

**In the Appellate Tribunal for Electricity at New Delhi  
(Appellate Jurisdiction)**

**Appeal No. 179 of 2015**

**Dated: 25<sup>th</sup> May, 2016**

**Present: Hon'ble Justice Mr. Surendra Kumar, Judicial Member  
Hon'ble Mr.T Munikrishnaiah, Technical Member**

**IN THE MATTER OF:**

Uttar Bharat Hydro Power (P) Ltd.  
A-2/452, Sector-8, Rohini  
New Delhi – 110 085

.....Appellant/Petitioner

**VERSUS**

1. Uttarakhand Power Corporation Limited  
Urja Bhawan, VCB Gabbar Singh Bhawan  
Kanwali Road Dehradun, Uttarakhand – 248 001
2. Uttarakhand Electricity Regulatory Commission  
Vidyut Niyamak Bhawan", Near I.S.B.T. P.O. Majra  
Dehradun (Uttarakhand)-248171

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Mr. Raheel Kohli  
Mr. Mr. Nitish Gupta  
Mr. Varun Pathak

Counsel for the Respondent(s): Mr. Pradeep Misra  
Mr. Manoj Kumar Sharma for R-1  
Mr. Shashank Pandit

Mr. Buddy A. Ranganadhan  
Mr. D.V. Raghuvamsy  
Mr. Raunak Jain for R-2  
Mr. Suraj Singh for R-1  
Mr. Matrugupta Misra for State Commission

.....Respondent(s)

### **JUDGMENT**

#### **Per Hon'ble T. Munikrishnaiah, Technical Member**

1. The present Appeal being Appeal No. 179 of 2015 has been filed by the Appellant/Petitioner Uttar Bharat Hydro Power (P) Ltd. under section 111 of the Electricity Act, 2003 against the Impugned Order dated 29.05.2015 passed by the Uttarakhand Electricity Regulatory Commission (hereinafter referred to as "UERC/Commission").

In the Impugned Order, the State Commission rejected the prayer of the Appellant/Petitioner to consider Project Specific Tariff as per RE Regulations, 2013 for the petitioner's project of capacity 10.5 MW as the project was commissioned on 11.07.2014. The State Commission did not consider the prayer of the Petitioner as the Petitioner had already entered into PPA and accepted to sell 10.5 MW power to the Respondent on generic tariff specified by the Commission under RE Regulations 2010.

2. The Appellant's company was incorporated on 22.11.1991 as M/s. Jubilee Steels (P) Ltd. and was subsequently on 11.06.1996, the company was renamed as Uttar Bharat Hydro Power (P) Ltd.
3. The Respondent No. 1, Uttarakhand Power Corporation Ltd. (herein after called as "**UPCL**") is a Distribution Licensee and Respondent No. 2, Uttarakhand Electricity Regulatory Commission is a electricity regulator empowered to discharge functions under Electricity Act, 2003.

4. **Brief Facts of the Case**

- 4.1 On 22.11.1991, the Appellant company was incorporated as M/s Jubilee Steels (P) Ltd and was subsequently on 11.06.1996, renamed as Uttar Bharat Hydro Power (P) Ltd.. The Appellant/Petitioner has set up a small hydro power generating station on Sarju River, in Kapkot, Bageshwar District, Uttarakhand, having installed capacity of 10.5 MW in the name of Sarju III Small Hydro Power Project.
- 4.2 On 08.08.1995, a Memorandum of Understanding was executed between the Appellant and the Non-Conventional Energy Development Agency, U.P. (herein referred to as the

“**NEDA**” for investigating & establishing Techno-economic feasibility for setting up a small hydro-electric project.

- 4.3 On 07.05.1997, a Memorandum of Understanding was executed between the Appellant, the Government of Uttar Pradesh, NEDA and the Uttar Pradesh State Electricity Board for setting up of 2.0 MW small hydro-electric project Sarju State-III on Sarju River in District Almora.
- 4.4 On 30.06.2000, an Agreement was executed between NEDA and the Appellant/Petitioner.
- 4.5 On 16.12.2002, A Power Purchase Agreement (PPA) was executed between the Appellant/Petitioner and UPCL for the purchase of the entire electric energy (excluding the Government Supply i.e., the 10% of Deliverable Energy delivered to UPCL at the Interconnection Point free of cost in terms of the PPA) received from the Project at the Interconnection Point.
- 4.6 On 28.04.2004, an Implementation Agreement was executed between the Government of Uttarkhand and the Appellant/Petitioner for setting up the Sarju State-III Hydro Project having an installed capacity of 2.0 MW and on 25.09.2006, a Supplementary Implementation Agreement

was executed between the Government of Uttarakhand and the Appellant/Petitioner, thereby amending the IA dated 28.04.2004. The Supplementary IA extended the date of achieving the financial closure of the Project to 31.03.2007.

4.7 On 07.08.2007, the Petitioner published invitations to bid for Electro-Mechanical, Hydro-Mechanical and Civil Works for the Project in Business Line and the Economic Times newspapers. The bids were awarded for the Civil Works on 10.09.2007 and the Electromechanical works on 07.04.2008.

4.8 In November 2010, a DPR was prepared and issued by the Department of Water Resources Development and Management, IIT (Roorkee) for the Project having an installed capacity of 10.5 MW with revised cost estimates of Rs 89.55 Crores for construction of the Project. A copy of the DPR issued in November 2010.

4.9 On 03.06.2011, a Supplementary IA ("**Second Supplementary IA**") was executed between the GOU and the Appellant thereby amending the IA dated 28.04.2004. The Supplementary IA dated 03.06.2011 increased the capacity of the Project from 2.0 MW to 10.5 MW and the Scheduled Commercial Operation Date was stated to be 15

months from 10.02.2010, being the date on which the Additional Secretary, GoU gave permission for increasing the said capacity. The Second Supplementary IA further states that, the Appellant shall sign a PPA with the Respondent for the entire saleable energy generated from the Project. The Second Supplementary IA was executed between the GOU and the Appellant/Petitioner.

4.10 On 13.10.2011, in terms of the provisions of the Second Supplementary IA executed between the GOU and the Appellant, the Appellant entered into a PPA with UPCL for the sale of power of 10.5 MW generated from the Appellant's Project. The PPA dated 13.10.2011 supersedes the earlier PPA dated 16.12.2002 executed between UPCL and the Appellant.

4.11 On 06.06.2012, the Respondent issued a letter to the Appellant stating that the Ld. Commission, vide its letter dated 17.04.2012 had directed the Respondent to take necessary actions in light of the deficiencies in the PPA and approach the Ld. Commission after mutually amending the PPA or after entering into a fresh PPA.

4.12 On 25.06.2012, the Appellant issued a letter to Respondent submitting its responses to the queries raised by the Ld. Commission and requested for a supplementary PPA to be signed between both parties incorporating the said amendments.

4.13 On 16.05.2013, 20.11.2013 and 17.12.2013, the Appellant vide various letters requested the Respondent to issue a Supplementary PPA. However, the Respondent is yet to provide the Appellant with draft copy of the Supplementary PPA till date.

4.14 On 16.05.2013 and 18.06.2013, the Appellant exercised its option under RE Regulations and requested the Ld. Commission to determine Project Specific Tariff for the Appellant's project.

4.15 On 15.10.2013, the amendment was brought to RE Regulations, 2013 thereby reinstating Regulation 3 of Chapter 1, Chapter 4 & 5 of the RE Regulations, 2010. It is pertinent to mention that the Regulations, which had been reinstated pursuant to first amendment to the RE Regulations, 2013, were only made applicable to the projects

commissioned prior to the coming into force of the RE Regulation, 2013.

4.16 On 11.07.2014, the Appellant declared CoD after the installation of the meter at the Project by UPCL.

4.17 On 16.01.2015, the Appellant filed a petition seeking determination of Project Specific Tariff for its 10.5 MW Small Hydro Power project on Sarju River at Kapkot, Bageshwar District, Uttarakhand under Section 62 and 86 of the Electricity Act, 2013 read with RE Regulations, 2013.

4.18 The Ld. Commission issued a communication dated 21.01.2015, whereby certain queries were raised qua a above mentioned tariff petition.

4.19 On 14.02.2015, the Appellant filed a detailed affidavit in response to the letter dated 21.01.2015 issued by the Ld. Commission.

4.20 On 07.05.2015, the final hearing was conducted in the matter, on 29.05.2015, the Impugned Order was passed by the Ld. Commission.

4.21 Aggrieved by the order, the Appellant filed this Appeal and prayed for following relief:



- a) That this Tribunal may be pleased to admit the present Appeal and set aside the Impugned Order dated 29.05.2015.
  - b) That this Tribunal may be pleased to issue appropriate directions to the Ld. Commission to determine the "Project Specific Tariff" of the Appellant's project in terms of RE Regulations, 2013.
  - c) Any other just and equitable relief in favour of the Appellant as deem fit by the Tribunal.
5. We have heard the arguments of Ld. Counsel, Mr. M.G. Ramachandran of the Appellant/Petitioner and Ld. Counsel Mr. Pradeep Misra and Mr. Buddy A. Ranganadhan of the Respondents. We have gone through the submissions of the rival parties and considered the Impugned Order and other material pertaining to Appeal.
6. The following issues arise for our consideration & conclusion:
- Issue No. 1: Whether the State Commission erred in disallowing the prayer of the Appellant/Petitioner to consider Project Specific Tariff as per R.E. Regulations, 2013 under the plea that the Appellant had already entered into PPA and accepted to sell 10.5 MW of power to Respondent Uttarakhand Power Corporation Ltd. (UPCL) on generic tariff specified by the Commission under R.E. Regulations 2010?**
- Issue No. 2: Whether the R.E. Regulations 2013 are applicable to the Appellant/Petitioner or whether R.E. Regulations 2010 are the governing Regulations for the PPA executed between the Appellant/Petitioner and Respondent?**
7. The Issue No. 1 and Issue No. 2 are interwoven, hence both the issues are being taken up together:
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8. The following are the submission of the Learned Counsel for the the Appellant:

8.1 that the Regulation 11 (2) of the RE Regulations, 2010 as well as Regulation 10 (2) of the RE Regulations, 2013 (similarly worded) have to be given a contextual and purposive meaning and not a pedantic and literal interpretation. The Regulations need to be interpreted in the context of the privilege or option being given to the RE Developers to opt for the Project Specific Tariff at a time closer to the date of the commissioning of the power plant. The option is not required to be exercised at the time of the signing of the PPA i.e. before commencement of the construction of the power plant and before incurring the capital expenditure. The reason is obvious. The RE Regulations entitle the RE Developer to exercise the option of Project Specific Tariff knowing fully the extent of the capital expenditure to be incurred. The RE Regulations, particularly, in the context of the provision of Section 86 (e) of the Electricity Act, 2003 of promoting the Non-Conventional Energy with promotional tariff, allows the Project Developer to finalize and incur the capital

expenditure and thereafter to decide the Project Specific Tariff or to continue with the generic tariff.

8.2 that the PPA is, however, signed in the initial stage before the construction of the power plant and incurring of the capital expenditure. At the stage of signing of the PPA, it is not possible for the Project Developer to know the actual capital expenditure that maybe incurred for establishing the project. However, before 3 months of the commercial operation of the power plant, the Project Developer will be fully aware of the total capital expenditure that will be incurred in the completion of the project. It is in that context that the option for Project Specific Tariff can be exercised within 3 months before the date of the commissioning. This is further fortified by the fact that in the case of an existing generator, the RE Regulations, 2010 give a period of one month from the date of the Publication of Regulations to opt for the Project Specific Tariff.

8.3 that it is also in the above context that Regulation 14 (2) of the RE Regulations, 2010 as well as Regulation 13 (2) of the RE Regulations, 2013 provide that till the fixation of the final

tariff, a RE based generating station can accept the generic tariff as provisional tariff. The PPA providing for the generic tariff is, therefore, a provisional tariff pending the exercise of the option by the RE Developer such as the Appellant herein for a Project Specific Tariff at any time prior to 3 months before the date of the commissioning of the power plant.

- 8.4 that the interpretation of the above provision is also to be guided by Regulation 13 of the RE Regulations, 2010 which deals with the tariff and the PPA period. The PPA period is with reference to the entire tariff period. The tariff period is from the Commercial Operation Date. Further, Regulation 14 of the RE Regulations, 2010 provides that an application for fixation of the Project Specific Tariff is to be based on actual capital cost in respect of completed unit. Similar provisions are also contained in the RE Regulations, 2013 i.e. Regulations 12 and 13. Further, there is also a provision in both the RE Regulations providing that till the Project Specific Tariff is determined, the RE generator can accept the generic tariff as a provisional tariff.

8.5 that at the time when the PPA was signed on 13.10.2011, the actual capital cost for the purpose of Project Specific Tariff was not available. Therefore, it was open to the Appellant to refer to the generic tariff in the PPA to enable financial closure and other aspects. However, the Appellant had the right under both the RE Regulations to decide on the option for the Project Specific Tariff 3 months before the completion of the project. In any event, it was not open to UPCL to insist on the Appellant to opt for a Project Specific Tariff or to accept the generic tariff while signing the PPA.

8.6 that it is a well-accepted phenomena in the power sector that the establishment of the project would involve a gestation period. The execution of the PPA can never be postponed till the actual completion of the project or 3 months before the scheduled Commercial Operation Date. The PPA needs to be signed at the beginning to enable financial closure. Therefore, it cannot be said that the Project Developer should exercise option at the time of executing the PPA. The option, as envisaged in the both the RE Regulations, is to be exercised when the project is about to be completed and

ready for commercial operation. Accordingly, the provision of the PPA, which is an agreement between the parties has to be read consistent with the RE Regulations which are statutory in character.

8.7 that the provisions of the PPA have to be interpreted consistent with the provisions of RE Regulations, 2010 or RE Regulations, 2013 which are statutory Regulations notified by the Commission. The provisions of the PPA cannot be contrary to the RE Regulations, 2010 or RE Regulations, 2013. In the present case the PPA was signed in terms of the RE Regulations, 2010 specifying the generic tariff on a tentative basis as at that time the actual capital expenditure incurred was not known. Accordingly, the terms of the PPA have to be read subject to the entitlement of the Appellant to exercise the option for the Project Specific Tariff at any time before 3 months prior to the commercial operation of the generating station. If otherwise interpreted, the terms of the PPA would be ultra vires the Regulations.

8.8 that the Commission in the Impugned Order has not considered the above salient aspects and has proceeded in

a mechanical manner by holding that upon the signing of the PPA, the Appellant had exercised the option for generic tariff.

8.9 that apart from the above mentioned submissions it is submitted that under scheme of the Electricity Act, 2003, the Ld. Commission is under a statutory obligation to ensure recovery of cost and to promote generation from renewable resources. Further, under said scheme the Ld. Commission is duty bound to interpret the PPA so as to ensure commercial viability and sustenance of the generating unit. However, the Ld. Commission acted contrary to the said scheme by not determining Project Specific Tariff for the Appellant's project. It is pertinent to mention that due to the delay in achieving commissioning of the project on account of reasons beyond the control of the Appellant, the project cost has escalated substantially and in the event the Appellant is only paid Generic Tariff, the operation of the Project would become unviable. However, the said aspect was completely ignored by the Ld. Commission while passing the Impugned Order.

8.10 that in alternative it is submitted that Ld. Commission has in any event sufficient power to relax the applicability of RE Regulations. The relevant provision of RE Regulations, 2010 in this regard is reproduced below:

*“47. Power to relax: The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person.”*

8.11 that the Ld. Commission’s power to relax had to be exercised keeping the mandate of Section 61 of the Electricity Act, 2003 which specifically provides that the State Electricity Regulatory Commission while dealing with tariff related matters must (i) take into consideration that the generation, transmission, distribution and supply of electricity are conducted on commercial principles, and (ii) safeguard consumer’s interest and at the same time, ensure recovery of the cost of electricity in a reasonable manner. The Ld. Commission has failed to exercise its power which should have been exercised so as to ensure that the statutory mandate is not getting defeated.

8.12 that the Commission may be pleased to set aside the Impugned Order dated 29.05.2015 and further issue



appropriate directions to the Ld. Commission to determine the “Project Specific Tariff” of the Appellant’s project in terms of RE Regulations, 2013.

9. **Per Contra the following are the submissions of the Respondent No. 1, Uttarakhand Power Corporation Ltd.**

9.1 that the contention raised by the Appellant in the present Appeal is that its project was commissioned after enforcement of 2013 Regulations, hence he has exercised the option under the said Regulations for Project Specific Tariff. Thus, the Clause under the PPA that generic tariff will be applicable to Appellant is of no consequence.

9.2 that the present Appeal only requires consideration whether option exercised by a generator under 2010 Regulations by entering into a PPA can be revised after enforcement of 2013 Regulations.

9.3 that Appellant was well aware that in case he will opt for generic tariff as per 2010 Regulations same will be binding till the entire period of PPA, in spite of it the Appellant entered into a PPA with the Respondent that the tariff as determined by the Commission under 2010 regulations as amended from time to time would be applicable to it. The

Regulation 11(2) under which option is exercised makes it clear that option once exercised shall not be allowed to be changed during the validity period of PPA. Thus, the Appellant was stopped from filing Petition under 2013 Regulations for Project Specific Tariff.

9.4 that after first amendment of 2013 Regulations w.e.f. 28.10.2013 Chapter 4 and 5 of 2010 Regulations were revived, hence the Appellant cannot invoke the Regulations 2013 for Project Specific Tariff and the prayer of Appellant was rightly rejected by the State Commission.

9.5 that a similar issue came up for hearing before Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. Vs. EMCO Limited & Anr. reported in 2016 (2) SCALE wherein Hon'ble Supreme Court in Para 29 summarized the legal position as follows:

*“29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1<sup>st</sup> Respondent as a power producer has the freedom of contract either to accept the price offered by the Appellant or not before the PPA was entered into. But such freedom is extinguished after PPA is entered into.”*

9.6 that thus there is no force in the Appeal and the same is liable to be dismissed.

**10. The following are the submissions of Ld. Counsel for Respondent No. 2, UERC**

10.1 that in terms of the RE Regulations, 2010, the Appellant had exercised its option to be governed by generic tariff. The Regulations do not specify any form for exercise of such option. The only condition is that such option must be exercised *AT LEAST* three months before the date of the Commissioning.

10.2 that the option was categorically and unequivocally exercised by the Appellant by means of execution of the PPA dated 13.10.2011 wherein the Appellant had categorically agreed to sell power at the generic tariff. In terms of Regulation 11 (2) such option once exercised was not to be changed during the validity of the PPA. The attempt of the Appellant is to completely evade and avoid the rigour of the said Regulation.

10.3 that on execution of the PPA, the option stood exercised and the respective rights and obligation of the parties stood fortified on that day. Merely, because of 2013 Regulations

were subsequently notified and the Appellant commissioned its Unit only thereafter did not wipe out the earlier exercise of the option.

10.4 that the principle of exercise of option and its binding nature has been upheld by this Tribunal under the very same Regulations in respect of the option exercisable in respect of fuel cost of biomass generators. This has been so held in Judgment dated 20<sup>th</sup> August, 2015 in Appeal No. 143 of 2014 titled Rai Bahadur Narain Singh Sugar Mills Ltd. Vs. UERC.

10.5 that the entire argument of the Appellant proceeds on the fundamental basis that the option had to be exercised “three months” before the Commissioning, i.e. closer to the date of commissioning. Hence, the Appellant was entitled to exercise the option after the 2013 Regulations were notified.

This argument is erroneous for the following reasons:-

- i) The expression in both the Regulations is “at least” 3 months before the date of commissioning. The stipulation is not “3 months” before the commissioning. Hence, the option could have been exercised at any time before 3 months of the date of commissioning.
- ii) In fact the option was exercised by agreeing in the PPA to be governed by the generic tariff and not the Project Specific Tariff.

- iii) The entire argument of the 3 months period as ostensible being closer to the commissioning when the capital cost is known cannot override the express stipulation of the Regulations.
- iv) Simply because the 2013 Regulations have since been notified did not wipe out the PPA executed during the existence of the 2010 Regulations. If that were so, then there could be no PPA in existence at all. Hence, the Appellant cannot proverbially “have its cake and eat it too”. The Appellant cannot be allowed to take benefit of a valid PPA yet say that the tariff clause in the PPA is rendered otiose in light of the 2013 Regulations. Either the document has to stand in its entirety or not at all. The Appellant cannot seek to rely on portions of a document and exercise the other portions that are inconvenient to it.
- v) For all the aforesaid reasons, the present appeal may be dismissed.

**11. Our Consideration and Conclusion on the above issues:**

11.1 The main contention of the Appellant/Petitioner is that at the time of signing PPA i.e. on 13.10.2011, the actual capital cost for the purpose of Project Specific Tariff was not available as the work of execution of the project was under progress, therefore to enable financial closure and other aspects the Appellant opted for generic tariff as per the RE Regulations, 2010 in the PPA.

Further, the option, as envisaged in both the RE Regulations is to be exercised when the project was about to be completed and ready for commercial operation. As per the terms of the PPA, the option can be exercised three months before the commissioning of the project or one month after issuance of RE Regulations. Hence, the Appellant/Petitioner is eligible for Project Specific Tariff in accordance with RE Regulations, 2013.

11.2 Before proceeding further, let us examine the relevant part of the Impugned Order, which is quoted below:

*“From the facts of the petition, the reply and the Rejoinder it is evident that the project was commissioned on 11.07.2014, i.e. after the notification of RE Regulations, 2013. Therefore, in accordance with the provisions of the RE Regulations, 2013, this project gets covered by the relevant provisions of the RE Regulations, 2013. Keeping in view the submissions made by the Petitioner and the Respondent, the provisions of the RE Regulations, 2010, RE Regulations, 2013 and the PPA executed between the two parties the Commission decides to provide generic tariff to the Petitioner under the provisions of the RE Regulations, 2013. The Commission has already clarified in the previous paras that because the Petitioner had already exercised its option in the PPA and accepted to sell 10.5 MW of power to the Respondent on generic tariff specified by the Commission under the RE Regulations, 2010, the Petitioner cannot now seek Project Specific Tariff at this stage. Accordingly, the Commission directs the Petitioner to sell power under the provisions of the same PPA but at the generic tariff specified in the RE*

*Regulations, 2013 as the project was commissioned after the said Regulations came into force”.*

The State Commission in the Impugned Order rejected the prayer of the Appellant/Petitioner under the plea that the Petitioner already exercised the option for generic tariff under RE Regulations, 2010. Hence, the Petitioner cannot claim Project Specific Tariff under RE Regulations, 2013, at this stage.

11.3 Let us examine the incrementing points of the PPA entered between M/s Uttar Bharat Hydro Power Ltd. and Uttarakhand Power Corporation Ltd. on 13<sup>th</sup> day of October 2011.

- a) This Agreement will supersede the earlier PPA signed on 16.12.2002.
- b) This Agreement shall be subject to approval of UERC and any change suggested by UERC in the Agreement shall be incorporated in the PPA being executed now.
- c) Article 1.3: ‘Date of commercial operation or Commissioning (COD) in relation to a unit means the date declared by the generator on achieving maximum continuous rating through a successful trial run and in relation to the generating station, the date of commercial operation means the date of commercial operation of the last unit or block of generating station and expression commissioning’ shall be construed accordingly. In case of small hydro plants the date of commissioning shall, however, not be linked to achieving maximum continuous rating, but the generator will have to demonstrate the same within three years of commissioning.

- d) 'Regulations' mean 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 as amended from time to time.
- e) The rate applicable for supply of electricity by UPCL to the Generating Company shall be as per the tariff determined by the Commission under appropriate Rate Schedule of Tariff for the consumer category – determined on the basis of the total load requirement of the plant and billing done in the manner as specified by the Commission in the Regulations.
- f) The Generating Company and UPCL shall comply with all the Regulations issued by UERC from time to time including but not limited to Uttarakhand Electricity Grid Code, Open Access Regulations, SLDC Regulations to the extent they are applicable to them.
- g) The Generating Company shall own, install, operate, and maintain the Generating Company equipments and associated dedicated transmission line described in Annexure I. The Generating Company shall follow such operating procedures on its side of the electric interconnection with UPCL system, as are consistent with applicable laws, rules and regulations, the terms and conditions of this Agreement, provisions of the SGC, and other related guidelines, if any, issued by UERC, SLDC and UPCL.
- h) The cost of laying the transmission line up-to the 33/11 KV Sub-Station, Kapkote, District Bageshwar, Uttarakhand owned, maintained and operated by UPCL, the required bay, terminal equipments and associated synchronization equipments, etc. shall be borne as per Clause 38 (2) of UERC Regulation, 2010.
- i) The Generating Company shall give at least sixty (60) days advance written notice to the date on which it intends to synchronize a unit of the plant with the grid system, to the Nodal Officer of UPCL (Executive Engineer, Electricity Distribution Division, Bageshwar)



with the copy to the higher officials of UPCL and UERC. The authorized representative of the Generating Company and the Nodal Officer of UPCL shall inspect the unit which the Generating Company intends to synchronize to the Grid System within Seven days after being notified in writing by the Generating Company about the readiness of the unit for the synchronization with the grid.

According to PPA, the applicable Regulations are RE Regulations, 2010 as amended from time to time.

Further, the Agreement shall be subject to the approval of UERC and any change suggested shall be incorporated in the PPA.

Further, this PPA is valid for period of 35 years from the date of commercial operation of the project.

11.4 UPCL's letter No. 1114/UPCL/Comm/Sarju-3/ED dated 06.06.2012, is as under:

*"M/s. Uttar Bharat Hydro Power Pvt. Ltd.  
A-2/452, Sector-8  
Rohini, New Delhi*

***Sub: In the matter of approval of PPA signed between UPCL & M/s. Uttar Bharat Hydro Power Pvt. Ltd.***

*In reference to above mentioned subject please find enclosed herewith letter no. UERC/Misc. App. No. 06/2012/95 dated 17.04.2012 of Hon'ble UERC vide which Power Purchase Agreement signed UPCL & M/s. Uttar Bharat Hydro Power Pvt. Ltd., were returned to UPCL with following direction:-*

*UPCL is hereby directed to take necessary action with regard to the above deficiencies and approach the Generators and mutually amend/incorporate the conditions consistent with the aforesaid Orders of the Commission in this regard. Thereafter, both UPCL & the Generators, if required should re-enter into either a fresh power purchase agreement or in an agreement supplementary to the existing agreement, duly incorporating the conditions consistent with the above Orders. Accordingly, the PPA proposals are being returned in original”.*

*In this regard, it is further intimated that UPCL vide its letter no. 75/UPCL/RM/K-19 dated 25.04.2012 has filed a review petition before the Hon'ble Commission for reviewing their order dated 14.02.2012.*

*This is for your information*

*Encl: As mentioned above*

*(Anil Kumar)  
Executive Director (Commercial)”*

11.5 On preliminary examination of the proposals pertaining to PPAs entered by UPCL with M/s URRO 1, M/s. Lakshmi Sugar Mills Co. Ltd., M/s. Uttam Sugar Mills Ltd. and M/s. Uttar Bharat Hydro Power Pvt. Ltd., the following deficiencies have been found in all the proposals based on the Commission's decisions in the above Order dated 14.02.2012 and Removal of Difficulty Order dated 28.10.2010 in respect of RE Generators:

1. It is not clear from the PPA proposals that whether UPCL provided any opportunity to the Generator to exercise the option, prior to signing of the PPA, as to whether the Generator desires to construct the

evacuation line and other associated equipments at its own cost.

2. PPA proposals also does not include that in case, where the evacuation system has been constructed by the Generator, UPCL will pay additional tariff of 5 paisa/unit to the Generator provided ownership of such lines/system remains with the developer. The condition pertaining to option to be given by UPCL for either purchasing the evacuation system of the Generator at depreciated cost or pay additional 5 paisa/unit as per Regulations has also not been included in the proposal.
3. Regulations provide that maintenance of terminal equipment at the generating end and the dedicated evacuation line if owned by the Generator will have to be maintained by the Generator subject to the condition that transmission/distribution licensees, as the case may be carryout maintenance of the aforesaid system on mutually agreed charges as specified in the Regulations. However, as per the Regulations, maintenance of terminal equipment at sub-station of the concerned licensee shall be the responsibility of the concerned licensee. Notwithstanding the above provisions of the Regulations, PPA proposals thrust upon the responsibility of maintenance of the evacuation line on the Generators.

In the light of the above UPCL is hereby directed to take necessary action with regard to the above deficiencies and approach these Generators and mutually amend/incorporate the conditions consistent with the aforesaid Orders of the Commission in this regard. Therefore, both UPCL & the Generators, if required, should re-enter into either a fresh power purchase agreement or in an agreement supplementary to the existing agreement, duly incorporating the conditions consistent with the above Orders. Accordingly, the PPA proposals are being returned in original.

11.6 In view of the above, the Appellant/Petitioner in their letter dated 25.06.2012 submitted their reply to the discrepancies pointed out by the State Commission and requested UPCL for entering into Supplementary Agreement.

Further, the Appellant reminded the same regarding Supplementary Agreement, in their letters dated 16.05.2013, 20.11.2013, 17.12.2013 but the Supplementary Agreement was not entered by UPCL with the Appellant.

11.7 As seen from the submissions, we are not clear that the State Commission has approved the PPA dated 13.10.2011 or not incorporating the discrepancies pointed out by the State Commission.

Further, it is to mention here that the Appellant has given the necessary information with regard to the discrepancies pointed out by the State Commission and requested UPCL to enter into Supplementary Agreement, but as per the records so far the rival parties have not entered into Supplementary Agreement.

11.8 As per Article 1.13 of the PPA dated 13.10.2011, the Regulations applicable are mentioned as 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 as amended from time to time.

The contention of the Respondent is that the Regulation applicable in the PPA is RE Regulations, 2010 and hence RE Regulations, 2013 will not be applicable to the Appellant for fixation of tariff. Whereas in the PPA, there is a condition that the PPA Agreement dated 13.10.2011 shall be subject to approval of UERC and any change suggested by UERC in this Agreement shall be incorporated in the PPA.

We feel this is a gross negligence of the Respondent when there are specific directions from the State Commission, the Respondent UPCL failed to comply the same.

11.9 The Respondent in its reply to the Petition submitted that the Petitioner had entered into PPA on 13.10.2011 with it whereby the Petitioner accepted to make available 10.5 MW power to UPCL at the levelised rate and the option of generic

tariff was accepted by the Petitioner as per the provisions specified under the RE Regulations, 2010 as per Clause 2.1(vii) of the PPA.

Further, that the RE Regulations, 2010 were effective and the PPA was executed and the option of generic tariff was accepted by the Petitioner.

It is pertinent to mention here that the PPA, which was entered on 13.10.2011 shall be valid only after approval of the State Commission duly incorporating any discrepancies or suggestions made by the State Commission. As discussed in the above paras that the State Commission has pointed out certain discrepancies to the UPCL and after obtaining the relevant information from the RE Generator, directed to submit the PPA duly incorporating the discrepancies. But the Respondent UPCL failed to take the approval of the Commission.

In view of this, whether the PPA entered on 13.10.2011 is a valid document or not. As per the PPA condition, unless the PPA is approved by the Commission, we cannot treat the PPA as an approved document. Further, the State

Commission has also not considered this fact in the Impugned Order. Further, in the PPA, it is stated that RE Regulations mean the UERC (Tariff Order and other terms for supply of RE services and non-fossil fuel based cogeneration stations/Regulations, 2010 as amended from time to time. The State Commission vide amendment dated 15.10.2013 to RE Regulations, 2013, Regulation 3 of Chapter 1, Chapter 4 and 5 of the RE Regulations, 2013 was reinstated.

11.10 Let us examine whether the Appellant/Petitioner is having right to exercise option under RE Regulations, 2013 for determination of Project Specific Tariff or not.

Further, whether the RE Regulations 2013 are applicable to the Petitioner or whether RE Regulations, 2010 are the governing Regulations for the PPA executed between the Petitioner and the Respondent. The relevant Regulations are quoted below:

The Clause 11 (2) of the RE Regulations, 2010 reads as under:-

*(2) The RE Based Generating Stations and Co-generation Stations, except those mentioned under Proviso 1 & 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 or one month after the date of issuance of these Regulations, whichever is later. **The option once exercised shall not be allowed to be change during the validity period of the PPA.***

On 15.04.2013, the RE Regulations, 2013 were notified and are effective from 15.04.2013. Further an amendment was brought to RE Regulations, 2013, and as per the amendments, the RE Regulations, 2010 shall stand repealed except for Regulation 3 of Chapter 1, Chapter 4 and Chapter 5 of the RE Regulations, 2010 and thus the said Regulations are reinstated. The relevant Clause 11(2) of RE Regulations, 2013 reads as under:

*(2)... The RE Based Generating Stations and Co-generation 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***

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**of the 1st unit, in case of multiple units or one month after the date of issuance of these Regulations, whichever is later. The option once exercised shall not be allowed to be change during the validity period of the PPA...**

11.11 Both the Regulations clearly specify that the RE based generating stations 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 shall give its option to the Distribution Licensee at least three months in advance of date of commissioning or one month after the date of issuance of these Regulations whichever is later.

The option once exercised shall not be allowed to be changed during the validity period of the PPA.

It is true that the Petitioner/Appellant entered into PPA on 13.10.2011 and the Appellant's project was commissioned on 11.07.2014 i.e. after the notification of RE Regulations, 2013. The Appellant in light of the above mentioned RE Regulations exercised its option for the Project Specific Tariff vide letter No. UBHPP/UERC/27/2013 dated 16.05.2013 and again vide letter No. UBHPP/UERC/50/2013 dated

18.06.2013 i.e. the Appellant/Petitioner applied for Project Specific Tariff well before 3 months prior to the commercial operation of the power plant i.e. on 11.07.2014 as envisaged in the RE Regulations. Therefore, we feel that in accordance with the provisions of the Regulations, 2013, this project gets covered by the relevant provisions of the RE Regulations, 2013.

11.12 The Counsel of the Respondent quoted the Judgment passed by this Tribunal in Rai Bahadur Narain Singh vs. UPCL and UERC. In the said Appeal, the RE Generation Plant is based on Biomass Based Co-Generating Plant whereas in the present case, the RE Generation Plant is small Hydro Generation Plant.

The commissioning of the Biomass Plant cannot be compared with small hydro stations because the geographical conditions and the site conditions prevailing at the project sites of the respective RE plant vary. Further, in the Hydro Generating Stations due to geographical conditions and various problems, the project gets delayed. In view of this in the PPA, the duration of the project was

specified as 35 years from the date of commissioning of the plant and the project was commissioned on 11.07.2014 that is after coming into force of RE Regulations, 2013.

11.13 It is also to mention here that at the time of entering into PPA i.e. on 13.10.2011, the Appellant's project was under construction and as per Regulation 15(1) of RE Regulations, 2010 capital cost of the project includes the expenditure incurred or projected to be incurred, initial spares, interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation during construction on loans arrived in the manner specified in sub Regulation 2 up to the date of commercial operation or commissioning of the project, as admitted by the Commission after prudence check. The capital cost shall also include the expenditure incurred or projected to be incurred towards the evacuation infrastructure up to point of interconnection (i.e. it does not include cost of dedicated line and associated equipment from point of interconnection up to the nearest sub-station of transmission or distribution licensee to which generating station is connected). For

calculation of Project Specific Tariff the capital cost shall also include the expenditure incurred or projected to be incurred towards additional capitalization.

The Commission determined the levelized/generic tariff based on the normative values of the components dealing with determination of tariff.

Thus, in case of hydro generating station, the actual capital expenditure has to be taken up to the commissioning of the project. It is pertinent to mention here that the Appellant signed the PPA on 13.10.2011 and hence the actual cost of the project is only normative figures.

In view of this in the RE Regulations, it is specifically mentioned that the generator can submit its proposal for Project Specific Tariff at least three months before commissioning of the plant so that the project developer could be able to know the actual project cost.

11.14 As per Regulation 14 of RE Regulations, 2010, the Project Developer can make an application for fixation of Project Specific Tariff based on actual cost in respect to the

completed units of the RE based generating stations and co-generating stations. Similarly, in the Regulation 12(2) of RE Regulations, 2013 specifies that these Regulations shall be considered from the date of Commercial Operation Date (COD) or commissioning of the renewal energy plant and also Regulation 13 of RE Regulations, 2013 specifies the RE Based Generating Stations, may make an application for fixation of Project Specific Tariff based on actual capital cost in respect of the completed units of the RE Based Generating Stations.

11.15 Further, Regulation 13(2) of RE Regulations, 2013 clearly specifies the fixation of final tariff of RE Based Generating Stations or Co-Generating Stations may either accept the generic tariff as provisional tariff or make an application for determination of provisional tariff in advance of the anticipated date of completion of project based on the capital expenditure actually incurred up to the date of making the application. The provisional tariff determined by the Commission, may be charged from the Commercial

Operation Date (COD) of the respective unit of the generating station.

Provided that the RE Based Generating Stations and Co-Generating Stations shall be required to make fresh application for determination of final tariff based on actual expenditure incurred up to the date of Commercial Operation or commissioning of the generating stations with duly audited and certified copies of the accounts by the statutory auditors within 18 months from the COD.

This clearly mentions that the project developer has been given a privilege to make an application for fixation of tariff once the actual cost of the project is known to the project developer.

11.16 This Tribunal in its Judgment held that the State Commission has powers to revise the Tariff in a concluded PPA keeping in view of the change in the circumstances of the case which are uncontrollable.

The relevant Judgments are quoted below:

a) *Junagadh Power Projects Pvt. Ltd. Vs. Gujarat Urja Vikas Nigam*, Appeal No. 132 of 2012, in Judgment dated 02.12.2013 (Full Bench) wherein it was held:

*“29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that **the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. The State Commission has the duty to incentivize the generation of electricity from renewable sources of energy** and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company...”*

- b) *Patikari Power Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission, Appeal No. 179 of 2010 vide Judgment dated 23.04.2012, wherein it was held as under:*

*“37. Ld. Counsel for the Appellant has submitted that due to lower generation at Patikanihydro electric project due to less inflows, the Appellant had to infuse additional finances to pay the debts and the project could become a non-performing asset. **There is point in the submissions made by the Appellant that it will not serve the object of the Act regarding promotion of renewable sources of energy if the existence of such a project is endangered due to change in the fact situation on the basis of which the Appellant developed the project and which is dependent on nature and beyond its control. This aspect requires reconsideration by the State Commission. We also notice that the validity of PPA is for 40 years and the project has to sustain operations for such a long***

*period. We, therefore, feel that the State Commission should consider the aspect of low discharge”.*

Thus, the State Commission can consider the case of the Appellant with respect to relax the option already exercised at the time of signing PPA based on the condition to exercise the option three months before commencement of the project.

In the instant case, the project execution was under progress at the time of signing the PPA and accordingly the Appellant/Petitioner exercised option for generic tariff for supply of power.

11.17 The Appellant/Petitioner can exercise the option for Project Specific Tariff keeping the mandate of Section 61 of Electricity 2003 which specifically provides that the State Electricity Regulatory Commission while dealing with tariff related matters, safeguard consumers' interest and at the same time ensure recovery of the cost of electricity in a reasonable manner.

11.18 In our opinion, the Appellant/Petitioner has correctly and legally exercised its option for determination of Project



Specific Tariff for the Appellant's project as specified in the RE Regulations, 2013.

Thus, we feel that rejecting the option filed by the Appellant for Project Specific Tariff by the State Commission is not tenable. Thus, the option exercised by the Appellant/Petitioner for Project Specific Tariff as per RE Regulations, 2013 has to be considered by the State Commission.

11.19 In view of the above discussions, we direct the State Commission to allow the option exercised by the Appellant/Petitioner towards determination of Project Specific Tariff and taking into consideration the actual project cost as per the Auditors' Report, comparing with relevant documents and after prudence check.

11.20 Thus, we allow the instant appeal and set aside the Impugned Order dated 29.05.2015. Accordingly, the Issue Nos. 1&2 are decided in favour of the Appellant

**ORDER**

The instant appeal being Appeal No. 179 of 2015 is allowed and the Impugned Order dated 29.05.2015 is set aside accordingly. The State Commission is directed to determine the Project Specific Tariff of the Appellant's project within two months from the date of issue of this order.

No order as to costs.

Pronounced in the open Court on this **25<sup>th</sup> day of May, 2016.**

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

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

**√ REPORTABLE/NON-REPORTABLE**