

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

**(APPELLATE JURISDICTION)**

**APPEAL NO. 178 OF 2014**

**Dated: 3<sup>rd</sup> May, 2016**

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER  
HON'BLE MR. T. MUNIKRISHNAIAH, TECHNICAL MEMBER**

**IN THE MATTER OF**

**M/s Him Urja Private Limited**

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

**..... Appellant**

**VERSUS**

**1. Uttarakhand Electricity Regulatory Commission**

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

**2. Uttarakhand Power Corporation Limited**

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

**..... Respondents**

Counsel for the Appellant ... Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri

Counsel for the Respondent(s)... Mr. Buddy A. Ranganadhan  
Mr. Raunak Jain for R-1/UERC  
  
Mr. Sanjay Sen, Sr. Adv.  
Mr. Tushar Nagar  
Ms. Shikha Ohri for R-2/UPCL

**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**'),

a generating company, against the Order, dated 10.4.2014 (in short, the '**Impugned Order**') passed by the Uttarakhand Electricity Regulatory Commission (in short, the '**State Commission**') in Petition No. 19 of 2012 whereby, the State Commission has determined the tariff for the Appellant's 15 MW small hydro-electric project. The State Commission has artificially applied the tariff from a date later than what it ought to have been. The State Commission has also disallowed part of capital cost incurred by the Appellant and reduced the amount of capital subsidy which was not received by the Appellant at all. The State Commission has also not allowed the interest/carrying cost on the arrears due to the Appellant. The Appellant had filed Petition No. 19 of 2013 for determination of project specific tariff in accordance with UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010 (in short, '**RE Regulations, 2010**') in respect of its Project.

2. The Appellant has challenged the Tariff Order, dated 10.4.2014, passed by the State Commission wherein, the State Commission has fixed the levelised tariff for 15 MW Small Hydro Project of the Appellant at Vanala, District Chamoli in the State of Uttarakhand. The said generating station achieved Commercial Operation on 5.12.2009. According to the Appellant, the State Commission, vide impugned order, has determined the project specific tariff of the Appellant from 15.5.2011 whereas, the RE Regulations, 2010 came into force w.e.f. 1.7.2010, though notified on 6.7.2010..

3. By filing the impugned petition, the Appellant asked for the plant specific tariff as per RE Regulations, 2010.

4. The Appellant has challenged the impugned order on the following three aspects:

- i) Date of Applicability of Tariff;

- ii) Disallowance of interest on the tariff payable;
- iii) Deduction of capital subsidy from the capital cost, which is actually not received by the Appellant.

5. The relevant facts for the purpose of deciding this Appeal, are as under:

- (a) that the Appellant is the 15 MW small-hydro generating project. Respondent No.1 is the statutory regulator constituted under Section 82 of the Electricity Act, 2003 for the State of Uttarakhand and is empowered to discharge various functions under the various provisions of the Electricity Act, 2003. Respondent No.2 is the power distribution company in the State of Uttarakhand;
- (b) that the Appellant is engaged in the business of generation and supply of electricity. Since its incorporation, the Appellant has been developing and operating run of the river small hydro generation projects in the State of Uttarakhand;
- (c) that the Appellant had set up a 15 MW (2 x 7500 kw) Small Hydro Power Project at Vanala, District Chamoli in the State of Uttarakhand. The Appellant has achieved Commercial Operation Date (COD) of the Project on 5.12.2009;
- (d) that the State Commission notified the UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 (in short, '**RE Regulations, 2008**');
- (e) that the Appellant, prior to the Commercial Operation of the generating station, applied for open access to supply power to third parties. The said request was rejected by the State Commission on the advice of the Government of Uttarakhand. Aggrieved by the rejection order, dated 16.11.2009, the

Appellant filed Writ Petition No. 529/2009 before the Hon'ble Supreme Court. The Appellant, on 2.12.2009, entered into a short term PPA with the Respondent No. 2 for the period from 2.12.2009 to 31.3.2010 for generation and supply of electricity. The Commercial Operation Date of the said generation station was 5.12.2009;

- (f) that on 26.3.2010, Tariff Petition was filed by the Appellant for determination of tariff for its project for supply of electricity by the Appellant to the Respondent No. 2, which petition was kept in abeyance by the State Commission due to pendency of the Writ Petition before the Hon'ble Supreme Court. The Hon'ble Supreme Court admitted the Writ Petition on 7.5.2010;
- (g) that, on 15.5.2010, another short-term PPA entered into between the Appellant and the Respondent No. 2/Distribution Licensee;
- (h) that, on 6.7.2010, the State Commission notified the UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2010 (in short, '**RE Regulations, 2010**'), which was made effective from 1.7.2010;
- (i) that the Distribution Licensee, Respondent No.2 herein, terminated the PPA, dated 15.5.2010, and, further, open access for sale to third parties was also denied, leaving absolutely no choice for the Appellant to sell electricity;
- (j) that, on 28.7.2010, in the said circumstances, the Appellant approached the Hon'ble Supreme Court which by order, dated 28.7.2010, directed the Respondent No. 2/Distribution Licensee to purchase electricity and the Appellant to supply the electricity to the Respondent No. 2. The relevant para of the

direction of the Hon'ble Supreme Court, vide its order, dated 28.7.2010, is quoted as under:

*“Having heard learned counsel for the respective parties, we allow such prayer and direct the petitioner No. 1 company to generate power and provide the same to the Respondent No. 3 and the State Transmission Utility, Uttarakhand, till the decision in the special leave petition. Since the issue of generation of electricity and supply of power is involved, it is in the interest of the parties to have the matter heard at an early date. Accordingly, this matter be listed for final disposal on 14<sup>th</sup> September, 2010 subject to part-heard matters. The parties are directed to complete the pleadings in the meantime”*

- (k) that, on 6.5.2011, another interim order was passed by the Hon'ble Supreme Court in the said matter directing the purchase of electricity at the tariff as per the RE Regulations, 2010 with effect from July, 2010. The relevant para of the direction of the Hon'ble Supreme Court, vide its order, dated 6.5.2011, is quoted as under:

*“Having heard learned counsel for the respective parties and as an interim arrangement, we direct the respondent No. 3 to pay the tariff for the power generated by the petitioner at the rates indicated in the UERC Regulations, 2010, which came into effect on 6<sup>th</sup> July, 2010. Such payment is to be made with effect from the month of July, 2010, and will be subject to the final result in the writ petition”*

- (l) that the Appellant approached the State Commission by filing a petition, being Petition No. 19 of 2012, before the State Commission for determination of tariff of its said small-hydro project on 9.3.2010 in accordance with Regulation 33 read with Regulation 49 of UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 (in short, '**RE Regulations, 2008**') and the draft NCE Regulations, 2009 which were finally notified on 6.7.2010. The tariffs and related norms under these

Regulations were effective from 1.7.2010 for projects commissioned on or after 1.4.2009;

- (m) that deficiencies/shortcomings in the application filed by the Appellant/Petitioner was intimated vide State Commission's letter, dated 8.6.2010. The replies were submitted by the Appellant/Petitioner vide its letter, dated 3.7.2010. However, it was observed that there was no long term PPA of the Appellant's plant with Respondent No.2/UPCL as required under the prevailing Regulations;
- (n) that in the inter-regnum, the Appellant/Petitioner had filed a Writ Petition No. 529/2009, before the Hon'ble Supreme Court on 16.11.2009 on the issue of taking power generated by it outside the State under Open Access which was admitted by Hon'ble Supreme Court on 7.5.2010. The Hon'ble Supreme Court vide its Order, dated 28.7.2010, directed the Appellant/Petitioner to generate power and provide the same to the Respondent No.2/UPCL till the outcome of decision in writ petition. Subsequently, UPCL continued the purchase of power from the Appellant's SHP @ Rs 2.75/kWh in accordance RE Regulations, 2008. Further, the Hon'ble Supreme Court, vide its Order, dated 6.5.2011, directed the purchase of power in accordance with rates specified by the State Commission in RE Regulations, 2010. The Appellant/Petitioner withdrew the writ Petition from Hon'ble Supreme Court on 25.7.2012;
- (o) that during the pendency of the proceedings before the Hon'ble Supreme Court and, in absence of any long term PPA with UPCL/Distribution Licensee, the petition filed by the Appellant was kept in abeyance. The Appellant, vide its letter, dated 16.8.2012, submitted that since the interlocutory Orders passed by the Hon'ble Supreme Court had been vacated,

therefore, the tariff for the said SHP of the Appellant has to be decided by the State Commission. The State Commission, vide its letter, dated 12.9.2012, informed the Appellant that the Appellant was required to file a fresh petition seeking determination of tariff in accordance with prevailing RE Regulations, 2010 based on the audited Capital Cost of the project. Thereafter, a supplementary petition was filed by the Appellant on 22.11.2012 in continuation to the original Petition filed on 26.3.2010 with the request to allow an interim tariff of Rs. 3.50 per unit from Sept., 2012 till determination of final tariff of the SHP;

- (p) that the State Commission, vide its letter, dated 4.12.2012, directed the Distribution Licensee/UPCL to enter into a long term PPA with the Appellant/Developer and intimate the same to the State Commission. The Distribution Licensee/UPCL was also directed that the Appellant be paid at the provisional tariff of Rs 3.50/kWh only after the long term PPA has been signed till the final determination of tariff for Vanala SHP by the State Commission. In compliance to the State Commission's directive, the PPA was executed by UPCL with the Appellant on 21.12.2012;
- (q) that the Respondent No.2 moved the review petition before the State Commission seeking review of the Order, dated 21.12.2012, which was dismissed on 8.1.2013;
- (r) that the supplementary petition filed by the Appellant had some deficiencies which was communicated to the Appellant, vide letter, dated 1.2.2013;
- (s) that the said petition, being Petition No. 19 of 2012, has been decided by the impugned order, dated 10.4.2014, which is under challenge before us in the instant appeal;

6. We have heard Mr. M.G. Ramachandran, learned counsel for the Appellant, Mr. Buddy A. Ranganadhan, learned counsel for the Respondent No.1 and Mr. Sanjay Sen, learned senior counsel for the Respondent No. 2. We have deeply gone through the material available on record including the impugned order passed by the State Commission.

7. The following issues arise for our consideration in this Appeal:

- (A) ***Whether the tariff determined by the State Commission should be applied from 1.7.2010 when RE Regulations, 2010 were given effect to or from 15.05.2011?***
- (B) ***Whether the State Commission has rightly disallowed the interest on the difference in tariff of Rs. 3.50 per unit paid on a provisional basis and Rs. 4.00 per unit which has been determined by the State Commission?***
- (C) ***Whether the deduction of capital subsidy from the capital cost, which is actually not received by the Appellant, is correct and legally justified?***

**ISSUE-WISE CONSIDERATIONS ARE AS FOLLOWS:**

8. **Issue (A) : Date of Applicability of Tariff:**

8.1 On this issue, the following contentions have been made by the Appellant:

- (a) that the State Commission has wrongfully applied the tariff determined from 15.5.2011, based on the date of expiry of the short term PPA entered into between the Appellant and Respondent No. 2/Licensee;
- (b) that, firstly, the short-term PPAs were executed by the Appellant, in the circumstances when the Respondent No 2 refused to allow any open access to the Appellant. Such refusal, to allow open access, was in blatant violation of the provisions



of the Electricity Act, 2003 providing for non-discriminatory open access;

- (c) that the Appellant had entered into two short-term PPAs, dated 2.12.2009 up to 31.3.2010 and second on 15.5.2010 up to 15.5.2011;
- (d) that the short term PPA, dated 15.5.2010, was not given effect to by Respondent No 2 because the said short term PPA, dated 15.5.2010, was terminated by the Respondent No.2/Licensee, vide notice, dated 13.7.2010 i.e. within two months;
- (e) that the Appellant had obtained the aforesaid interim orders, dated 28.7.2010 and 6.5.2011 from the Hon'ble Supreme Court to the effect that the supply of power by the Appellant to Respondent No 2 will be as per the Tariff Regulations. By order, dated 6.5.2011, the Hon'ble Supreme Court, specifically, clarified that the tariff payable shall be in accordance with the RE Regulations, 2010 with effect from July, 2010;
- (f) that on 13.8.2010, the Respondent No. 2 had issued an office memorandum in which it was specified that power is being procured from the Appellant in accordance with the Hon'ble Supreme Court's interim order, dated 28.7.2010. In the circumstances, the supply of power cannot be termed to be under the Short Term PPA as held by the State Commission but was under the Orders of the Hon'ble Supreme Court. Therefore, the tariff needs to be given effect to from the effective date of the RE Regulations, 2010 i.e. 1.7.2010;
- (g) that in any event, from 13.7.2010 when the PPA was terminated and 28.7.2010 when the Hon'ble Supreme Court passed the interim order, there was no question of supply at the tariff

under any short term PPA. It was specifically under the RE Regulations, 2010;

- (h) that even as per the Short Term PPAs, dated 2.12.2009 & 15.5.2010, the tariff was to be as per the RE Regulations, 2008 as amended from time to time. Clause 2.1 of the Short Term PPA, dated 15.5.2010 reads as under:

*“2. POWER PURCHASE SALE AND BANKING*

*2.1 UPCL shall accept and purchase 15.00 MW (Plus 10% overloading) of power made available to UPCL system from the Generating Company based on Small hydro with capacity up to 25MW at the levelised rate specified for such plant in Schedule I of the Uttrakhand Electricity Regulatory Commission (Tariff and Other Terms from Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 as amended from time to time”.*

- (i) that RE Regulations, 2008 were amended with effect from 1.7.2010 when the RE Regulations, 2010 became effective which included Regulation 11(2) and, therefore, the tariff should be applied atleast from 1.7.2010;
- (j) that in terms of the RE Regulations, the tariff is from the commercial operation date. In the present case, since, the commercial operation date of the Appellant’s SHP is 5.12.2009, which is prior to the RE Regulations, 2010, the tariff should be applicable at least from the date when the Regulations came into force. Hence, the State Commission has erred in not applying the tariff from 1.7.2010 when the RE Regulations, 2010 came into force.

8.2 **Per contra**, the following contentions have been made on behalf of the Respondent No. 1/State Commission on this issue:

- (a) that the Appellant's submission that the State Commission erred in giving effect to the tariff determined only from 15.5.2011 instead of 1.7.2010 is misconceived. In order to determine the date of applicability of the project specific tariff for the Vanala SHP, the State Commission had analyzed the occurrences from the date of commissioning of the project, i.e. 5.12.2009 till filing of application for determination of tariff i.e. 26.3.2010;
- (b) that para 3.13 of the impugn order, dated 10.4.2014, states submissions and reasons and grounds for applicability of the tariff from 15.5.2011 instead of 1.7.2010;
- (c) that it is established from the impugned order that till 15.5.2011, the Appellant was bound by the then existing PPA with UPCL and that during the currency of that PPA, the Appellant was entitled for generic tariff specified in the RE Regulations 2010. The Appellant had not committed long term supply of power to the Licensee/UPCL. Notwithstanding this, UPCL had entered into a power purchase agreement with Appellant for purchase of power at generic tariff w.e.f 15.5.2010 for a period of one year i.e. 14.5.2011. Since, no further agreement for purchase of power existed beyond 15.5.2011 and the interim orders of the Hon'ble Supreme Court directing UPCL to purchase power from the Appellant's generating station had been vacated consequent to withdrawal of the writ petition filed by the Appellant before the Hon'ble Supreme Court, the State Commission has allowed project specific tariff from 15.5.2011 else which would have applied only after signing of long term PPA, that is, from 21.12.2012;
- (d) that the contention of the Appellant that the project specific tariff should have been applied effective from 1.7.2010 when the

RE Regulations, 2010 were given effect is incorrect and meritless;

- (e) that the contention of the Appellant that the tariff Petition was filed as per Regulation 11(2) of the RE Regulations, 2010 is incorrect as already dealt in Para 3.13 of the impugned order, dated 10.4.2014. The Appellant had approached the State Commission for determination of tariff vide its application, dated 9.3.2010, in accordance with Regulation 33 read with Regulation 49 of RE Regulations, 2008 and the draft NCE Regulations, 2009, which were finally notified on 6.7.2010. Since, the petition was filed by the Appellant under RE Regulations, 2008, which had no provision for determination of project specific tariff, Appellant's petition was not maintainable. Subsequently, after notification of the RE Regulations, 2010, the State Commission, vide its letter, dated 26.7.2010, asked the Appellant to submit its option in terms of the provisions of the Regulations so as to enable the State Commission to take appropriate view on the application filed for determination of project specific tariff. In reply, the Appellant, vide its letter, dated 2.12.2010, again requested the State Commission to decide the tariff on normative basis on yearly basis for two years or for such period as the State Commission considers appropriate and also to make the tariff applicable from the date of application of the tariff determination. This request was not tenable as project specific tariff determination is for the project life and not for a short period. Thus, after withdrawal of the writ petition from the Hon'ble Supreme Court on 25.7.2012, the Appellant filed a petition under RE Regulations 2010 almost 2 years after its date of commercial operation;

- (f) that, further, Regulation 13 of the RE Regulations, 2010 relied upon by the Appellant has to be read along with Regulation 10(2), which specifies as under:

*“The RE Based Generating Stations and Co-generating Stations, except those mentioned under Proviso 2 to sub-Regulation (1) of Regulation 2, may opt for the generic tariff, as determined based on norms specified in these Regulations for different technologies, or may file a petition before the Commission for determination of “Project Specific Tariff”. For this purpose RE Based Generating Stations and Co-generating Stations shall give its option to the distribution licensee at least 3 months in advance of date of commissioning of the project or commissioning of the 1st unit, in case of multiple units or one month after the date of issuance of these Regulations, whichever is later. This option once exercised shall not be allowed to be changed during the validity period of the PPA.”*

- (g) that the Appellant, even after notification of RE Regulations, 2010, chose not to give any option to the distribution licensee as required under Regulation 10(2) of the RE Regulations, 2010 even after a categorical letter issued by the State Commission in this regard;
- (h) that the Appellant is also seeking to rely upon the interim order, dated 6.5.2011, of the Hon’ble Supreme Court to contend that even as per this order the tariff payable under the RE Regulations, 2010 was to be payable. It is noteworthy that subsequent to the interim order, dated 6.5.2011, of the Hon’ble Supreme Court, the Appellant withdrew its Writ Petition which was dismissed as withdrawn on 25.7.2012. On withdrawal of the Writ Petition, the interim orders therein merged with the final withdrawal and the Appellant could not, after such withdrawal rely on the interim order as held by this Appellate Tribunal, in its judgment, dated 16.2.2015, in Appeal No. 324

of 2013 titled Sree Renuka Sugars vs Hubli Electricity Supply Co Ltd. & another;

- (i) that the Appellant's contention that as per the short term PPAs, the tariff was to be as per the RE Regulations, 2008 as amended from time to time and the RE Regulations, 2008 were amended on 1.7.2010, and, accordingly, tariff should be applied atleast from 1.7.2010, is misconceived and not acceptable because there was no provision of determination of project specific tariff in the RE Regulations, 2008 and, moreover, the Appellant had, further, entered into one year PPA with UPCL w.e.f 15.5.2010 for sale of power at generic tariff in accordance with the then prevailing regulations i.e. RE Regulations 2008. It is, further, noteworthy that the provisions of project specific tariff were specified in RE Regulations, 2010 subject to the condition that the tariffs under these Regulations were applicable for RE projects having a PPA with the distribution licensee for entire life of the project, which position is clear from the reading of Regulation 12 of RE Regulations 2010, which is quoted hereunder:

*"12. Tariff and PPA Period*

- (1) The Tariff Period for Renewable Energy power projects shall be equal to Useful life of the Project.*
- (2) Tariff period under these Regulations shall be considered from the date of commercial operation or commissioning of the renewable energy plant.*
- (3) The PPA shall be required to be executed with distribution licensee for the entire Tariff Period."*

Thus, it is incorrect on the part of the Appellant to contend that the tariff should be applied atleast from 1.7.2010, whereas, it actually entered into a long term PPA with UPCL only in December, 2012;

8.3 Mr. Sanjay Sen, learned Senior Advocate, appearing for the Respondent No.2/Distribution Licensee in the State of Uttarakhand with regard to Issue No. (A), has contended as under:

- (a) that this Appellate Tribunal has to consider three tariff periods for deciding this issue, being Issue (A). The first tariff period is from 15.5.2010 to 30.6.2010, which period is covered by a short term PPA, dated 15.5.2010. The second short term PPA is for the period from 15.5.2010 to 14.5.2011. Under this tariff period, the Appellant received Rs. 2.75 per KWH for supply of electricity to the Respondent No.2. This tariff of Rs. 2.75 per KWH was in accordance with the RE Regulations, 2008. While the PPA was ending on 14.5.2011, the tariff of Rs. 2.75 per KWH was applicable till 30.6.2010;
- (b) that a new tariff regulations i.e. RE Regulations, 2010, which were notified on 6.7.2010, were made effective from 1.7.2010. This RE Regulations, 2010, for the first time, gave an option to developers to either opt for a generic tariff or opt for a project specific tariff. The generic tariff under the RE Regulation 2010 is Rs. 3.50 per unit;
- (c) that it is to be noted that before the applicability of RE Regulation 2010 had been notified, the Appellant, on 9.3.2010, had filed a tariff petition for determination of tariff under project specific tariff route under Regulation 33 read with Regulation 49 of the RE Regulations, 2008 and the draft NCE Regulations, 2009. Under both these Regulations i.e. RE Regulations, 2008 and RE Regulations, 2010 for getting generic tariff or project specific tariff, there is a need of execution for long term PPA with the distribution licensee. However, during this period, the Appellant was not keen on signing a long term PPA and retained its option to sell power outside the state. It was in this context



that it had filed a petition before the Hon'ble Supreme Court under Article 32 of the Constitution of India when the aforesaid interim orders were passed by the Hon'ble Supreme Court;

- (d) that on the date when the Hon'ble Supreme Court had passed the interim order, dated 6.5.2011, the Appellant had neither executed a long term PPA nor sought determination of project specific tariff in relation to RE Regulations, 2010. The said petition was filed for project specific tariff under the RE Regulations, 2008 (before RE Regulations, 2010 was notified). Since, there was no project specific tariff applicable to the Appellant, the State Commission, in compliance with the Hon'ble Supreme Court's order directed that for the period 1.7.2010 (i.e. when RE Regulation, 2010 become effective), the Appellant will be entitled to the generic tariff of Rs. 3.50 per KWH as provided in RE Regulations, 2010. In the said interim order, the Hon'ble Supreme Court does not say that the Appellant will be entitled to a project specific tariff under the RE Regulations, 2010 when there was no determination of the tariff on the date of passing of the interim order;
- (e) that, thereafter, the Appellant filed a supplementary petition on 22.11.2012 for determination of project specific tariff and, only thereafter, executed the PPA on 21.12.2012. The State Commission proceeded on the basis of the supplementary petition and on the fact that there was a long term PPA to determine a project specific tariff of Rs. 4.00 per KWH for the period of 35 years. It is necessary to appreciate that such tariff should be applicable from the date of executing the PPA and not for the prior period. However, the State Commission balanced the equities in favour of the Appellant by directing that the project specific tariff should apply as soon as the period covered under the short term PPA comes to an end on 14.5.2011;



- (f) that during the continuation of the short term PPA, the Appellant cannot get benefit of a project specific long term tariff for which there was no PPA at all. In fact, for the period up to 14.5.2011, the Appellant has accepted Rs. 3.50 per KWH without any protest. The Appellant, in its written submissions, for the first time, has produced a letter, dated 13.7.2010, to argue that the short term PPA had come to an end and that the tariff had to be determined retrospectively. As per this letter, dated 13.7.2010, by which, the short term PPA was terminated, would indicate that the short term PPA was valid till 14.5.2011 and the RE Regulations, 2008, under which the PPA was executed, stood repealed on 6.11.2010 and a new regulations being RE Regulations, 2010 came into effect from 1.7.2010. The letter, dated 13.7.2010, issued by the Respondent No.2/ Distribution Licensee to the Appellant terminating the short term PPA, dated 15.5.2010, depicts that the Appellant was requested to enter into a long term PPA with UPCL for supply of power from the said SHP positively by 18.8.2010, failing which, it shall be deemed that there is no power purchase agreement between the Appellant and UPCL and UPCL will not be bound to buy power from the said plant on or after 19.8.2010. It was after the issuance of this letter, dated 13.7.2010, by the Distribution Licensee to the Appellant, the said IA was filed before the Hon'ble Supreme Court, which was disposed of by the aforesaid order, dated 28.7.2010;
- (g) that when the compliance of the interim order of the Hon'ble Supreme Court in the said writ petition was being made, the Appellant, on 25.7.2012, withdrew the said writ petition when the Hon'ble Supreme Court, while allowing the withdrawal of the writ petition, observes as under:

*“Learned counsel mentions this matter upon notice to the respondents for leave to withdraw the writ petition.*

*Learned counsel submits that the writ petition has been rendered infructuous by virtue of orders passed by other fora.*

*The writ petition is, accordingly, dismissed as withdrawn.*

*All interim orders are vacated.”*

#### 8.4 **Our consideration on Issue (A):**

- (a) After going through and deeply considering the rival submissions of the parties, we directly proceed towards the decision on Issue No. (A) as we feel no need to reiterate the same submissions here again.
- (b) Now, we are to decide as to whether the approach adopted by the State Commission, while deciding the applicability of the tariff determined by the impugned order, is perfectly just, legal and correct one.
- (c) We have narrated above the whole facts and circumstances of the case which led the Appellant to file the aforesaid writ petition, being WP No. 529/2009, before the Hon'ble Supreme Court on 16.11.2009, when the Appellant had applied for open access to supply power to third parties prior to commercial operation date of the generating station and the said request was rejected by the State Commission. As per the submissions of the Appellant, the said request of the Appellant was rejected by the State Commission on the advice of the Government of Uttarakhand. In that situation, the Appellant had to file the writ petition before the Hon'ble Supreme Court in November, 2009. We may note here that the Appellant subsequent to filing the writ petition before the Hon'ble Supreme Court, had entered into a short term PPA on 2.12.2009 with the Respondent No. 2/Distribution Licensee for the period from 2.12.2009 to 31.3.2010 for generation and supply of electricity. The

Commercial Operation Date of the said generation station was 5.12.2009.

- (d) The Hon'ble Supreme Court passed the aforesaid interim orders i.e. 28.7.2010 and 6.5.2011. The Discom fully complied with the said interim orders of the Hon'ble Supreme Court. Ultimately, what happened was that the said writ petition was withdrawn by the Appellant from the Hon'ble Supreme Court on 25.7.2012. The Hon'ble Supreme Court, while ordering the withdrawal of the said writ petition, vide order, dated 25.7.2012, has observed as under:

*“Learned counsel mentions this matter upon notice to the respondents for leave to withdraw the writ petition.*

*Learned counsel submits that the writ petition has been rendered infructuous by virtue of orders passed by other fora.*

*The writ petition is, accordingly, dismissed as withdrawn.*

*All interim orders are vacated.”*

- (e) It appears from the order, dated 25.7.2012, passed by the Hon'ble Supreme Court, that while allowing the withdrawal of the said writ petition when the learned counsel for the Appellant sought leave to withdraw the said writ petition submitting that the said writ petition had been rendered infructuous by virtue of orders passed by other fora, the Hon'ble Supreme Court relying thereupon, dismissed the writ petition as withdrawn and clearly directing that all interim orders are vacated. Thus, the consequence of the withdrawn of the said writ petition from the Hon'ble Supreme Court on 25.7.2012 is that the writ petition had been dismissed as withdrawn and all the interim orders were vacated, the legal position as emerges is that as if there were no interim orders of the Hon'ble Supreme Court and the Appellant has been reinstated to the same

position on the date of filing the writ petition before the Hon'ble Supreme Court.

- (f) We are unable to agree to the contentions of the Appellant's counsel that since RE Regulations were amended by the new RE Regulations, 2010 w.e.f. 1.7.2010, the tariff should be as determined by the impugned order and should be applied from 1.7.2010.
- (g) The State Commission, in order to determine the date of applicability of the project specific tariff for the said small hydro project of the Appellant had analyzed the occurrences from the date of commissioning of the project, i.e. 5.12.2009 till filing of application for determination of tariff i.e. 26.3.2010.
- (h) We find from the impugned order that till 15.5.2011, the Appellant was bound by the then existing PPA with UPCL (Respondent No.2 herein) and during the currency of that PPA, the Appellant was entitled for generic tariff specified in the RE Regulations 2010 because the Appellant had not entered into a long term PPA with the Licensee/UPCL. Notwithstanding this, UPCL had entered into a power purchase agreement with Appellant for purchase of power at generic tariff w.e.f 15.5.2010 for a period of one year i.e. 14.5.2011. Since, no further agreement for purchase of power existed beyond 15.5.2011 and the interim orders of the Hon'ble Supreme Court directing UPCL to purchase power from the Appellant's generating station had been vacated consequent to withdrawal of the writ petition filed by the Appellant before the Hon'ble Supreme Court, the State Commission has allowed project specific tariff from 15.5.2011 else which would have applied only after signing of long term PPA, that is, from 21.12.2012. We are unable to accept this contention of the Appellant that the project specific tariff should

have been applied from 1.7.2010 when the RE Regulations, 2010 were given effect to.

- (i) We, further, find that the tariff Petition was filed as per Regulation 11(2) of the RE Regulations, 2010. The same aspect has been dealt with in Para 3.13 of the impugned order, dated 10.4.2014, passed by the State Commission. The Appellant had approached the State Commission for determination of tariff vide its application, dated 9.3.2010, in accordance with Regulation 33 read with Regulation 49 of RE Regulations, 2008 and the draft NCE Regulations, 2009, which were finally notified on 6.7.2010 w.e.f. 1.7.2010. Since, the petition was filed by the Appellant under RE Regulations, 2008, which had no provision for determination of project specific tariff, Appellant's said petition was not maintainable, particularly, in view of the facts and circumstances that subsequently, after notification of the RE Regulations, 2010, the State Commission, vide its letter, dated 26.7.2010, asked the Appellant to submit its option in terms of the provisions of the Regulations so as to enable the State Commission to take appropriate view on the application filed for determination of project specific tariff. We, further, note that in reply, the Appellant, vide its letter, dated 2.12.2010, again requested the State Commission to decide the tariff on normative basis on yearly basis for two years or for such period as the State Commission considers appropriate and also to make the tariff applicable from the date of application of the tariff determination. This request was not tenable as project specific tariff determination is for the project life and not for a short period. Thus, the request of the Appellant was not tenable as the project specific tariff determination is for the project life and not for a short period. Thus, after withdrawal of the writ petition from the Hon'ble Supreme Court on 25.7.2012, the

Appellant filed a petition under RE Regulations 2010 almost 2 years after date of commercial operation of its plant.

- (j) We have conjointly read Regulation 10(2) and Regulation 13 of the RE Regulations, 2010, which we have already quoted above. The Appellant, even after notification of RE Regulations, 2010, chose not to give any option to the distribution licensee as required under Regulation 10(2) of the RE Regulations, 2010 even after issuance of the categorical letter by the State Commission in this regard.
- (k) The Appellant is also seeking to rely upon the interim order, dated 6.5.2011, of the Hon'ble Supreme Court to contend that even as per this order the tariff payable under the RE Regulations, 2010 was to be payable. We further note that subsequent to the interim order, dated 6.5.2011, passed by the Hon'ble Supreme Court in the aforesaid writ petition, the Appellant withdrew its writ petition on 25.7.2012. The settled law in cases of such withdrawal is that "On withdrawal of the Writ Petition, the interim orders therein always merge with the final withdrawal and the Appellant could not, after such withdrawal rely on the interim order as held by this Appellate Tribunal, in its judgment, dated 16.2.2015, in Appeal No. 324 of 2013 titled Sree Renuka Sugars vs Hubli Electricity Supply Co Ltd. & another. In this judgment, this Appellate Tribunal, while dismissing the appeal, has observed as under:

*"14. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court reported in Tayabhai M. Bagasarwalla v. Hind Rubber Industries Pvt. Ltd. (1997) 3 SCC 443. After going through the said case law we find that the case law was on the proposition that an interim order is binding on the parties and is to be enforced. This was during the pendency of the main petition when the interim order was in force. In this judgment the Hon'ble Supreme Court clearly held that if the*

suit is finally decided against the party, the parties should be put back in the position that he was on the date of the suit. The Hon'ble Supreme Court further observed that even if the court has no jurisdiction to entertain the suit, but if any interim order even without jurisdiction is passed by the court, then the same will have to be complied with and the plea that the interim order was passed without jurisdiction by the court will be no excuse for the enforcement of interim order. Thus this case law is not applicable in the case before us.

15. In *Kalabharati Advertising v. Hemant Vimal Nath Narichania*, (2010) 9 SCC 437 it was observed by the Hon'ble Supreme Court that no litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. The Hon'ble Supreme Court further observed that it is not permissible for a party to file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefit of the interim order or consequential orders passed in pursuance of interim order by the writ court would continue. The benefit of the interim relief automatically gets withdrawn / neutralized on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after losing the case in a court. Once a foundation is removed the super structure is bound to fall. The interim relief is granted only in aid of and as ancillary to the main relief which may be available to the party at the time of final adjudication by the court. Further it was held that after obtaining interim relief, the party cannot avoid final adjudication of matter on merit and claim that he would enjoy the fruit of interim relief even after withdrawal / dismissal of the case. The same view has been reiterated by the Hon'ble Supreme Court in *Amarjeet Singh & Others v. Devi Ratan and Ors.* (2010) 1 SCC 417.

**17. Summary of findings:**

The interim order dated 11.12.2010 passed by State Commission in O.P. No. 13 of 2010 stood merged with the final order dated 03.01.2013 passed by State Commission whereby the said petition was dismissed as withdrawn by



*the State Commission on the application of the appellant petitioner seeking withdrawal of the said petition being O.P. No. 13 of 2010. Since, the interim order had merged with the main order disposing of the petition, there remains no question of any enforcement of the said interim order after the disposal of the main petition which was not allowed to be decided on merits by the appellant petitioner because at the fag end the appellant petitioner moved the application seeking withdrawal of the said petition without obtaining the decision of the petition on merits relating to determination of project specific tariff of the appellant's cogen units."*

- (1) We are quite conscious about the fact that the RE Regulations, 2008 had no provision for project specific tariff. RE Regulations, 2010, which were notified on 6.7.2010, were made effective from 1.7.2010. This RE Regulations, 2010, for the first time, gave an option to developers to either opt for a generic tariff or opt for a project specific tariff. We, further, find from the record that the Hon'ble Supreme Court, in the aforesaid interim orders, nowhere directed or observed that the Appellant will be entitled for a project specific tariff under RE Regulations, 2010, particularly, in the circumstances when there was no determination of tariff on the date of passing of the interim orders by the Hon'ble Supreme Court. We, further, find thereafter, the Appellant filed a supplementary petition on 22.11.2012 for determination of project specific tariff and, only then executed the PPA on 21.12.2012. The State Commission proceeded on the basis of the supplementary petition and on the fact that there was a long term PPA to determine a project specific tariff of Rs. 4.00 per KWH for the period of 35 years. However, such tariff of Rs. 4.00 per KWH might be applicable from the date of executing the PPA and not for the prior period. However, the State Commission has balanced the equities in favour of the Appellant by directing that the project specific



tariff should apply as soon as the period covered under the short term PPA comes to an end on 14.5.2011.

**In view of the above discussions, we do not find any illegality or perversity in the findings recorded by the State Commission on Issue No.(A) regarding applicability of the tariff and this issue, being Issue No.(A), is accordingly, decided against the Appellant.**

9. **Issue (B) : Interest on the difference in tariff:**

9.1 On this issue, the following contentions have been made by the Appellant:

- (a) that the State Commission has not dealt with this issue at all and has not directed the Respondent No. 2/Distribution Licensee to pay the interest on the difference in tariff of Rs. 3.50 per unit paid on a provisional basis and Rs. 4.00 per unit which has been determined by the State Commission;
- (b) that the State Commission has given time for six months to pay the arrears in installments to the Respondent No.2 without dealing with the interest;
- (c) that the State Commission has failed to appreciate that interest being consequential in nature cannot be denied. The interest is only on the differential amount for the past period, which the Appellant is receiving now, when the tariff is related to the past period. Further, the State Commission has failed to appreciate that interest is not a penalty, but is payable for the time value of money and non-payment of the correct tariff to the Appellant for supply of power. So long as, there is no prohibition for payment of interest in the Regulations or in the Agreement, the question of denial of interest does not arise;

9.2 **Per contra**, the following contentions have been made on behalf of the Respondents on this issue:

- (a) that it is wrong to contend that the State Commission has not dealt with this issue in the impugned Order. This issue has been dealt with by the State Commission in para 3.15.2 of the impugned order, which is as under:

*“In this regard, the Commission would like to mention that the tariff determination process was delayed as the matter was sub-judice and a long term PPA was not executed. Further, UPCL is allowed only that cost to be recovered from the consumers through tariffs which has been approved by the Commission. So far the Commission did not approve any tariffs for Vanala SHP and hence, it would be incorrect on the part of the Petitioner to mention that UPCL would have utilized such funds for its own purposes for such period of time. While determining UPCL’s power purchase cost, the generic tariff as applicable to Vanala SHP was considered and was allowed as the cost to be recovered from the consumers and then loading on it the burden of payment of interest equivalent to the discount factor would be improper.”*

- (b) that the Regulations issued by the State Commission nowhere specify that interest has to be paid for the interim period. Since, the tariff determination of the Appellant’s plant was delayed for reasons attributed to the Appellant itself, hence, the Appellant cannot be compensated by way of interest;
- (c) that during the argument, the Appellant made an attempt to submit that the levelisation of tariff from the year 2010 results in under recovery of costs, which is a new submission. The Appellant has received the full benefit of the generic tariff upto 14.5.2011 without having entered into a long term PPA. The generic tariff is based on normative principles that allows recovery of all costs and gives the developer a regulated return;

- (d) that the findings and contention of the State Commission in the impugned order on the point of interest is based on the views of the Hon'ble Supreme Court in NTPC vs. MPSEB, reported in (2011) 15 SCC 580.

9.3 **Our consideration on Issue (B):**

After hearing and going through the rival contentions, we do not find any force or merits in Appellant's contentions as in the matter of NTPC vs. MPSEB (supra), the Hon'ble Supreme Court while upholding the view of this Appellate Tribunal, has confirmed the view that the right to claim interest is without prejudice to any other liability incurred by the licensee. Besides, what is prohibited is recovery of price or charge exceeding the tariff determined under section 62(6) of the Electricity Act, 2003 and then only, the generating company will have to pay the interest on the difference. When a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined under Section 62(6) of the Electricity Act, 2003, then such person can claim the excess price or charge paid by him along with interest. This section 62(6) of the Electricity Act, 2003 does not refer to the period during which the tariff is being determined. It also does not state that if the finally determined tariff is less than the provisional tariff or an existing tariff continued by the statutory notification, then interest shall be payable on the differential amount.

**Thus, in view of the above discussions, this issue, being Issue No.(B) is decided against the Appellant**

10. **Issue (C) : Deduction of capital subsidy from capital cost, which is actually not received by the Appellant:**

10.1 On this issue, the following contentions have been made by the Appellant:

- (a) that the State Commission in the calculations at Appendix-I has reduced the capital subsidy amount from the capital cost;
- (b) that the State Commission has erroneously reduced the amount of capital subsidy to the extent of 75% of Rs. 6.20 crores from the capital cost determined even though the Appellant has not received any such capital subsidy;
- (d) that the capital subsidy is payable by the Ministry of New and Renewable Energy, Government of India inter-alia, with the condition that such plants which operate at 80 % capacity for a continuous period 80 days;
- (e) that the Appellant has not been able to fulfill the condition on account of high silt content in the river, which is not, for any reason, attributable to the Appellant. The high water level at 80% is available only in the months of July to September of a year and during this period, there has been excessive silt in the river affecting the performance of the hydro plant;
- (f) that, consequently, no such capital subsidy was actually receivable or received by the Appellant, not for any reason attributable to the Appellant. In fact, achieving higher capacity levels is in the interest of the Appellant as the revenues from sale of power will be much higher to the benefit of the Appellant;
- (g) that the State Commission's Regulations take note of the Policy of MNRE for payment of subsidy as under:

*"16(3) The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator."*

(h) that this Appellate Tribunal has already dealt with this issue in its Judgment, dated 20,12,2012 in SLS Power Limited vs. APERC & Ors observing that it would not be desirable to reduce the normative capital cost of mini hydel projects by the subsidy amount for the following reasons:

- (i) The subsidy is being given later in post commissioning period directly to the lending agency towards repayment of loan. Reduction of capital cost by subsidy amount will reduce the equity component too whereas in fact there is no reduction in equity resulting in lower return to the Developer. The debt component will also reduce upfront if the capital cost is reduced by the subsidy amount whereas for construction of the project debt component corresponding to capital cost will be arranged by the Developer as subsidy is available only later after commissioning of the project.
- (ii) Subsidy is not available to all the Developers.
- (iii) Reduction in capital cost by subsidy amount will also reduce the O&M charges as these are determined as a percentage of capital cost which will not be correct as O&M charges are not dependent on subsidy and will not reduce if the subsidy is paid by the Central Government.
- (iv) Further, this Appellate Tribunal has observed in SLS Power Limited vs. APERC & Ors (supra), that, however, the actual subsidy amount received by the project developer from Government of India after adjusting the pre-payment penalty, if any, may be adjusted against the arrears due to the Developers as a result of determination of tariff as per the directions given in this judgment or against the payments made to the Developers for the energy supplied.

10.2 **Per contra**, the following contentions have been made on behalf of the Respondents on this issue:

- (a) that the State Commission has correctly considered the subsidy offered/made available by MNRE to the Appellant and reduced the same from the capital cost. State Commission's approach is in accordance with Regulation 16(2) of the RE Regulations, 2010;
- (b) that the Appellant's contention that the State Commission ought to have considered its case under Regulation 16(3) of the RE Regulations, 2010 is entirely misplaced. The said regulation deals with corrections in tariffs in case the amount of subsidy is reduced by MNRE. In the present case, there has been no reduction in subsidy. The Appellant's entitlement to the subsidy is dependent upon certain conditions. The Appellant, by fulfilling such conditions, can easily avail the benefit. The reliance placed by the Appellant upon SLS Power Ltd. vs. APERC & Ors. (supra), is misplaced in as much as the facts of the present case are completely different, more particularly the Tariff Regulations of the State Commission;
- (c) that the State Commission may make an additional enquiry as to whether the failure of the Appellant to secure the benefit of subsidy from the Government of India was owing to the negligence of the Appellant. The Appellant has simply made bald statement relating to availability of water and silting of river. Without giving any evidence to suggest that the Appellant was not able to achieve 80% PLF for 80 days, which is a mandatory requirement for grant of subsidy. No letter or communication, etc has been produced by the Appellant to show as to what steps it took to get the benefit of subsidy, which benefit accrues to the consumers of the State. So the

Appellant, in order to distinguish itself from the others, has to demonstrate on evidence/ facts;

- (d) that the State Commission has, in accordance with the RE Regulations, 2010, appropriately deducted 75% of capital subsidy from loan amount and the said approach is in accordance with 3<sup>rd</sup> and 4<sup>th</sup> proviso to regulation 16(2) of RE Regulations, 2010 which specifies that *“Provided further that subsidy available from MNRE, to the extent specified under Regulation 25, shall be considered to have been utilized towards pre-payment of debt leaving balance loan and 30% equity to be considered for determination of tariff. Provided further that it shall be assumed that the original repayments shall not be affected by this prepayment.”*;
- (e) that the State Commission, during the hearing before it, had asked the Appellant to submit a statement containing full details of calculation of any subsidy and incentive received, due or assumed to be due from the Central Government and/or State Government. The Appellant, vide its reply, dated 20.2.2013, submitted before this Appellate Tribunal that it had applied with MNRE for grant of capital subsidy but no subsidy had been received by it till date as it was unable to fulfil the conditions of grant of subsidy which requires the plant to be tested at 80% of the capacity for 80 days. However, the Appellant could not run the plant for such period due to excessive silt in the river, therefore, testing has not been done. As per the statement of the Appellant that as per the Policy circulated by MNRE, dated 11.12.2009, the subsidy eligible for its project works out to Rs. 6.20 Crore. Accordingly, from the loan amount, the capital subsidy equal to 75% of Rs. 6.20 Crore has been considered to have been utilized towards pre-payment of debt in accordance with the Regulations;



- (f) that, since, the Appellant had not received any subsidy for the project, the State Commission, in the impugned order, dated 10.4.2014, has provided that the same may be reviewed in accordance with Regulation 16(3) of RE Regulations, 2010 as reproduced hereunder:

*“The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator.”*

- (g) that the State Commission has not reduced the capital cost of the project by the eligible subsidy amount but has reduced the loan amount in accordance with the RE Regulations, 2010. However, in case the developer does not get any subsidy or the amount of subsidy is at variance than the amount considered by the State Commission, then the State Commission would carry out necessary corrections in tariffs provided the reduction in subsidy amount is not due to the inefficiency of the generator.

### 10.3 **Our consideration on Issue (C):**

After going through the rival contentions and findings recorded by the State Commission on this issue in the impugned order, we agree to the views taken by the State Commission in the impugned order. The State Commission, in the impugned order has provided that the same may be reviewed in accordance with Regulation 16(3) of the RE Regulations, 2010. The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the State Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator. In view of this relaxation or liberty,



we do not find any illegality and perversity in the impugned order and, accordingly, **this issue, being Issue No.(C), is also decided against the Appellant.**

11. Since, all the three issues have been decided against the Appellant, the instant Appeal, being Appeal No. 178 of 2014, merits dismissal.

**ORDER**

12. The present Appeal, being Appeal No. 178 of 2014, is hereby dismissed and the Impugned Order, dated 10.4.2014, passed by the Uttarakhand Electricity Regulatory Commission, in Petition No. 19 of 2012, is hereby upheld. There shall be no order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 3<sup>rd</sup> DAY OF MAY, 2016.**

**(T. Munikrishnaiah)**  
**Technical Member**

**(Justice Surendra Kumar)**  
**Judicial Member**

√ **REPORTABLE/NON-REPORTABLE**

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