Act provided these incentives are being addressed by the pool of cross subsidy. In this case also, the provision of keeping first 100 units free of cost has to be addressed from cross subsidy.

Accordingly, the reason of review given in the review petition dated 20th June, 2007, as given in para 1(a) of this order, is not admissible because the review applicant has sought review on the basis of GoUP subsidy in pursuance to section 65. The argument given for review vide supplementary affidavit dated 28th June 2007 in this context, as reproduced in the opening of this paragraph, also does not cut much ice in view of the fact that the proposed tariffs based on the existing GoUP subsidy was already implemented and also that this incentive was to be addressed through the pool of cross subsidy. However, since this provision of keeping 100 units free was to be addressed through cross subsidy, which was likely to be received from metered consumers of LMV-1, LMV-2, LMV-4, LMV-6 and 11 kV consumers of HV-2 category consumers getting supply more than 18 hrs. per day, which is decisively the predominant chunk of consumption thereby feeding excess revenue to be utilized for the purposes of cross subsidy, therefore, maintainability of review against the provision of hour linked tariff, as discussed in para (a) of this tariff order, would have a direct bearing on the implementation of the scheme of keeping first 100 units free of cost thereby necessitating review of this scheme also.

- c. **TOD rates for HV-2 category** - the ground given by the review applicant on this issue, as already stated in para 3(a) of this order, is being reproduced :

“That the drawl of power from central pool has increased during the night hours and UP has to pay extra money in the form of UI Charges to meet the demand. In this regard graphs showing schedule and actual drawl of power for few days of last six month are enclosed for Commission’s kind perusal. Similar graph for other days can be seen on the NRLDC website if needed ([www. nrlDC.org](http://www.nrlDC.org) under report and trends). The Commission shall appreciate that supplying power to the industries at lower rates while utility making higher payment in the form of UI Charges does not justify increasing the rebate to industries during night hours. Keeping in view the acute power shortage in the northern grid, the utilities do not want to

allow any rebate to the industries during night hours. It is requested that the rebate to industries for power supply during non peak hours in the night should be done away with.”

In this context, it would be appropriate to reproduce para 8.125 of the tariff order 2006-07, which discusses about reworking of TOD structure:

“The Commission has retained the principle of time-differentiated tariff for HV-2 consumers. The Commission has also noted the representations by the large industry consumers on the TOD structure approved by the Commission in its previous Order, wherein a premium of 20% was payable on the base tariffs approved for the category during peak-hours, while the rebate during off-peak hours stood at 5%. The Commission does not have any consumption history of the consumers in the category in desired detail to assess the revenue impact of the application of TOD rates on the consumers of the category. The Commission has however, reworked the TOD structure and approves a lower premium rate of 15% during the peak hours whereas, the off peak TOD rates have been lowered from (-)5% to (-)7.5%. Although there was an argument thrown by the licensee that the State system does not have any significant off peak but the argument does not cut much ice as even if the State system does not have a pronounced off peak still one cannot deny its existence at regional level and licensee can always avail the benefit of purchasing cheap power in the situation through ABT mode.”

Admittedly, it was raised by the licensee even during the proceedings of the tariff order that the State System does not have any significant off peak but the off peak rebate was enhanced in view of strong representations of large industry consumers and also due to the fact that licensee had failed to submit backup evidences to support their contention, which has been partially submitted now. Further, the submission of the licensee that *while utility making higher payment in the form of UI charges does not justify increasing the rebate to industries during the night hours* also runs contrary to the analysis of the Commission that licensee can always avail the benefit of purchasing cheap power in the situation through ABT mode. However, since the graph of schedule Vs. actual drawl has been submitted only for 15 days within the duration of 1st January, 2007 to 10th May, 2007 (date of the

issue of the tariff order), which cannot be treated as representative and reliable. Further, as per most of the submitted graphs the demand is minimum during 5:00 P.M. to 8:00 P.M. and it is maximum between 00:00 hrs to 06:00 hrs., which is if not absurd then definitely beyond logic. Accordingly, even if it is considered that a primary contention in this respect was made by the licensee during the course of tariff proceedings, submission of such evidence would have hardly altered the course of Commission's findings as these evidences cannot be treated as representative and reliable. Therefore, the review cannot be held maintainable with respect to the provision of TOD rate structure.

9. After dismissing the issues of review, as given in para 1 of this order, on the basis of difference in approved and actual numbers, as filed through review petition dated 20th June, 2007 and after maintaining the review admissible only for hour linked tariffs and the provision of keeping first 100 units free of cost on the basis of error apparent on the face of record in respect of time provided for carrying out consumer indexing in the entire state, the Commission would like to deal with the anomaly of providing dual tariff rates on 11 kV consumers of HV-2 category.
10. As far as the issue of providing dual tariff rate on 11 kV consumers of HV-2 category is concerned, we would like to observe that the above portion of the order suffers from patent error although the same is essentially in the nature of a typographical mistake. As is obvious from the discussions of chapter 8 that is tariff design, it is clear that for 11 kV consumers under HV-2 category, the Commission has prescribed hour linked tariff structure and accordingly, the tariff at 11 kV should not be read in the box given at page No. 115 of the volume –II of the tariff order 2007. It is clarified that box 'B' given at aforesaid page would read as under

Consumers getting supply above 11 kV Voltage Level

	For supply above 11kV up to & including 66kV	For supply above 66kV and up to & including 132kV	For supply above 132kV
BASE RATE			
Demand Charges	Rs.170/kVA	Rs.160/kVA	Rs.150/kVA
Energy Charges	Rs.3.30/kVAh	Rs.3.20/kVAh	Rs.3.05/kVAh
TOD RATE			
22 hrs – 06 hrs	(-) 7.5%	(-) 7.5%	(-) 7.5%
06 hrs – 17 hrs	0	0	0
17 hrs – 22 hrs	(+) 15%	(+) 15%	(+) 15%

11. It is also clarified that the tables given for hour linked tariffs for 11 kV HV-2 consumers i.e. point No. 3(A)(a), given on page No. 113 and 114 of volume II of tariff order 2007, would be read to be having its components as “Demand Charge” and “Energy Charge” in place of “Fixed charge” and “Energy Charge” meaning thereby that the word “Fixed Charge” would be replaced by “Demand Charge”. Accordingly, the revised tables are reproduced for clarity :

(A) Consumers on 11 kV

a. Urban Schedule

Base Rate for the category (To be used with Hour linked tariffs):

Description	Demand Charge	Energy Charge
For all loads	Rs. 180.00 / kVA/ Month	Rs. 3.50/ kWh
TOD Rate*		
22 hrs. – 06 hrs	-	(-)7.5%
06 hrs. – 17 hrs.	-	0
17 hrs – 22 hrs.	-	(+) 15%

Hour linked tariff

Average Supply hours less than 14 Hours per day (in a billing cycle)

Description	Demand Charge	Energy Charge
For all loads	Base rate	Base rate (-)10%
TOD Rate		
22 hrs. – 06 hrs	Base rate	(-)7.5%
06 hrs. – 17 hrs.	Base rate	0
17 hrs – 22 hrs.	Base rate	(+) 15%

*** TOD rate shall be applicable on the hour linked energy charges**

Average Supply hours between 14 to 18 hours per day (in a billing cycle)

Description	Demand Charge	Energy Charge
For all loads	Base rate	Base rate (-) 5%
TOD Rate*		
22 hrs. – 06 hrs	Base rate	(-)7.5%
06 hrs. – 17 hrs.	Base rate	0
17 hrs – 22 hrs.	Base rate	(+) 15%

*** TOD rate shall be applicable on the hour linked energy charges**

Average Supply hours more than 18 hours per day (in a billing cycle)

Description	Demand Charge	Energy Charge
For all loads	Base rate	Base rate
TOD Rate		
22 hrs. – 06 hrs	Base rate	(-)7.5%
06 hrs. – 17 hrs.	Base rate	0
17 hrs – 22 hrs.	Base rate	(+) 15%

*** TOD rate shall be applicable on the hour linked energy charges**

12. The Commission, after consideration of facts/grounds, is of the opinion that considering the field of review, as delineated by section 114 & order XLVII CPC, various rulings and findings as pronounced by Hon'ble Supreme Court and Hon'ble High Courts as discussed in para 5 of this order, holds the review maintainable only for the provisions related to tariff linked with hours and scheme related to keeping first 100 units free of cost as these parts of the order either suffer from an error apparent on the face of record or have a direct nexus with some other part of the order, which is affected by such patent error. Remaining of the issues raised for review vide review petition dated 20th June, 2007 and supplementary affidavits dated 28th June, 2007 & dated 4th July, 2007 have been held to be not maintainable on the grounds given thereof. The Commission has very cautiously examined each issue within the framework of review maintainability, which is in consonance with the observation of Hon'ble Supreme Court in para 8 of Green View Tea Industries Vs. Collector Golaghat & Another, (2002)1 SCC, 109 where in relying amongst others on judgment in Sow Chandra Kanta Vs. Sheike Habib, (1975)1 SCC, 674, Northern India Cateres (India) Ltd. Vs. Lt. Governor of Delhi, (1980)2 SCC, 167, as reproduced below:

“May be, we were not right in refusing special leave.... A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.”

Therefore, for the purposes of clarity, a list is being given to show, which of the items raised by review application dated 20th June, 2007 & supplementary affidavits dated 28th June, 2007 & 4th July, 2007 have been held to be maintainable for the purposes of review and which of those have been found to be not maintainable.

- a. Review of hour linked tariff in metered consumers of LMV-1, LMV-2, LMV-4, LMV-6 and 11 kV consumers of HV-2 category - Maintainable
 - b. Review of the provision of keeping first 100 units free of cost in rural metered consumers under LMV-1, LMV-2 & LMV-5 category – Maintainable
 - c. Review of tariff for LMV-3 category - Not Maintainable
 - d. Review of tariff for LMV-8 category – Not Maintainable
 - e. Review of TOD charges under HV-2 Category – Not Maintainable
 - f. Review for removing anomaly on the rates of 11 kV consumers under HV-2 category – Typographical error, necessary correction given.
13. After adjudging the issues on the principles of review maintainability, we would also like to go in the implementation details of tariff order 2006-07 issued on 10th May, 2007. While holding the review as maintainable for issues related to hour linked tariffs and keeping first 100 units free of cost, as given in previous para, the remaining portion of the tariff order needs to be implemented immediately as it is already too late in the day to implement tariff order 2006-07 thereby leading to serious regulatory asynchronism. While directing this, the Commission has tested the tariff order on the Principles of Severability. As the parts of order kept under review are distinctly separable from the remaining provisions, there is no operational issue in implementing the remaining portion of the tariff order, which is in consonance with the findings of the Hon’ble Supreme Court in RMD Chamarbaugwala V. Union of India, where Venkatrama Aiyar, J., speaking for the Court observed that “when a statute is in part void, it will be enforced as against the rest, if that is severable from what is invalid”. However, in order to

make the complete scheme of tariff operational, it would be imperative to provide treatment to the issues under review for the purposes of charging tariff during the pendency of review subject to the final outcome of review of both these issues.

14. Accordingly, during the pendency of review on both aforesaid mentioned issues, the treatment would be as follows:

a. Hourly linked tariff for metered LMV-1, LMV-2, LMV-4, LMV-6 & 11 KV consumers of HV-2 category

As review applicants were given three month time to make all necessary arrangement for applying hour linked tariffs in above mentioned categories and they were allowed to charge base rate irrespective of average supply availability and consumption therefore, it has been decided that review applicants would continue to charge base rate in above manner on all above categories during the pendency of review subject to final outcome of the petition.

b. Provision of keeping first 100 units free of cost in the rural metered sub categories of LMV-1, LMV-2 and LMV-5 categories

Here also it was provided in the tariff order, under the heading of transitional tariff, that this tariff scheme shall come in force after three months of application of the tariff order dated 10th May, 2007 and it was also provided that till such time the rates as specified for the un-metered and metered categories under rural schedule, as applicable vide tariff order 2004-05, shall remain in force. Accordingly, it is being directed that the transitional tariff shall continue to be in force during the pendency of review petition before the Commission subject to the final outcome of the review.

15. The Commission therefore, finds the review petition as maintainable on these two accounts and admits the petition on these two accounts for final disposal with direction for charging of transitional tariff, as discussed in previous para of this

order. The Commission would invite public objections and comments on the matters under review and it may also conduct appropriate public hearings, as it may deem fit, for soliciting public response on the matter. Notice for inviting public objections and comments as well as notices for public hearings would be issued by the Commission separately. After receipt of such comments and objections, the review applicants would be given time to file their response on the comment / objections. The review applicants are, however, directed to implement the tariff order dated 10th May, 2007 specifying transitional tariffs against the categories for which the review has been found to be maintainable. The review applicants are also directed that while notifying the tariff, it should be clearly indicated that the provision of transitional tariff against the items under review would be subject to the final outcome of the review petition.

(R. D. Gupta)
Member

(P.N. Pathak)
Member

(Vijoy Kumar)
Chairman

Dated : 13th July, 2007

Place : Lucknow.