

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 193 OF 2014

Dated: 20th November, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

IN THE MATTER OF

M/s Him Urja Private Limited

E-14, East of Kailash,
New Delhi-110065

..... Appellant/petitioner

VERSUS

Uttarakhand Electricity Regulatory Commission

Viduyt Niyamak Bhawan,
Near I.S.B.T., P.O. Majra,
Dehradun-248171
Uttarakhand

Uttarakhand Power Corporation Limited

Victoria Cross Vijeyta Gabar Singh Bhawan,
Kanwali Road, Balliwala Chowk,
Dehradun-248001
Uttarakhand

Uttarakhand Renewable Energy Development Agency

Energy Park Campus, Industrial Area,
Patel Nagar,
Dehradun – 248001
Uttarakhand

..... Respondents

Counsel for the Appellant

...

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ishan Mukherjee

Counsel for the Respondent(s)...

Mr. Buddy A. Ranganadhan
Mr. D.V. Raghu Vamsy for R-1

Mr. Pradeep Misra
Mr. Manoj Kr. Sharma for R-2 & 3

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by M/s Him Urja Private Limited (in short, the '**Appellant**'), against the Impugned Order, dated 28.5.2014, passed by the Uttarakhand Electricity Regulatory Commission (in short the '**State Commission**') whereby, the State Commission has rejected the accreditation to the Appellant's Small Hydro Electric Project under the Renewable Energy Certificate Scheme of the Central Commission read with the Renewable Purchase Obligation Regulations of the State Commission.

2. The Appellant has established a 4.4 MW run of the river mini Hydro generating station on the river Mandakini in the State of Uttarakhand. The entire electricity from this generating station is being supplied to the Respondent No. 2, Uttarakhand Power Corporation Limited (UPCL), the distribution licensee in the State of Uttarakhand.

3. Respondent No.1 is the Uttarakhand Electricity Regulatory Commission, which is empowered to discharge certain functions prescribed under the Electricity Act, 2003. Respondent No.2, UPCL is the distribution licensee in the State of Uttarakhand. Respondent No.3 is the Nodal Agency in the State of Uttarakhand handling the operation and execution of various schemes based on non-conventional sources of energy.

4. The relevant facts for the purpose of deciding this Appeal are as under:
(a) that on 21.12.2001, the Appellant entered into a Power Purchase Agreement (PPA) with the Respondent No. 2/UPCL for supply of electricity from its generating station. At the relevant time, the State Commission had not been constituted for the state of Uttarakhand and the tariff for such supply was fixed at Rs. 2.50 per unit in terms of the then prevailing policy of the government of Uttarakhand. The PPA inter-alia provide as under:

“6.2 TARIFF FOR NET SALEBLE ENERGY

The Corporation shall pay for the net Saleable Energy delivered by the Company to the corporation at the Interconnection Point at a fixed rate of Rs. 2.50 (Rupees two paise fifty only) per Kilowatt hour. This rate is firm and fixed and shall not be changed due to any reason whatsoever.”

- (b) that on 26.12.2001, revised agreement was submitted to the State Commission for approval. On 24.5.2002, the project was synchronized with the grid with sale of infirm power to Respondent No.2 @ Rs. 2.50 per unit.
- (c) that on 9.4.2007, the State Commission while examining the validity of the PPA, dated 22.12.2001, held that the PPA was not legally valid and there was no requirement for the State Commission to abide by the provisions of the PPA for the purpose of determining tariff. This order of the State Commission, dated 9.4.2007, was challenged by the Appellant before this Appellate Tribunal in Appeal No. 61 of 2007. This Appellate Tribunal, vide its judgment, dated 30.10.2007, set-aside the order of the State Commission holding that the State Commission has no jurisdiction to reopen the PPAs, which were already entered into prior to the constitution of the State Commission.
- (d) that on 30.4.2008, the State Commission enacted the Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity From Non-Conventional and Renewable Energy Sources) Regulations, 2008 (in short, **‘State RE Regulations, 2008’**). In terms of the said Regulation, the State Commission determined the tariff for small hydro generating stations (upto 5 MW) commissioned between 1.1.2002 and 31.3.2007 at Rs.2.55 per unit. This was a preferential tariff determined by the State Commission. However, the Appellant was not given benefit of the tariff and the tariff for the Appellant continued at Rs.2.50 per unit.

- (e) that on 14.1.2010, the Central Commission framed and notified the CERC (Renewable Energy Certificate) Regulations, 2010. In terms of the said Regulation, a renewable energy generator was entitled to apply for accreditation and, subsequently, registration for receiving Renewable Energy Certificates (RECs) subject to certain conditions being fulfilled, the primary condition being that the renewable energy generator does not supply electricity at the preferential tariff determined by the State Commission, but supplies electricity to distribution licensee at a price not exceeding the average pooled power purchase cost of the distribution licensee.
- (f) that the State Commission framed and notified the Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010 (in short, '**State RE Regulations 2010**') and in terms of the said Regulation, the State Commission, vide order, dated 6.7.2010, determined the tariff for small Hydro generating stations (upto 5 MW) commissioned between 1.1.2002 and 31.3.2007 at Rs. 2.85 per unit. This was a preferential tariff determined by the State Commission. However the Appellant was not given benefit of the tariff and the tariff for the Appellant continued at Rs. 2.50 per unit.
- (g) that on 3.11.2010, the State Commission framed and notified the Uttarakhand Electricity Regulatory Commission (Compliance of Renewable Purchase Obligation) Regulations, 2010 (in short, '**State RPO Regulations, 2010**'). In the said RPO Regulations, 2010, the State Commission adopted the RECs Regulations, 2010 of the Central Commission with regard to accreditation of renewable energy generators under the REC mechanism.
- (h) that the State Commission, vide order, dated 29.5.2012, determined the Average Pooled Power Purchase Cost (APPC) of the Respondent No.2/UPCL for the year 2012-13 at Rs. 2.68 per unit. This APPC

tariff of Rs. 2.68 per unit was more than the tariff of Rs. 2.50 per unit, which the Appellant was getting under the PPA with the Respondent No.2/UPCL.

- (i) **that on 22.6.2012, the Appellant applied for accreditation for issuance of RECs with the Respondent No. 3 as the Appellant had complied with all the provisions of Regulation 8 of the State RPO Regulations, 2010.**
- (j) that on 6.9.2012, the Respondent No.2, through communication, dated 6.9.2012, addressed to the Respondent No.3, objected to the grant of accreditation to the Appellant on the ground that the electricity being procured from the Appellant was being taken for its RPO compliance and, therefore, accreditation should not be granted to the Appellant.
- (k) that on 12.11.2012, the Respondent No.3, in view of the Respondent No.2's letter, rejected the Appellant's application for accreditation for issuance of RECs. This was also communicated by the Respondent No. 3 to the National Load Despatch Centre, which is the nodal agency in terms of the RECs Regulations of the Central Commission.
- (l) that the Appellant, aggrieved by the rejection of the application for accreditation by the Respondent No. 3, filed a petition before the State Commission on 19.11.2012, which has been rejected by the State Commission by the impugned order, dated 28.5.2014.
- (m) that, thus, in short, the claim of the Appellant in this appeal is that as per the State RPO Regulations, 2010, the Appellant is entitled for issuance of RECs. The tariff of the Appellant was determined by the State Commission, vide order, dated 17.11.2005, and the Appellant aggrieved by the order, dated 17.11.2005, filed an appeal being Appeal No. 204 of 2005 before this Appellate Tribunal and this Appellate Tribunal, vide its judgement, dated 29.3.2006, while

setting-aside the State Commission's order, dated 17.11.2005, remitted the matter back to the State Commission to determine the tariff of the Appellant afresh. The State Commission again determined the tariff, vide order, dated 9.4.2007, against which order, the Appeal No. 61 of 2007 was filed before this Appellate Tribunal and this Appellate Tribunal, vide its judgment, dated 30.10.2007, while allowing the Appeal, directed the State Commission to adopt the tariff as per the PPA, dated 22.12.2001, entered into between the Appellant and the Respondent No.2 w.e.f. the commercial operation date of the Appellant's generating station and, further, holding that the Appellant will be entitled to receive the arrears, if any, with interest @ 6% from the Respondent No.2/UPCL. Thus, this Appellate Tribunal, vide its judgment, dated 30.10.2007, in Appeal No. 61 of 2007, directed the State Commission to adopt the tariff as per PPA, dated 22.12.2001, and the State Commission, in compliance of the direction of this Appellate Tribunal, adopted the tariff @ Rs. 2.50 per unit of the Appellant. The preferential tariff for other generating companies at that time was Rs. 2.85 per unit for non-renewable energy sources projects.

- (n) that we may further make it clear that the Appellant does not want any tariff increase and the Appellant is satisfied with getting fixed tariff @ Rs. 2.50 per unit as per PPA's terms and as ordered by this Appellate Tribunal. The Appellant simply wants the issuance of RECs for trading as per State RPO Regulations, 2010. The Appellant applied for accreditation, as mentioned above, in the year 2012 when the Appellant was fulfilling all the elements in order to qualify him for obtaining the accreditation and registration and ultimately RECs.

5. We have heard Mr. Anand K. Ganesan, the learned Counsel for the Appellant/petitioner, Mr. Buddy A. Ranganadhan, the learned counsel for the

Respondent No.1/State Commission and Mr. Pradeep Misra, the learned counsel for the Respondent No.2 & 3 and gone through the written submissions filed by the rival parties. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission.

6. The sole issue which arises for our consideration in the instant Appeal is ***whether the Appellant is eligible for accreditation and, further, entitled to the grant of accreditation as provided under Regulations 8 and 9 of the UERC (Compliance of Renewable Purchase Obligation) Regulations, 2010 respectively?***

7. The main contentions of the Appellant on this issue are as under:

- (a) that the State Commission has rejected the application of the Appellant for grant of accreditation by the impugned order on the following grounds:
 - (i) that the tariff of Rs. 2.50 per unit has been adopted under Section 63 of the Electricity Act, 2003.
 - (ii) that the tariff, vide order of the State Commission, dated 9.4.2007, had been set aside by this Appellate Tribunal holding that the State Commission had no jurisdiction to reopen the PPAs executed prior to the constitution of the State Commission, hence, State Commission's order, dated 9.4.2007, became non-est.
 - (iii) that the Appellant is being paid at Rs. 2.50 per unit, which is higher than the tariff determined in the order of the State Commission, dated 9.4.2007, the Appellant is getting a preferential tariff. The Appellant is being paid a tariff higher than as determined by the State Commission, vide its order, dated 9.4.2007, and, therefore, the Appellant is not entitled to accreditation under the REC mechanism.

- (iv) that the Appellant did not file the Petition or make the claim immediately upon the framing of the State RPO Regulations, 2010 and has only made the claim in the year 2012 by filing the application seeking grant of accreditation.
- (b) that in terms of Regulation 8 of the State RPO Regulations, 2010, the following two conditions are required to be fulfilled by the Appellant:
 - (i) that the Appellant should not be supplying electricity to a distribution licensee (Respondent No.2 herein) at a preferential tariff determined by the State Commission.
 - (ii) that the supply of electricity to the distribution licensee must be at a price not exceeding the Average Pooled Power-purchase Cost (APPC) of the distribution licensee.
- (c) that, since, both the conditions prescribed under Regulation 8 of the State RPO Regulations, 2010 are fulfilled by the Appellant, subsequently, the Appellant is supplying electricity to the Respondent No.2 at the tariff of Rs. 2.50 per unit which is not even a tariff determined by the State Commission and the question of the same being a preferential tariff determined by the State Commission does not arise at all. Hence, the Appellant is fully eligible to the grant of accreditation.
- (d) that, in fact, the State Commission had for the projects commissioned between 1.1.2002 and 31.3.2007 determined the preferential tariff at Rs. 2.85 per unit which has not been made applicable to the Appellant and in the circumstances, the question of the Appellant supplying electricity at the preferential tariff does not arise.
- (e) that, further, when the Appellant sought for accreditation, the APPC tariff, as determined by the State Commission for the distribution licensee/Respondent No.2, was Rs. 2.68 per unit. The

tariff of Rs. 2.50 per unit was lower than the APPC tariff of Rs. 2.68 per unit. In the circumstances, the conditions mentioned in the State RPO Regulations, 2010 were duly fulfilled by Appellant seeking accreditation for the purposes of being entitled to RECs.

- (f) that the State Commission has gone on a completely erroneous and misplaced premise in the impugned order that the Appellant is getting a tariff more than the tariff determined in the order, dated 9.4.2007 of the State Commission and, therefore, the Appellant is not entitled for accreditation. Since, the order of the State Commission, dated 9.4.2007, had been set aside by this Appellate Tribunal had become non-est and the impugned order having been based on the non-est order, dated 9.4.2007 of the State Commission is absolutely illegal and against law.
- (g) that the findings of the State Commission that the tariff of Rs. 2.50 per unit is the tariff adopted under Section 63 of the Electricity Act, 2003 is totally misplaced. There can be no question of Section 63 being invoked in the present case where the tariff of Rs. 2.50 was entered into the PPA prior to the constitution of the State Commission and, in fact, even prior to coming into force of the Electricity Act, 2003.
- (h) that the adoption of tariff under Section 63 of the Electricity Act, 2003 is pursuant to a competitive bidding process in terms of the Competitive Bidding Guidelines framed by the Government of India under Section 63 of the Electricity Act, 2003. When the Electricity Act, 2003 itself was not in force at that time, the question of there being a competitive bidding process under Section 63 of the Electricity Act, 2003 and the tariff being adopted under Section 63 of the Electricity Act, 2003 does not arise.
- (i) that there was no competitive bidding for adoption of tariff in the present case. The State Commission had proceeded on a grossly erroneous basis that the tariff of Rs. 2.50 per unit being paid to

the Appellant under the PPA, dated 21.12.2001, is a tariff that has been adopted under Section 63 of the Electricity Act, 2003. The tariff was determined by the State Commission, vide its order, dated 9.4.2007, which had not been set aside by this Appellate Tribunal on the ground that the State Commission had no jurisdiction to reopen the already existing PPAs. Since, the order, dated 9.4.2007, has become non-est, the same could never be considered by the State Commission in the impugned order.

- (j) that this Appellate Tribunal, in its judgment, dated 14.9.2006, in Appeal No. 189 of 2005 filed against an order of Uttarakhand State Commission itself had held that the State Commission could not reopen the PPAs which were executed prior to constitution of the State Commission. Hence, the question of the State Commission in the impugned order relying on its own already set-aside order, dated 9.4.2007, and the tariff determined by the said already set-aside order, does not arise.
- (k) that the impugned order of the State Commission is contrary to the well-settled principle of law that once an order is set aside, the order does not exist in law and it is only the decision of the appellate authority that survives as held in *Sharda Singh vs. State of U.P.*, (2009) 11 SCC 683, *Chandi Prasad vs. Jagdish Prasad* (2004) 8 SCC 724 and *Amba Bai vs. Gopal* (2001) 5 SCC 570.
- (l) that, further, an order passed without jurisdiction is nullity and void ab-initio as held in the case of *Chiranjilal Shrilal Goenka vs Jasjit Singh*, (1993) 2 SCC 507.
- (m) that the State Commission, by the impugned order, has proceeded to hold that since the tariff of Rs. 2.50 being paid to the Appellant is more than the tariff determined in the order, dated 9.4.2007, the Appellant is being paid a preferential tariff. When there is no tariff at all determined by the State Commission after

the order, dated 9.4.2007, of the State Commission having been set-aside, the question of the State Commission relying on the already quashed order does not arise.

- (n) that in the case of other developers also, similar tariff orders were passed by the State Commission fixing tariff much lower than Rs.2.50 per unit. These developers also filed appeal against such orders before this Appellate Tribunal. After notification of the Renewable Energy Regulations, 2008, the appeals were withdrawn on account of the revised tariff of Rs. 2.55 per unit being applicable. After the Renewable Energy Regulations, 2010, the tariff applicable for such generators is Rs. 2.85 per unit. **Even after application of the said REC Regulations, 2008, the tariff of the Appellant's small hydro project continued at Rs. 2.50 per unit and after the enforcement of the State RPO Regulations, 2010, the tariff for the other similarly placed generators is Rs.2.85 per unit.** Since, the Appellate Tribunal directed the State Commission to adopt the PPA tariff i.e. Rs.2.50 per unit, the State Commission has adopted the tariff of Rs. 2.50 per unit for the Appellant's small hydro project.
- (o) that the Appellant has been incurring huge losses since 2010 due to alteration in the silt profile of the river and the disaster of Uttarakhand in 2013. Despite the above position, the Appellant has continued to supply electricity under the PPA and not opted to supply to third parties or for captive purposes. However, the Appellant is being penalized despite supplying at the lower tariff of Rs. 2.50 per unit under the PPA. **The State Commission ought not to have rejected the claim of the Appellant for accreditation under the REC Mechanism when the Respondent No.2/UPCL is getting the electricity at the lower tariff of Rs. 2.50 per unit as against the higher tariff being paid to other similarly placed generators.**

(p) that the State Commission has, in the impugned order, proceeded on the erroneous basis that since the Appellant had approached the State Commission only in the year 2012 whereas, the State RPO Regulations came into force in the year 2010, the claim of the Appellant cannot be justified. The Appellants is not seeking for accreditation or RECs for the period from 2010. There is no provision in the State RPO Regulations, 2010 or any provision in any other Regulation that unless the generator approaches for accreditation within the specified time period of the establishment of the generating station, the application for accreditation and registration cannot be processed. The Appellant approached the Respondent No. 3 for accreditation immediately on 22.6.2012 immediately upon fulfilling the conditions under the State RPO Regulations, 2010. The State Commission had passed the order determining the APPC for the year 2012–13 at Rs. 2.68 per unit only on 29.5.2012. Hence, the Appellant was in a position to compare the tariff of Rs. 2.50 per unit being paid to the Appellant prior to the order, dated 29.5.2012, determining the APPC for the year 2012-13. The Appellant only sought for accreditation for the period from 2012 onwards, since the Appellant is fully qualified and complying with each of the conditions mentioned in the State RPO Regulations, 2010 for accreditation and subsequent registration under the REC mechanism hence, the rejection of the Appellant's application, vide impugned order, dated 28.5.2014, is bad in law and is liable to be set-aside.

8. Contrary to the submissions advanced on behalf of the Appellant, the following submissions have been made on behalf of the Respondents:

(a) that in terms of Regulation 8 of the State RPO Regulations, 2010, the following conditions are required to be fulfilled by the Appellant in order to become eligible to apply for accreditation:

- (i) that a generating company engaged in generation of electricity from renewable energy sources has connectivity to the state network.
 - (ii) that the said generating company does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Commission.
 - (iii) that it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase (excluding transmission charges) of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.
 - (iv) that it possesses the necessary infrastructure required to carry out energy metering and time-block wise accounting.
- (b) that, Mr. Pradeep Misra, learned counsel for the Respondent Nos. 2 & 3, having taken us through the conditions required for generating company in order to be eligible to apply for accreditation, has submitted that one condition which is not fulfilled by the Appellant, is that the Appellant does not have power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the State Commission because the pooled power purchase cost at the relevant time is Rs. 2.85 per unit but the Appellant is selling electricity at Rs. 2.50 per unit which is the adopted tariff. Rest other conditions provided under Regulation 8 of the State RPO Regulations, 2010 are fulfilled.
- (c) Mr. Pradeep Misra has vehemently argued that the tariff of any generation company can be determined or adopted by the

Regulatory Commission under Section 62 & 63 read with Section 64 of the Electricity Act, 2003. Under Clause 2(o) of the State RPO Regulations, 2010, the term '*preferential tariff*' is defined as follows:

'Preferential Tariff' means the tariff fixed by the Appropriate Commission for sale of energy from a generating station based on renewable energy sources to a distribution licensee.'

(d) that, since, this Appellate Tribunal, vide its judgment, dated 30.10.2007, in Appeal No. 61 of 2007, while setting-aside the tariff order, dated 9.4.2007, of the State Commission directed the State Commission to adopt the tariff of the Appellant as per the power purchase agreement, dated 22.12.2001, entered into between the Appellant and the Respondent Nos. 2 & 3, and the State Commission, in compliance of the direction of this Appellate Tribunal, had adopted the tariff @ Rs. 2.50 per unit of the Appellant, hence, the said tariff is being called an adopted tariff by the State Commission. The preferential tariff for a generating company at that time was admittedly Rs. 2.85 per unit for all renewable energy sources projects whereas, the Appellant has been getting the tariff @ Rs. 2.50 per unit throughout the date of the PPA, dated 22.12.2001. We will deal with this contention during our discussions subsequently.

(e) Mr. Pradeep Misra is calling PPA tariff of Rs. 2.50 per unit for the Appellant as adopted tariff citing the second proviso to Regulation 2(1) of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generation Stations) Regulations, 2010, which provide ad under:

"Provided further that in respect of generating stations where directions/orders have been issued by a higher court, they shall be governed by such directions/orders."

(f) that on this basis, Mr. Misra submits that since, the tariff of the Appellant has been adopted at Rs. 2.50 per unit as per the

direction of this Appellate Tribunal, the said tariff of Rs. 2.50 per unit should be deemed to be a preferential tariff for the Appellant and, accordingly, the Appellant does not fulfill the relevant conditions prescribed under Regulation 8 of the State RPO Regulations, 2010 and the Appellant is not eligible for accreditation and, subsequently, is also not entitled to issuance of RECs.

(g) that the State RPO Regulations, 2010 have been amended in the year 2013, vide notification, dated 28.12.2013. Considering the impact of amendment in the State RPO Regulations notified in the year 2013 has been discussed in para 2.1 and 2.3 of the impugned order and the relevant findings are as under:

- (i) that the tariff being paid by the Discom to the Appellant was directed by this Appellate Tribunal to be “adopted”.
- (ii) that the power so sold by the Appellant to the Discom was being treated towards its RPO and, hence, Clause 8.1(b) of the Regulations, as amended, has not been complied with by the Appellant.
- (iii) that, undisputedly, the PPA was entered into between the Appellant and the Respondent No. 2 on 22.12.2001 and the Appellant has been supplying power to the Discoms throughout.

9. **Our consideration and conclusion:**

9.1 We have narrated above the contentions raised by the rival parties on the aforementioned issue. We do not think it necessary to repeat the same here again. Before we proceed towards our own discussion and conclusion, we deem it necessary to cite the relevant part of the impugned order which we reproduce as under:

“2. Commission’s views and decision

2.1. The Commission observed that the Petitioner had filed the Petition under the then prevailing RPO Regulations, 2010. Relevant Regulations 8.1 of RPO Regulations, 2010 specifying eligibility criteria for accreditation under REC mechanism is as follows:

“8.0 Eligibility for Accreditation

8.1 A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for accreditation subject to following conditions:

a. It has connectivity to the State network;

b. It does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Commission;

c. It sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase (excluding transmission charges) of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price; and

Explanation: For the purpose of these regulations, “Pooled Cost of Purchases” means the weighted average pooled price at which the distribution licensee has purchased the electricity including the cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.

d. It possesses the necessary infrastructure required to carry out energy metering and timeblock wise accounting. Provided that the renewable energy purchased by the obligated entity in excess of its Renewable Purchase Obligation, as certified by the State Nodal Agency, shall be deemed to have been supplied by the renewable generators at pooled cost of purchases on pro-rata basis, at the option of such generators being given in writing to the concerned obligated entity and the State Nodal Agency and such generators shall also be entitled for accreditation only for such excess generation. The State Nodal Agency shall certify the quantum of such units for each generator after taking necessary data from all concerned. PPAs of such generators shall also have to be modified accordingly.”

(Emphasis added)

The above regulations have been replaced by RPO (First Amendment) Regulations, 2013 w.e.f. 28.12.2013 given below:

“8.1 A generating company engaged in generation of electricity from renewable energy sources including self-consumption of generation from renewable energy based captive generation plant

and renewable energy based Co-generation plants shall be eligible to apply for accreditation subject to following conditions:

a. It has connectivity to the State network and injects power into the grid. However, injection of power into the grid will not be a pre-requisite for accreditation in case of self consumption of generation from RE based captive generation plants and RE based Co-generation plants.

b. It does not have any power purchase agreement for the capacity related to such generation to sell electricity, to any Entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under section 62 or adopted under section 63 of the Act by the appropriate Commission:

Provided that self consumption of generation from renewable energy sources based captive generation plants and renewable energy sources based cogeneration plants shall be based on the capacity as assessed by the distribution licensee of the State, and the same shall be considered as the capacity for captive consumption for the purpose of issue of certificates.

c. It sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at the pooled cost of power purchase (excluding transmission charges) of such distribution licensee as determined by the Commission, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price; and

Explanation: For the purpose of these regulations, "Pooled Cost of Purchases" means the weighted average pooled price at which the distribution licensee has purchased the electricity including the cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be."

Provided that such a generating company having entered into a power purchase agreement for sale of electricity with the obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under section 62 or adopted under section 63 of the Act by the Commission shall not, in case of pre-mature termination of the agreement, be eligible for participating in the Renewable Energy Certificate (REC) scheme for a period of three years from the date of termination of such agreement or till the scheduled date of expiry of power purchase agreement, whichever is earlier.

....”.

(Emphasis added)

Regulation 8.1(b) of the above referred RPO Regulations, 2010 stipulates that the Project should not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Commission. In this regard, the Commission observed that the Petitioner had entered into a PPA dated 22.12.2001 for sale of power from its Rajwakti HEP to Respondent-2 at the rate of Rs. 2.50 PU as per the Policy of GoU. This rate was fixed and the PPA stipulated that this rate shall not be changed due to any reason, relevant clause of the aforesaid PPA is as under:

“6.2 TARIFF FOR NET SALEABLE ENERGY

The Corporation shall pay for Net Saleable Energy delivered by the Company to the Corporation at the Interconnection Point at a fixed rate of Rs 2.50 (Rupees two paise fifty only) per kilowatt hour. This rate is firm and fixed and shall not be changed due to any reason whatsoever.”

2.2. The Commission also observed that in exercise of its power under the Electricity Act, 2003, this Commission had determined the tariff for Rajwakti HEP and the rate worked out was even less than the rate agreed in the PPA. The order of the Commission was challenged in the Hon’ble ATE by the Petitioner. Hon’ble ATE vide its Order dated 30.10.2007 set aside the Order and ordered the Commission to adopt the tariff as per the power purchase agreement. The Petitioner continued to make supplies to the Respondent No. 2 at that tariff. This Commission prescribed RPO Obligation under UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 and the detailed mechanism for accreditation under renewable energy certificate (REC) framework were notified on November, 2010. The Petitioner continued to make supplies at the agreed and adopted rate till 2011-12. Only in 2012-13 when the average power purchase cost (APPC) exceeded marginally than the agreed tariff, he has come up for accreditation. Mere exceeding of APPC over his agreed rate cannot be a basis of claiming that, ab-initio, only the energy component was contracted and he is now entitled to separate compensation for environmental attributes. If that was so, the contention should have been raised by the Petitioner at the time of notification of RPO obligation or atleast when in November, 2010, the mechanism for accreditation was issued.

2.3. The Petitioner submitted that its tariff has not been determined u/s 62 or 63 of the Electricity Act, 2003, therefore, it should be entitled to REC. In this regard, it is hereby clarified that this Commission had determined the tariff of the Rajwakti HEP u/s 62 of the Electricity Act, 2003 and the same was much lower than the rate agreed upon vide PPA dated 22.12.2001. The Petitioner also contended that the Commission’s Order

was set aside by the Hon'ble ATE. In this regard, it can be noted that the Hon'ble ATE vide Order dated 30.10.2007 had dealt with and settled the issue of validity/applicability of the PPA dated 22.12.2001. Relevant extract of the aforesaid Order is reproduced as following:

“....

Decision with reasons:

23) The validity of the PPA is the basic question in this appeal. If the PPA is valid, the price of power determined by the PPA cannot be undone by a tariff order of the Commission.

... 35) In view of the above opinion expressed by us, the tariff vis-à-vis UPCL, respondent No.2, will have to be based on the PPA dated 22.12.2001. We do not find it necessary to go into the other objections, listed in para 10(a) to (g) above, to the impugned tariff order. We, therefore, allow the appeal and direct the Commission to adopt the tariff as per P.P.A. of 22.12.2001 between the appellant and the UPCL w.e.f. from the commercial operation date of the appellant's station and the appellant will be entitled to receive the arrears, if any, with interest @ 6% from the respondent No.2, UPCL.

...”

Emphasis added

Consequently the tariff as per the PPA existing between Petitioner and Respondent No. 2 stands adopted by the Commission and such adoption can only be under Section 63 of Electricity Act, 2003 as no other Section of the Act authorises the Commission to adopt the tariff. Moreover, the tariff adopted was higher than tariff determined by the Commission u/s 62 of the Electricity Act, 2003. Accordingly, contention of the Petitioner that his tariff has not been determined u/s 62 or 63 is not valid and hence, rejected.”

9.2 We have deeply and cautiously scanned the relevant part of the impugned order. Para 2.1 of the impugned order provides Regulation 8 dealing with eligibility for accreditation of State RPO Regulations, 2010. Thereafter, the first amendment Regulations, 2013 w.e.f. 28.12.2013 slightly replacing Regulation 8 of the State RPO Regulations, 2010, has been cited. Then in the same para 2.1, which is at page 11 of the impugned order, clearly says that Regulation 8.1(b) of the State RPO, 2010 stipulates that the project should not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Commission. The State Commission observed in the impugned order that the Appellant/petitioner had entered into a PPA, dated 22.12.2001, for sale of

power from its small hydro electric project to the Respondent No. 2 @ Rs. 2.50 per unit as per the Policy of Government of Uttarakhand. This rate was fixed and the PPA stipulated that this rate shall not be changed due to any reason whatsoever. This stipulation is contained in Clause 6.2 of the PPA, dated 22.12.2001.

9.3 Para 2.2 of the impugned order narrates what has been observed by the State Commission. The State Commission has observed therein that in exercise of its power under the Electricity Act, 2003, the State Commission had determined the tariff for the Appellant's small hydro electric project and the rate worked out, vide tariff order, dated 9.4.2007, which was challenged by the Appellant before this Appellate Tribunal in Appeal No. 61 of 2007 and this Appellate Tribunal, vide its judgment, dated 30.10.2007, had set-aside the tariff order, dated 9.4.2007, of the State Commission and, further, directed the State Commission to adopt the tariff as per the PPA. Citing these relevant facts, the State Commission tried to keep mum or not to disclose the date of its order and the appeal number filed by the Appellant before this Appellate Tribunal just to conceal and ignore the relevant facts. We may disclose the State Commission, vide tariff order, dated 9.4.2007, had determined the tariff of the Appellant holding that the PPA, dated 22.12.2001, was not legally valid and there was no requirement for the State Commission to abide by the provisions of the PPA for the purposes of determining the tariff for the Appellant. This Appellate Tribunal, vide its judgment, dated 30.10.2007, in Appeal No. 61 of 2007 filed by the Appellant had set-aside the order, dated 9.4.2007 of the State Commission clearly holding that the State Commission had no jurisdiction to reopen the PPAs which were already entered into prior to the constitution of the State Commission. This Appellate Tribunal, vide its judgment, dated 30.10.2007, in Appeal No. 61 of 2007, further directed the State Commission to adopt the PPA tariff for the Appellant and it was in compliance of the said direction of the Appellate Tribunal, the State Commission has adopted the PPA tariff of the Appellant @ Rs. 2.50 per unit whereas, the other generating companies of the same category at that time were getting tariff @ Rs. 2.85 per unit. The impugned

order shows that the State Commission has determined the tariff of Rs. 2.50 per unit of the Appellant as the adopted tariff since the word had inadvertently been used by this Appellate Tribunal in its judgment, dated 30.7.2007. According to para 2.2 of the impugned order, the Appellant/petitioner continued to make supplies at the agreed and adopted rate till 2011-12 and, only in 2012-13, when the average power purchase cost (APPC) exceeded marginally than the agreed tariff, the Appellant has come up for accreditation. The observation of the State Commission on this point is that mere exceeding of APPC over agreed rate cannot be a basis of claiming accreditation and the said contention should have been raised by the Appellant/petitioner at the time of notification of State RPO Regulation, 2010 or at the time of notification of RPO obligation.

9.4 Para 2.3 of the impugned order says that the Appellant/petitioner submitted that its tariff has not been determined under Section 62 & 63 of the Electricity Act, 2003 and, therefore, it should be entitled to accreditation and, consequently, REC. Dealing with the said contention, the State Commission has recorded in para 2.3 of the impugned order that the State Commission had determined the tariff of the small hydro electric project of the Appellant under Section 62 of the Electricity Act, 2003 which was much lower than the rate agreed upon, vide PPA, dated 22.12.2001. Since the tariff order, dated 9.4.2007, of the State Commission was set-aside by this Appellate Tribunal in Appeal No. 61 of 2007, and this Appellate Tribunal, vide its judgment dated 30.10.2007, after setting-aside the order, dated 9.4.2007, directed the State Commission to adopt the tariff as per PPA, dated 22.12.2001 with UPCL w.e.f. the commercial operation date of the Appellant's station. The State Commission concludes by saying that consequently, the tariff as per the PPA existing between the Appellant/petitioner and Respondent No. 2/distribution licensee stands adopted by the Commission and such adoption can only be under Section 63 of Electricity Act, 2003 as no other Section of the Act authorises the State Commission to adopt the tariff and the tariff adopted i.e. @ Rs. 2.50

per unit was higher than tariff determined by the State Commission under Section 62 of the Electricity Act, 2003. Thus, PPA tariff of the Appellant in compliance of the order of this Appellate Tribunal, has been treated by the State Commission as 'tariff adopted' under Section 63 and accordingly rejected the application seeking the accreditation of the Appellant.

9.5 The aforementioned reasoning and findings recorded by the State Commission in the impugned order are absolutely against the provisions of law and against the true import of the judgment, dated 30.10.2007 of this Appellate Tribunal in Appeal No. 61 of 2007 and the impugned order is vitiated as suffering from perversity and the same cannot be allowed to stand any more. We hereby quashed and set-aside the various findings/reasoning recorded by the State Commission in the impugned order for the following reasons:

- (a) that, since the Appellant/petitioner entered into power purchase agreement with the Respondent No.2/UPCL for supply of electricity from its generating station and at the relevant time, the State Commission had not been constituted for the State of Uttarakhand and as per PPA, the tariff for supply was Rs. 2.50 per unit as provided in clause 6.2 of the PPA, dated 21.12.2001. Clause 6.2 of the PPA clearly provides for a fixed rate of Rs. 2.50 per unit and the rate is firm and fixed which shall not be challenged due to any reasons whatsoever. The project of the Appellant was synchronized with the grid on 24.5.2002 and fixed the tariff at Rs. 2.50 per unit.
- (b) that the tariff of the Appellant was determined by the State Commission, vide order, dated 17.11.2005, and the Appellant aggrieved by the order, dated 17.11.2005, filed an appeal being Appeal No. 204 of 2005 before this Appellate Tribunal and this Appellate Tribunal, vide its judgment, dated 29.3.2006, while setting-aside the State Commission's order, dated 17.11.2005,

remitted the matter back to the State Commission to determine the tariff of the Appellant afresh. The State Commission again determined the tariff, vide order, dated 9.4.2007, which we have discussed above in detail. The Appellant/petitioner filed an appeal against the State Commission's order, dated 9.4.2007 and this Appellate Tribunal, vide its judgment, dated 30.10.2007, as stated above, by allowing the Appeal and setting-aside the State Commission's order, dated 9.4.2007, directed the State Commission to adopt the tariff as per the PPA, dated 22.12.2001, entered into between the Appellant and the Respondent No.2 w.e.f. the commercial operation date of the Appellant's generating station and, further, holding that the Appellant will be entitled to receive the arrears, if any, with interest @ 6% from the Respondent No.2/UPCL. Thus, this Appellate Tribunal had set-aside/quashed the order of the State Commission, dated 9.4.2007 and directed the State Commission to adopt the tariff as per PPA, dated 22.12.2001, of the Appellant and the State Commission in compliance of the direction of this Appellate Tribunal, has adopted/fixed the tariff @ Rs. 2.50 per unit of the Appellant.

- (c) When the tariff of the Appellant was adopted by the State Commission @ Rs. 2.50 per unit as directed by this Appellate Tribunal, we have no hesitation in clearly stating that the preferential tariff for the other generating companies of the identical nature at that time was Rs. 2.85 per unit for the non-renewable energy sources projects.
- (d) The State Commission, even after the fact that it was ordered by this Appellate Tribunal that the State Commission has no jurisdiction to reopen the PPAs, which were already executed between the parties prior to the constitution of the Commission, further, undertook exercise of fixing the tariff for the Appellant and inspite of the fact that the order, dated 9.4.2007, of the State Commission having been already setting aside by this Appellate

Tribunal, the State Commission, further impacted its order, dated 9.4.2007.

9.6 It is true that this Appellate Tribunal, in its judgment, dated 30.10.2007, in Appeal No. 61 of 2007, which was filed against the tariff order, dated 9.4.2007, of the Appellant passed by the State Commission in para 35 thereof has observed as under:-

“35) In view of the above opinion expressed by us, the tariff vis-à-vis UPCL, respondent No.2, will have to be based on the PPA dated 22.12.2001. We do not find it necessary to go into the other objections, listed in para 10(a) to (g) above, to the impugned tariff order. We, therefore, allow the appeal and direct the Commission to adopt the tariff as per P.P.A. of 22.12.2001 between the Appellant and the UPCL w.e.f. from the commercial operation date of the Appellant’s station and the Appellant will be entitled to receive the arrears, if any, with interest @ 6% from the respondent No.2, UPCL.”

9.7 This Appellate Tribunal, while allowing the appeal and setting aside the order of the State Commission, dated 9.4.2007, directed the State Commission to adopt the tariff as per PPA, dated 21.12.2001, between the Appellant and UPCL w.e.f. CoD of the Appellant’s station. Even the word ‘adopt’ was mentioned in the judgment, dated 30.10.2007, of this Appellate Tribunal, which clearly means that the State Commission should just fix the tariff of the Appellant as per the tariff fixed in the PPA. Its purpose and intention could not be invented to mean or to interpret ‘to adopt’. Its purpose was only to direct the State Commission to fix the tariff as per provided under PPA, dated 21.12.2001. The State Commission has rightly fixed the tariff of the Appellant @ Rs. 2.50 per unit as provided in clause 6.2 of the PPA, dated 21.12.2001. The learned State Commission has wrongly proceeded on the wrong premise that this Appellate Tribunal has used the word to adopt the tariff and interpreting the meaning of the word ‘adoption’ the State Commission while passing the impugned order has treated the PPA tariff as adopted and by applying the provisions of section 63 of the Electricity Act, 2003, the State Commission has passed the impugned order which has lead to this total illegality and has completely vitiated the impugned order.

9.8 It is also true that the tariff is to be determined by the State Commission either under Section 62 or 63 of the Electricity Act, 2003. A procedure for determination of tariff under Section 62 & 63 of the Electricity Act, 2003 has been provided. For determination of tariff by bidding process under Section 63 of the Electricity Act, 2003, the following language has been used in the Electricity Act, 2003:

“63. Determination of tariff by bidding process. – Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

Thus, for adoption of tariff provided under section 63 of the Electricity Act, 2003, there should be transparent process of bidding in accordance with the guidelines issued by the Central Government and without fulfilling the conditions provided under section 63 of the Electricity Act, 2003, no tariff can be determined by bidding process. Hence, the tariff fixed after going through the transparent process of the bidding and that too in accordance with the guidelines issued by the Government of India, the said tariff can be adopted by the State Commission under section 63 of the Electricity Act, 2003. Hence, there could be no question of section 63 being invoked in the present case where the tariff of Rs. 2.50 was entered into the PPA prior to the constitution of the State Commission and, even prior to coming into force of the Electricity Act, 2003. Thus, the State Commission, while passing the impugned order, has committed illegality in treating the PPA tariff ordered to be fixed by this Appellate Tribunal as per the PPA entered as adopted tariff under section 63 of the Electricity Act, 2003.

9.9 In terms of Regulation 8 of the State RPO Regulations, 2010, the following two conditions are required to be fulfilled by the Appellant:

- (a) that the Appellant should not be supplying electricity to a distribution licensee (Respondent No.2 herein) at a preferential tariff determined by the State Commission.

- (b) that the supply of electricity to the distribution licensee must be at a price not exceeding the Average Pooled Power-purchase Cost (APPC) of the distribution licensee.

9.10 According to the learned counsel for the Respondents, the condition that the Appellant should not be supplying electricity to a distribution licensee/Respondent No.2 herein at a preferential tariff determined by the State Commission is not fulfilled. The submission in support of non-fulfillment of this condition as made by the Respondent's counsel is that since this Appellate Tribunal in its judgment, dated 30.10.2007, in Appeal No. 61 of 2007, directed the State Commission to adopt the PPA tariff for the Appellant's small hydro electric project and the State Commission in compliance thereof has treated the PPA tariff i.e. Rs. 2.50 per unit as adopted tariff under section 63 of the Electricity Act, 2003. Since, a procedure for determining tariff by bidding process has been clearly provided under section 63 of the Electricity Act, 2003 which says that the State Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government (Government of India). Thus, the State Commission is bound to adopt the tariff only if the tariff is discovered in pursuance to a competitive bidding process in terms of the competitive guidelines framed by the Government of India under section 63 of the Electricity Act, 2003. Since the procedure prescribed under section 63 of the Electricity Act, 2003 has not been gone through in this case, PPA tariff as directed by this Appellate Tribunal to be adopted/fixed cannot be termed the adopted tariff.

9.11 In view of the above discussions, we find and clearly hold that all the conditions in order to become eligible to apply for accreditation as per Regulation 8 of the State RPO Regulations, 2010 are fully satisfied/fulfilled by the Appellant/petitioner and the Appellant/petitioner is fully entitled for accreditation and subsequent registration and issuance of RECs under REC mechanism. **Consequently, the issue is decided in favour of the Appellant and the application seeking accreditation filed by the**

Appellant/petitioner before the State Commission is liable to be allowed.

ORDER

The present Appeal, being Appeal No. 193 of 2014, is hereby allowed and the impugned order, dated 28.5.2014, passed by the Uttarakhand Electricity Regulatory Commission, is hereby set-aside along with the findings recorded therein. Since, we have, in our abovementioned conclusion, held that the Appellant/petitioner is fully eligible for accreditation as per Regulation 8 of the State RPO Regulations, 2010 since all the conditions provided in the said Regulations are fully satisfied/fulfilled by the Appellant/petitioner, the Appellant/petitioner is fully entitled for accreditation and consequent registration and issuance of the Renewable Energy Certificates under REC mechanism, the Respondent No.1/State Commission is directed to grant accreditation to the Appellant/petitioner for Renewable Energy Certificates within two months from today and all the respondents are, further, directed to ensure the compliance of the directions given in this judgment without fail. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 20TH DAY OF NOVEMBER, 2015.

**(I.J. Kapoor)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ **REPORTABLE/NON-REPORTABLE**

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