

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 88 of 2010 & I.A. No. 111 of 2009

And

Appeal No. 93 of 2010

Dated 11th January, 2011

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

Appeal No. 88 of 2010 & I.A. No. 111 of 2009

In the matter of:

**PTC India Limited,
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi-110 066.**

... Appellant

Versus

- 1. Uttrakhand Electricity Regulatory Commission,
1st Floor of Institution of Engineers (India),
Near ISBT, Majra,
Dehradun-248 001,
Uttrakhand.**
- 2. Swasti Power Engineering Limited,
Plot No. 111, Road-72,
Jubilee Hills,
Hyderabad- 500 033.**
- 3. Uttrakhand Power Corporation Limited,
Urja Bhavan, Kanwali Road,
Dehradun-248 001,
Uttrakhand.**

4. **Punjab State Electricity Board,
Through Chief Engineer,
220 kV Sub-Station, PSEB,
Ablowal,
Patiala-147 001
Punjab.**
5. **Punjab State Electricity Regulatory Commission,
SCO 220-221, Sector-34A,
Chandigarh-160 017.**
6. **Power Transmission Corporation
of Uttranchal Limited,
7-B, Lane #1, Vasant Vihar Enclave,
Dehradun-248 001,
Uttrakhand.**
7. **Government of Uttrakhand,
Through its Secretary (Energy),
Dehradun-248 001,
Uttrakhand.**

... Respondents

Counsel for Appellant(s)

Mr. Ashish Bernad
Mr. Varun Pathak

Counsel for the Respondent(s): Mr. Suresh Tripathy for R-1
Mr. Pradeep Misra for R-3,6 & 7
Mr. R.K. Mehta &
Mr. Antaryami for R-2
Mr. Aditya Madan for PSPCL

Appeal No. 93 of 2010

In the matter of:

**M/s. Bhilangana Hydro Power Limited,
B-37, IIIrd Floor, Setor-1,
Noida 201 301,
Gautam Budh Nagar**

... Appellant

Versus

- 1. Uttrakhand Electricity Regulatory Commission,
1st Floor of Institution of Engineers (India),
Near ISBT, Majra,
Dehradun-248 001,
Uttrakhand.**
 - 2. Uttrakhand Power Corporation Limited,
Urja Bhavan, Kanwali Road,
Dehradun-248 001,
Uttrakhand.**
 - 3. Him Urja Pvt. Ltd.,
E-14, East of Kailash,
New Delhi-110 065.**
- ... Respondents**

Counsel for Appellant(s)

Mr. Sanjay Sen &
Ms. Shikha Ohri

Counsel for the Respondent(s): Mr. Suresh Tripathy for R-1
Mr. Pradeep Misra for R-2

JUDGMENT

PER HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

1. Appeal Nos. 88 and 93 of 2010 have been filed by PTC India Limited and Bhilangana Hydro Power Ltd. respectively against order dated 30.12.2009 of

Uttarakhand Electricity Regulatory Commission denying open access to a hydro power generating company for sale of power to a trading licensee for resale outside the State of Uttarakhand.

2. PTC India Ltd., the Appellant in Appeal No. 88 of 2010 is a trading licensee. The State Commission of Uttarakhand is Respondent No.1. Respondent No. 2 is Swasti Power Engineering Ltd., a hydro power generating company with whom PTC, the Appellant herein, signed a Power Purchase Agreement. Respondent No. 3 is Uttarakhand Power Corporation Ltd. (UPCL), the distribution company in the State of Uttarakhand. Respondent No. 4 is Punjab State Electricity Board who has signed power purchase agreement with PTC Ltd., the Appellant, for purchase of power generated by Swasti Power Engineering Ltd., Respondent No. 2 herein. Respondent No. 5 is the

State Commission of Punjab. Respondent No. 6 is the Power Transmission Corporation of Uttarakhand responsible for the development and operation & maintenance of intra-state transmission system in the State of Uttarakhand. Respondent No. 7 is Government of Uttarakhand.

3. In Appeal No. 93 of 2010, the Appellant is Bhilangana Hydro Power Limited, a hydro power generating company in the State of Uttarakhand. Respondent No. 1 is the State Commission of Uttarakhand. Respondent No. 2 is UPCL, the distribution licensee of Uttarakhand. Respondent No. 3 is Him Urja Private Limited, a generating company setting up a hydro power project in Uttarakhand.

4. Since the impugned order under challenge and issues are same in both the Appeals, a common Judgment is being passed.

BACKGROUND

5. The background of the cases is described below:-

- i) Govt. of Uttrakhand allotted hydro project sites to private generating companies in the year 2003 in pursuance of the State Government's policy on small hydro power. Subsequently, Implementation Agreement was signed between the hydro project developers and the State Government. The Implementation Agreement provided choice to the generating company for sale of power to UPCL, the distribution licensee of Uttrakhand, High Tension consumer within the State of Uttrakhand, local rural grids in Uttrakhand, rural power distribution entities

and any consumer outside the State of Uttrakhand.

- ii) The hydro generating companies, Respondent No.2 herein in Appeal No. 88 of 2010 and Appellant in Appeal No. 93 of 2010, signed agreement with trading licensees for sale of entire power except the agreed percentage of free power as royalty to the State Government.
- iii) The trading licensee, Appellant in Appeal No. 88 of 2010, which has signed a Power Purchase Agreement with Swasti Power Engineering Ltd., Respondent-2 herein, signed back to back agreement with Punjab State Electricity Board for sale of entire power purchased from the hydro generating company.
- iv) The hydro generating companies also signed wheeling agreement with Power Transmission

Corporation of Uttarakhand, Respondent herein, for evacuation of power from the hydro project upto the sub-station of Central Transmission Utility for further transmission of electricity outside the State of Uttarakhand.

- v) On 14.5.2009, Uttarakhand Power Corporation Ltd., Respondent herein, filed a petition before the State Commission to allow open access for carrying electricity outside the State of Uttarakhand from Vanala Hydro Electric Project of Him Urja Pvt. Ltd., a generating company setting up a small hydro power project in the State of Uttarakhand.
- vi) The State Commission passed an interim order dated 10.6.2009 stating that from the Implementation Agreement signed by the hydro power generating company with the State

Government, it was clear that the sale outside the State was permissible only to a consumer and sought the status of the proposed buyer of electricity. Accordingly, Him Urja Pvt. Ltd. submitted its response to the State Commission contesting the interim order of the State Commission in the matter of open access. In the mean time UPCL filed another application that it was willing to withdraw its petition dated 14.5.2009 for seeking open access.

- vii) The State Commission vide a letter dated 10.08.2009 sought the view of the State Government on the issue of permissibility of sale of electricity outside the State of Uttrakhand from the hydro projects as per the terms of the Implementation Agreement.

- viii) The State Government vide letter dated 10.11.2009 intimated to the State Commission that there is severe shortage of electricity in the State and the hydro generating company had proposed to sell power to a Trading Company which did not fall in the category of consumer. Accordingly, the State Government informed that it would not be appropriate to consider the proposal of open access to the Hydro Project Developer.
- ix) The State Commission passed the impugned order on 30.12.2009 denying open access to the hydro generating company in view of the clarification given by the State Government. The State Commission also directed that a copy of the order may be sent to all small hydro power developers in the State as the order had

implication for similarly placed small hydro power developers.

- x) The State Commission also denied open access to Swasti Power Engineering Ltd., Respondent herein, vide order dated 30.12.2009 on the basis of its order of the same date in the matter of granting open access to another hydro power generating company, namely, Him Urja Pvt. Ltd.
- xi) Aggrieved by the order dated 30.12.2009 of the State Commission, the Appellants have filed these Appeals.

SUBMISSIONS OF APPELLANTS:

6. The learned counsel for the Appellants have submitted as under:-

- i) The State Commission has undertaken a restrictive interpretation of the definition of consumer and thereby denied permission to

the hydro generating company to sell electricity to a trading licensee. The State Commission has passed the order relying solely on the clarification given by the State Government, Respondent herein, without considering the scheme and provisions of the Electricity Act, 2003 and the various Regulations framed thereunder.

- ii) The Electricity Act, 2003 envisages trading in electricity for ensuring efficient and optimal supply of electricity to all consumers in the country. An electricity trader can purchase electricity from any source i.e. generating company, distribution company, etc., and resell it to any other entity irrespective of the fact that the entity is a consumer, a distributor or an Electricity Board. The

conjoint reading of the definition of ‘trading’, ‘consumers’ and the preamble of the Electricity Act, 2003 exhibits that the Electricity Act envisages the scheme of trading wherein an electricity trader can purchase electricity from a generator and resell to either a consumer directly, or to the Government or to any other person engaged in the business of supplying electricity to the public. The Trading Licensees in this case have agreement to supply electricity to a distribution company or a State Electricity Board which will ultimately supply the electricity to consumers.

- iii) The Electricity Act allows a generating company to supply electricity to any licensee and subject to regulations made by the State

Commission, to any consumer. The generation has also been de-licensed.

- iv) The Implementation Agreement gave the option to the hydro generating company to sell power to any consumer outside the State of Uttarakhand and by no way impeded or abridged the statutory right of the generating company to undertake such a sale through a trading licensee.
- v) The State Government has admitted that open access should not be granted due to shortage of electricity within the State. This can not be the basis of interpreting the provisions of the Implementation Agreement or the Electricity Act.
- vi) The P.T.C. India Limited, the Appellant herein, has signed back to back agreement

with Punjab State Electricity Board and due to open access not granted to the generating company, it will not be able to meet its obligation to supply under this agreement and will also be liable to pay liquidated damages as per the agreement. The learned counsel for the Appellants to support their arguments also made reference to Judgment reported in [2009] 16 SCC 659, Tata Power Co. Ltd. vs. Reliance Energy Limited.

PSEB (Respondent)

7. The learned counsel for Punjab State Electricity Board, R-4 herein in Appeal No. 88/2010, adopted the arguments of the Appellant.

UPCL, etc. (Respondent)

8. Shri Pradeep Misra, Learned counsel for UPCL, Power Transmission Corpn. of Uttrakhand and the

State Government (Respondents 3,6 and 7 herein in Appeal No. 88 of 2010 and Respondent No. 2 in Appeal No. 93 of 2010), has made the following submissions:-

- i) The State Government had decided to allot hydro project sites to developers who after setting up the project had to sell power within the State of Uttarakhand or to any consumer outside the State. Implementation Agreement signed by the hydro power generating company clearly described the conditions for supply of power. Any clause of the Implementation Agreement can not be challenged in the Appeal at this time.
- ii) The 2003 Act defines 'consumer' as a person who is supplied with electricity for his own use by a licensee or the Government, etc. Thus the Trading Licensees do not fall in the

definition of consumer and can not be sold power by the hydro power generating companies.

- iii) The Implementation Agreement has not placed any undue restriction on the hydro power generating companies. These generating companies had agreed to sell power within Uttarakhand or in case they wanted to sell power outside Uttarakhand, they would only sell to a consumer.
- iv) UPCL had approached the State Commission for permission to evacuate power generation by Him Urja Pvt. Ltd. on 66 kV network. The State Commission by the impugned order has held that as per Section 42 of the Electricity Act and its Regulations on open access in Distribution, open access is permissible only

to a consumer. Thus, in view of the statutory provision it has permitted the distribution company to withdraw the application;

- v) Appeal No. 88 of 2010 is not maintainable as the Appellant, a Trading Licensee is not a person aggrieved under Section 111 of the 2003 Act and Respondent No. 2 who is the generator has agreed to sell its power to Respondent No. 3, the distribution company of Uttrakhand. Respondent No. 2 has also not challenged the order passed by the State Commission. To support the argument he relied on 2009(12) SCC 315- West Bengal State Electricity Board vs. Gajendra Haldia & Ors.

STATE COMMISSION (RESPONDENT):

9. Shri Suresh Tripathy, the learned counsel for the State Commission in support of the impugned order submitted the following:-

- i) The Act permits supply of electricity by a generating company to a licensee or a consumer. It is open for a generating company to elect either of them or both. The hydro generating companies have on their own elected to enter an agreement providing for selling of power to any consumer outside the State of Uttrakhand. The definition of word “consumer” appearing in the Act was already available to the generating companies as the agreement was signed after the enactment of the Statute;

- ii) The definition of consumer in the Act is very clear and an intermediary trader can not be involved in the transaction;
- iii) Appeal No. 93 of 2010 challenging order dated 30.12.2009 is not maintainable as the order in question merely allowed UPCL, the distribution company to withdraw the application filed by it and there was no determination of any issue.

SWASTI POWER ENGINEERING LTD.(RESPONDENT):

10. Shri R.K. Mehta, the learned counsel for Swasti Power Engineering Limited, Respondent No.2 in Appeal No. 88 of 2010 submitted that they stand committed to the agreement signed with the Appellant, Power Trading Corporation, but were not in a position to supply power to the Appellant PTC in view of the order of the State Commission. In the meantime, their

power station has been commissioned and they are selling power to the UPCL, the distribution company of Uttrakhand.

ANALYSIS & FINDINGS:

11. Based on the contentions of the parties the following questions would arise:-

- i) Whether the Appeals are maintainable under Section 111 of the Electricity Act, 2003?
- ii) Whether the hydro generating companies, appellant/respondent herein, have a legal right to sell electricity to a Trading Licensee even though the Implementation Agreement signed with the State Government permits sale outside the State only to any consumer?

12. Let us first take up the issue of maintainability of the Appeals. According to the learned counsel for the

Respondents 3, 6 and 7 in Appeal No. 88/2010, PTC India Limited is not a person aggrieved under Section 111, as Respondent No. 2 who is the generating company has not challenged the order and has agreed to sell its power to Respondent No. 3.

13. PTC India Limited (PTC), the Appellant had signed a Power Purchase Agreement with Swasti Engineering Ltd., Respondent No.2, for purchase of entire power output of its hydro power station. PTC India Limited is a Trading Licensee which has been given license by the Central Commission for inter-state trading of electricity. PTC has also signed back to back Power Sale Agreement with Punjab State Electricity Board for re-sale of the entire power under which it has legal obligation to supply power. Denial of permission for open access to Respondent No. 2, the hydro generating company, will affect the business of

the Appellant PTC. The hydro generating station of Respondent No. 2 has already been commissioned and it is presently supplying power to Respondent No.3, the Distribution Licensee of Uttrakhand as it has been denied open access by the State Commission. However, Respondent No. 2 has not terminated its PPA with the Appellant, PTC. Just because Respondent No. 2 has not chosen to challenge the order of the State Commission it does not bar the Appellant to challenge the order. Denial of open access by the State Commission would result in default and non-fulfilment of Appellant's obligation to supply power and it may be liable to pay liquidated damages under its Power Sale Agreement besides causing loss of business. Besides, according to the Appellant, it was impleaded as Respondent No. 3 when application for

open access dated 10.8.2009 was made before the State Commission.

14. In view of the above, in our opinion PTC India Limited, the Appellant herein is a person aggrieved by the impugned order.

15. The learned counsel for the State Commission argued that Appeal No. 93 of 2010 is not maintainable as by the impugned order the Distribution Licensee of Uttrakhand, Respondent No. 2 herein, was permitted to withdraw its application for open access and there was no determination of any issue. Thus, the order is not appealable. We do not accept this argument. By the impugned order the State Commission has held that the open access can not be granted for supply of power by M/s. Him Urja, a generating company, to a trading licensee in terms of the Implementation

Agreement. The Commission by the impugned order also gave directions to send a copy of the order to all small hydro power developers in the State as the order had implication for similarly placed hydro project. Based on its order dated 30.12.2009, the State Commission also rejected the application for open access in respect of Respondent No. 2 in Appeal No. 88 of 2010 by an order of the same date i.e. 30.12.2009. The Appellant which is a hydro generating company and has signed an agreement with a trading licensee for sale of its entire power is, therefore, a person aggrieved by the impugned order.

16. In view of the above, we hold that both the Appeals are maintainable under Section 111 of the Electricity Act, 2003.

17. Let us now discuss the second issue regarding legal right of the generating company to sell electricity to a trading licensee.

18. The learned counsel for the Respondent UPCL has argued that under the Implementation Agreement sale outside the State is permissible only to a consumer. We have examined the State Government's Policy for development of small hydro power in the State, Bidding documents inviting hydro power developers and the Implementation Agreement signed by the hydro generating companies with the State Government.

19. Government of Uttarakhand invited bids for development of hydro electric projects upto capacity of 25 MW in December, 2002 according to its hydro power development policy. The developers had to bid

for premium payable upfront to the State Government and the projects were to be allotted to the qualified bidders making the highest bids. The project developer was offered choice to sell power within the State of Uttaranchal to some defined entities or to any consumer outside the State. It was proposed that the infrastructure and facilities of UPCL would be available to all Independent Power Developers for wheeling of the generated energy. The Developer was responsible for laying lines for connectivity to the nearest grid sub-station at the appropriate voltage which will normally be 132 kV or 33 kV depending on the capacity of the power station and the distance from the power station to the grid sub-station.

20. The State Government signed Project Development Agreement with the successful bidders followed by Implementation Agreement. Relevant

clause 4.1 of the Implementation Agreement for sale of power is reproduced below:-

“4.1. Disposal of Power.

4.1.1. The company shall have the option to dispose off Power from the Project, after allowing for Royalty Energy, in any one or more of the following modes:-

- (i) Sell power to the UPCL, and such sales shall be mutually negotiated between the UPCL and the Company; and/or*
- (ii) Sell power to any High Tension (HT) consumer within the State of Uttarakhand; and or*
- (iii) Sell power to local rural grids within the State of Uttarakhand, which are not connected to the UPCL’s main grid; and/or*
- (iv) Sell power to rural power distribution entities (i.e. those which sell power to predominantly rural areas); and/or*
- (v) Sell power to any consumer outside the State of Uttarakhand”.*

Thus, sale of power to any consumer outside the State of Uttarakhand is permissible according to the Implementation Agreement.

21. 'Consumer' has not been defined in the Implementation Agreement but it is indicated that the meaning of any undefined word in the Electricity Act, 2003 shall also be taken into consideration for harmonious interpretation of the Agreement. The word 'consumer' is defined in the Act as under:-

(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a

licensee, the Government or such other person, as the case may be”;

Thus, according to 2003 Act, consumer may be supplied electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity.

22. Trading in the Act is defined as purchase of electricity for resale thereof. A trading licensee could supply electricity to any person, a licensee or a consumer.

23. According to Section 7 of the Act, no license is required by a generating company for establishment, operation and maintenance of a generating station. The generating company may also supply electricity to any licensee or to a consumer subject to the

Regulations made under Section 42(2). The relevant clause 10(2) of the 2003 Act is reproduced below:-

“ 10(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer”.

24. Section 66 of the Act envisages that the Appropriate Commission shall promote the development of a market (including trading) in power. Section 66 of the Act, 2003 is reproduced below:-

“66. Development of market – The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard”.

25. Section 86 of the Act stipulates the functions of the State Commission. One of the functions under Section 86 (c) is to facilitate intra-state transmission and wheeling of electricity.

26. Thus the above provisions of Electricity Act give complete freedom to a generating company to sell power to any licensee including a trader and to a consumer. The Act also allows trading licensee to sell power to a consumer or to a distribution licensee. A restriction imposed by the State Commission on a generating company to sell only to a consumer and not to a trader will not be in consonance with the scheme and provisions of the Act.

27. It is argued by the Respondents UPCL/State Government that the Implementation Agreement provides for sale outside the State to only a consumer

and the State Commission has rightly held so. In our view, the State Commission has taken restrictive interpretation of clause 4.1 of the Implementation Agreement. Trader is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case the hydro power generating company has proposed to sell power to a Inter-state trading licensee which has back to back agreement for re-sale of power to a distribution licensee outside the State of Uttrakhand. The distribution licensee is going to pool the power procured from the trading licensee with power procured from other sources and supply the same to its consumers. Thus the power is ultimately going to be consumed by the consumers outside the State of Uttrakhand. This is in accordance with scheme of things and provisions of the Electricity Act, 2003.

28. In our opinion, the State Commission should have interpreted the clause 4.1 of the Implementation Agreement in consonance with the provisions of the Act which does not put restriction on a generating company for sale of its power. Clause 4.1.1 (v) of the Implementation Agreement also does not prohibit sale of power to 'any consumer' outside the State through a trading licensee. The Respondents, UPCL or the State Government are also not prejudiced by the hydro generating company selling power through a trading licensee when the Implementation Agreement allows sale of power to 'any consumer' outside the State of Uttrakhand and there was no agreement between UPCL and the generating companies for sale of power at the time of seeking open access.

29. The learned counsel for the Appellant in his arguments has referred to Hon'ble Supreme Court's Judgment in case of Tata Power Co. Ltd. Vs. Reliance Energy Limited (2009) 16 SCC 659. The relevant extracts of the Judgment are reproduced below:

“82. In terms of Section 7 of the 2003 Act, all persons are permitted to establish, operate and maintain a generating station. It can, in terms of Section 62(1)(a) of the 2003 Act, supply electricity to any licensee i.e. distribution licensee or trading licensee. The 2003 Act permits the generating company to supply the electricity directly to a trader or a consumer. In terms of Section 42(2) of the 2003 Act even for the said purpose no tariff is required to be determined.

83. The primary object, therefore, was to free the generating companies from the shackles of licensing regime. The 2003 Act encourages free generation and more and more

competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.

84. If de-licensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side-door of regulations”.

The restriction imposed by the State Commission on the hydro generating companies is against the ratio held by the Hon'ble Supreme Court.

30. Let us also examine the process of the disposal of the Petition dated 14.5.2009 filed by Utrakhand Power Corporation Ltd., Respondent herein, for granting open access to a hydro generating company for carrying electricity outside the State of Utrakhand through the system of UPCL, Respondent herein. The State Commission instead of granting open access gave an interim order on 10.6.2009 seeking details of the status of the proposed buyer with whom Power Purchase Agreement has been signed by the Hydro Generating Company. The State Commission in the interim order also opined that in terms of the clause 4.1.1 of the Implementation Agreement the sale

outside the State is permitted only to a consumer, as defined in the Act.

31. Further the State Commission also sought State Government's views on the issue vide its communication to Government of Uttarakhand on 10.8.2009. The State Government responded to the State Commission vide letter dated 10.11.2009. The State Commission intimated that there is a severe shortage of electricity in the State and the company has proposed to sell power generated to M/s. PTC which is a trading company and does not fall within the category of consumer. In view of this, the State Commission informed that it would not be appropriate to consider the proposal of open access of the developer. In the meantime, UPCL also filed an application to withdraw its petition for granting open

access to the generating company, which was opposed by the generating company.

32. The State Commission then converted an application for open access into a dispute between UPCL, the distribution licensee and the generating company to be adjudicated by the State Commission under Section 86(1)(f) of the Act. The State Commission then decided the dispute based on the clarification given by the State Government. The relevant para 2.10 of the impugned order is reproduced below:-

“2.10. The dispute between UPCL and HUPL regarding allowing open access or sale outside the State can now be decided on the basis of clarification given by the Government, which makes it amply clear that HUPL is not entitled to open access for sale of electricity outside the State to PTC. The Commission, having regard to this clarification by the Government, is of the view that

the proposed sale to PTC is not permissible under the Implementation Agreement and, therefore, permits UPCL to withdraw its application dated 14.05.2009 for allowing open access to HUPL”.

In our view this approach of the State Commission is wrong. The State Commission should have decided the application for open access without referring the matter to the State Government. The Implementation Agreement clearly has a clause for sale to any consumer outside the State and the UPCL or any other entity in Utrakhnad had not signed any Power Purchase Agreement with the hydro generating companies. Whether the power is sold directly to a consumer outside the State or supplied through a trading licensee and a distribution licensee/Electricity Board is irrelevant here and should not be the matter

of concern for the State Commission since such supply is permissible under the provisions of the 2003 Act.

33. The State Commission in the impugned order has gone as per views of the State Government on granting open access for sale to a trading licensee stating that it was a prerogative of the State Government while specifying the terms of allocation of the hydro power project site. This is not correct. In our opinion, the State Commission has full authority in the matter of granting open access on intra-state transmission/distribution system as per the provisions of the Act and its Regulations and State Government's view is not binding on the State Commission. The State Government has allocated hydro sites through competitive bidding based on upfront premium to be paid by the generating company. The Implementation Agreement allows sale of power to any consumer

outside the State. The 'sale of power to any consumer' outside the State can not be given a restrictive interpretation which defeats the very objective of delicensing generation and freedom for sale of power by a generating company to consumer or to a licensee, including a trading licensee.

34. It is clear from the communication by the State Government to the State Commission that its view for not allowing sale to a Trading licensee is governed by the power shortage in the State of Uttarakhand. In our opinion, this can not be a reason for denying open access to a generating company to supply power outside the State through a Trading Licensee. Admittedly, UPCL had not signed any power purchase agreement with the hydro generating company. UPCL only started purchasing power from Swasti Power Engineering Ltd., Respondent-2 herein, only after its

power station was commissioned and open access for supply of power to PTC, the Appellant, had been denied by the State Commission.

35. The learned counsel for the UPCL has argued that the State Commission has held that as per Section 42 of the Act and its Regulations it can permit open access on distribution system only to a consumer. The State Commission has not given a clear finding on this issue but has held that the generating company is not entitled to get open access in distribution system as a matter of right. However, we would like to give a clear finding on this important issue as a large number of renewable sources and co-generation plants each of small installed capacity are already connected to or planned to be connected to the distribution system for techno-economic reasons. Denial of open access to such small plants for sale to persons other than

consumer will infringe on the legal right of these generating companies which are connected to the distribution system for optimum utilization of the resources.

36. The Electricity Act makes obligatory on a transmission licensee to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges or any consumer subject to the provisions of Section 42(2) of the Act. Such legal obligation on the distribution licensee for open access to a generating company for supply to a person outside the area of distribution licensee has not been specified in the Act. However, there is no bar on providing open access to a generating company in distribution system if required for optimal utilization of the existing resources and to promote renewable sources of

generation and competition. After all promotion of open access and competition are the main features of the Act, the Tariff Policy and the National Electricity Policy.

37. Section 86(e) of the 2003 Act regarding function of the State Commission stipulates as under:

(e) promote congeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person.....”

Thus, the State Commission has to promote renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. The hydro generating stations of Appellant in Appeal No. 93 of 2010 and Respondent No. 2 in Appeal No. 88 of 2010 are renewable sources of energy which need to be promoted.

38. The request for qualification for development of hydro electric plants (Bidding documents) and the Hydro Policy of Uttarakhand Government also provided for connectivity of the hydro developers at 33 kV voltage level which is part of the distribution system and wheeling of energy outside the State. The relevant clauses of the Hydro Policy which form part of the bidding document are reproduced below:-

“4.6. WHEELING CHARGES

4.6.1. The infrastructure and facilities of UPCL will be made available to all IPPs for wheeling the generated energy.

4.6.2. Wheeling charges for wheeling the generated energy to third party consumers or outside the State will be as determined by the Electricity Regulatory Commission of Uttaranchal (ERCU). However, for those projects which are bid out prior to the

determination of this rate by the ERCU, the wheeling charges (for the entire concession period) would be 10% of net energy supplied at the interconnection point.

“4.7.GRID INTERFACING/TRANSMISSION LINE

The IPP shall be responsible for laying lines for connectivity to the nearest grid sub-station at the appropriate voltage, which will normally be 132 KV or 33 KV depending on the capacity of the power station and the distance from the power station to the Grid sub-station. The UPCL will determine the specifications of the evacuation facilities required, including the inter-connection point and voltage and the same would be specified in the project information document provided with the application form. On specific request from the IPP, the UPCL will carry out the implementation of evacuation facilities at charges to be mutually negotiated”.

39. Thus the Hydro Power Policy of the State Government and bidding documents clearly provides for connectivity of the hydro power project even at 33 KV system of the distribution licensee and wheeling of power through the distribution system. The bidding documents also permit sale of power by the generating company to any consumer outside the State. This would imply use of distribution system for wheeling energy outside the State of Uttarakhand for those hydro projects connected to the distribution network.

40. The Implementation Agreement also has a provision for evacuation of power outside the State. The relevant clause is reproduced below:-

“5.2.7. Evacuation of Power

The Government shall provide necessary assistance to the Company in tying up the transmission system for evacuation of power

from the Project out of Uttarakhand through the transmission system of the UPCL/PTCUL, Power Grid Corporation of India Limited (PGCIL) or any other such utility (ies)”.

41. The Transmission Service Agreement signed between the generating company and Power Transmission Corporation of Uttarakhand, the respondent herein and also the State Transmission Utility, also provides for making available transmission system of the transmission licensee/distribution licensees power network under para 4.1.

42. Section 11(1) of the Uttarakhand Electricity Regulatory Commission Regulation (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) of 2008 also provides for right to open access of a generating station carrying

electricity from his plant by using the distribution system. The relevant extracts are reproduced below:-

“11. Open Access

- (1) A person, who has constructed the Plant, shall have right to ‘open access’ for carrying electricity from his plant by using transmission lines or distribution system or associated facilities with such lines or system and for that matter, rules or regulations notified by the Commission in this regard shall apply on the plant.....”.*

The State Commission’s Regulation on open access in distribution provide for open access for the consumers. Non-availability of Regulations for open access to renewable sources of generation should not be a pre-requisite for providing them open access on the distribution system.

43. The State Commission in the impugned order has also not pointed out any constraint in providing open access to hydro generating company on the distribution system. In fact UPCL, the Distribution Company had itself filed the petition before the State Commission to allow grant of open access on its distribution system. For economical use of resources, it may be prudent to provide connectivity to small generating stations to the distribution system. Incidentally such inter-connection of a generating station to the distribution system may also provide stability to the distribution system even if commercially power from the power station is sold outside the distribution system.

44. Thus, we do not find any reason for not allowing open access to the hydro power generating company

on the distribution system for sale of power to the trading licensee for supply outside the State.

45. The learned counsel for the Appellant has also submitted a copy of the Implementation Agreement between the Government of Uttarakhand with another generating company subsequently where sale of power outside the State had been permitted. We are not going into the details of this arrangement as these are subsequent developments and these documents had not been produced before the State Commission at the time of passing the impugned order.

46. In view of above, we decide the second issue in favour of the Appellants.

SUMMARY OF FINDINGS:

47. The first issue is maintainability of the Appeals. PTC India Limited, the Appellant had signed

Power Purchase Agreement with Swasti Engineering Company Limited, Respondent No.2 for purchase of entire power output of its hydro power station. PTC had also signed back to back Power Sale Agreement with Punjab State Electricity Board for re-sale of the entire power. Under the Agreement, it has legal obligation to supply power. Denial of permission for open access to Respondent No. 2, the hydro generating company, will affect the business of the Appellant PTC and may also make it liable to pay liquidated damages to the buyer of power. Even though Swasti Power Engineering Ltd., Respondent No. 2, has not challenged the order dated 30.12.2009, it has not terminated its agreement with the Appellant, PTC. Thus, PTC is a person aggrieved by the impugned order.

48. Similarly, the impugned order passed by the State Commission denying open access to M/s. Him Urja for sale of power to a trading licensee has implication on other generating companies such as M/s. Bhilangana Hydro Power Limited, the Appellant herein in Appeal No. 93 of 2010. The State Commission by the impugned order had also given directions to send a copy of the Order to all small hydro power developers in the State as the order had implications for similarly placed hydro project. Based on its order dated 30.12.2009, the State Commission also rejected the application for open access in respect of Respondent No. 2 (in Appeal No. 88 of 2010) by an order of the same date i.e. 30.12.2009. Thus, the Appellant, Bhilangana Hydro Power Limited is also a party aggrieved by the impugned order. In view of this, we

hold that both the Appeals are maintainable under Section 111 of the Electricity Act, 2003.

49. The second issue is regarding legal right of the generating company to sell electricity to a trading licensee. The State Commission had denied open access to the hydro generating companies for sale of power to a trading licensee for supply outside the State in view of the clarification given by the State Government. The State Commission had clarified that sale to trading licensee was not permissible in terms of the Implementation Agreement.

50. The Implementation Agreement provided a choice to a generating company for sale of power to defined entities within the State and to 'any consumer outside the State'. Admittedly no agreement for sale of power had been signed by the generating companies with

UPCL or any other entity within the State of Uttarakhand at the time of seeking open access from the State Commission. On the other hand these generating companies signed the agreement with trading licensees for sale outside the State.

51. The Electricity Act gives complete freedom to a generating company to sell power to any licensee and to a consumer. The Act allows trading licensee to sell power to a consumer or to a distribution licensee. A restriction imposed by the State Commission on a generating company to sell only to a consumer and not to a trader will not be in consonance with the scheme and provisions of the Act. This is also against the ratio decided by the Hon'ble Supreme Court in *Tata Power Co. Ltd. vs. Reliance Energy Limited* (2009) 16 SCC 659.

52. A trading licensee is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case the generating company proposes to sell power of a trading licensee which has back to back agreement for resale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the power procured from the trading licensee with power procured from other sources and supply the same to its consumers. Thus, the power is ultimately going to be consumed by the consumers outside the State. This is in accordance with scheme of things and provisions of the Act. In our opinion, the State Commission has given restricted interpretation to clause 4.1 of the Implementation Agreement. The Respondents, UPCL or the State Government are not prejudiced by the hydro generating company selling power through a trading

licensee when the Implementation Agreement allows sale to 'any consumer outside the State'.

53. The State Commission should have decided the application for open access without referring the matter to the State Commission. Whether the power is sold directly to a consumer or through a trader should not be the concern for the State Commission as such supply is permissible under the provisions of the Act.

54. The State Commission had gone as per the views of the State Government in granting open access stating that it was a prerogative of the State Commission while specifying the terms of allotment of the hydro power site. This is not correct. In our opinion, the State Commission has full authority in granting open access on intra-state transmission system and distribution system as per the provisions

of the Act and its Regulations and State Government's view is not binding on the State Commission. The sale of power to 'any consumer outside the State' can not be given a restrictive interpretation which defeats the very objective of de-licensing generation and freedom for sale of power by a generating company to a consumer or to a licensee. Shortage in the State could not be a reason for denial of open access.

55. The learned counsel for the UPCL has argued that as per Section 42 of the Act and the State Commission's Regulations, it can permit open access in distribution only to a consumer. Small size generating stations particularly the renewable sources of generation are to be connected to the distribution system due to techno-economic reasons and for optimum utilization of resources. Denial of open access to such renewable sources of energy for sale to

persons other than consumers in the distribution licensee's area will infringe on the legal right of such generating companies which are connected to the distribution system for optimum utilization of the resources.

56. Section 86 (e) of the Act envisages that the State Commission has to promote renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. The State Commission has not indicated any constraint in providing open access to Appellants in the distribution system. In fact UPCL had filed the petition before the State Commission for allowing open access to the generating company on its distribution system. The hydro generating companies here are renewable sources of energy and the State Commission should

promote measures for connectivity and sale of electricity to any person.

57. The bidding documents for development of hydro projects in Uttarakhand and the State Govt.'s Hydro Policy also provide for connectivity at 33 kV at the distribution system of UPCL, the Respondent herein. It also provides for wheeling of energy on the distribution system. The Implementation Agreement also provides for State Government's support in providing wheeling on the system of UPCL. The State Commission's Regulations on renewable sources provides for open access to generating company on the distribution system.

58. In view of the above, we do not find any reason for not providing open access on the distribution system to hydro power generating companies which are

renewable sources of energy. We, therefore, hold that the State Commission should have provided open access to the generating companies for sale of power to trading licensee.

CONCLUSION:

59. In view of the above findings, we set aside the order dated 30.12.2009 of the State Commission. The State Commission is directed to grant open access to the generating companies, Respondent No. 2 in Appeal No. 88 of 2010 and Appellant in Appeal No. 93 of 2010 after they file application for granting open access on the distribution/transmission system of UPCL/Power Transmission Corporation of Uttarakhand Ltd. before the State Commission.

60. Pronounced in the open court on this **11th day of**
January, 2011.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

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