

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

**APPEAL NO. 287 OF 2015**

**Dated: 23<sup>rd</sup> April, 2019**

**Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member**  
**Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

**In the matter of:**

**Swasti Power Limited**  
**Plot No. 111, Road No. 72**  
**Jubilee Hills, Hyderabad**

**.... Appellant**

**Versus**

**1. Uttarakhand Electricity Regulatory**  
**Commission**  
**Vidyut Niyamak Bhawan,**  
**Near I.S.B.T., P.O. Majra, Dehradun**  
**(Uttarakhand) – 248171**

**.... Respondent No.1**

**2. Uttarakhand Power Corporation Ltd.**  
**Urja Bhawan, Kanwali Road**  
**Dehradun -248001**

**.... Respondent No.2**

**Counsel for the Appellant(s) : Mr. Tarun Johri**  
**Mr. Ankit Saini**  
**Mr. Ankur Gupta**

**Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan**  
**Ms. Stuti Krishn for R-1**

**Mr. Pradip Mishra**  
**Mr. Manoj Kr. Sharma for R-2**

**JUDGMENT**

**PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER**

**1. The Appellant has sought the following reliefs:**

Allow the instant Appeal filed by the Appellant and thereby, set-aside the order dated 22.09.2015 passed by the Uttarakhand Electricity Regulatory Commission in Petition bearing No. 02/2015 titled Swasti Power Ltd. V/s Uttaranchal Power Corporation Ltd. to the extent of the Claims of the Appellant, which have been rejected or declined by the Respondent No.1 in Impugned order and;

- a. Allow the instant Appeal filed by the Appellant and thereby, allow the Claim No. 1 to 4 raised by the Appellant against the Respondent as enumerated in Para 7.42 of the instant Appeal.
- b. Allow the cost of filing the instant Appeal before this Tribunal in favour of the Applicant; and
- c. Pass such other orders as this Tribunal deems fit and proper in the facts and circumstances of the case.

**1.1 The Appellant has raised the following Questions of Law for our consideration:**

- a) Whether in law, the relevant provisions of 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,

has no application to the facts and the circumstances of the case?

- b) Whether in law, the Appellant is entitled to refund of 2% Prompt Payment Rebate wrongfully deducted by the Respondent No.2 from the monthly energy bills raised by the Appellant for sale of energy generated from the Project?
- c) Whether in law, the Appellant is entitled to payment of Late Payment Surcharge @1.25% per month from the Respondent No.2 on account of delay in payments of the monthly energy bills/invoices raised by the Appellant upon the Respondent No.2 for sale of energy generated from the Project?
- d) Whether in law, the Power Purchase Agreement dated 03.07.2009 executed between the Appellant and the Respondent No.2 can over-ride the provisions of the Uttarakhand Electricity Regulatory Commission (Tariff and Other terms for Supply of Electricity from Non – conventional and Renewable Energy Sources) Regulations, 2008 and 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, framed by the Respondent No.1?
- e) Whether in law, the Power Purchase Agreement dated 03.07.2009 is not subjected to the provisions of 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?
- f) Whether in law, the Appellant is entitled to the benefits of the provisions of 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, when the tariff in respect of the Project is been paid to the Appellant in terms of the said Regulations in terms of the order dated 17.12.2012?

**2. Brief facts of the case are as follows:**

- 2.1 M/s Swasti Power Limited (hereinafter referred to as the “**Appellant**”) being aggrieved by the Order dated 22.09.2015 (hereinafter referred to as the “**Impugned Order**”) passed in Petition No. 02/2015 by the Uttarakhand Electricity Regulatory Commission have filed this instant Appeal under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) whereby the State Commission has declined to consider the Claims for refund of the 2% Prompt Payment Rebate deducted by the Respondent No.2 while clearing the invoices raised by the Appellant for sale of power generated from the Bhilangana Hydro Power Project (3 x 7.5 MW) generating station in the State of Uttarakhand (“**Project**”) and further, declined the Claim for payment of Late Payment Surcharge @1.25% as raised by the Appellant for the period prior to the signing of the Supplementary PPA on 10.012013.
- 2.2 The Appellant is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Plot No. 111, Road No. 72, Jubilee Hills, Hyderabad.

- 2.3 The State Electricity Regulatory Commission (hereinafter referred to as “**Respondent No.1/State Commission**”) is the State Commission in the State of d exercising powers and discharging functions under the provisions of the Electricity Act, 2003.
- 2.4 Uttarakahdn Power Corporation Ltd. (hereinafter referred to as “**Respondent No.2**”), is the distribution licensee in the State of Uttarakhand.
- 2.5 On 16.10.2003, the Appellant entered into an Implementation Agreement with the Government of Uttarakhand for setting up of the Bhilangana Hydroelectric Project having installed capacity of 22.5 MW (Project).
- 2.6 On 19.10.2002, Government of Uttarakhand notified its ‘policy on hydropower development by private sector in the State of Uttarakhand (upto 25 MW)’ so as to encourage generation of power through small hydropower sources of energy.
- 2.7 On 24.08.2005, the Appellant and M/s PTC India Ltd. entered into a Power Purchase Agreement for sale of power generated from the Project, with delivery point being the nearest point of interconnection of the State Grid with the Central Transmission Utility system.
- 2.8 On 30.09.2005, the Appellant executed a Power Wheeling Agreement with the Respondent No.2 for wheeling of power generated from the Project to the Delivery Point.

- 2.9 On 25.07.2007, the Appellant submitted an application with Power Transmission Corporation of Uttarakhand Ltd. for Long Term Open Access to the intra-state distribution/transmission system.
- 2.10 On 30.04.2008, the State Commission framed UERC (Tariff and Other Terms for Supply of Electricity from Non-Conventional and Renewable Energy Sources) Regulation, 2008.
- 2.11 On 10.08.2009, the Appellant filed an Application before the Respondent No.1 seeking permission to sell electricity to PTC consistent with the Power purchase Agreement dated 24.08.2005.
- 2.12 On 03.07.2009, since, the order from the State Commission was not forthcoming on account of certain pending clarifications and the Project being ready for its Commercial Operations, the Appellant and the Respondent No.2 i.e. Uttarakhand Power Corporation Ltd. entered into negotiations for sale of power generated from the Project by the Appellant to the Respondent No.2, subject to the outcome of the Petition filed by the Appellant.

That the recital part of the PPA dated 03.07.2009 entered into between the Parties stated as under:-

*“WHEREAS, the Generating Company desires to sell entire 22.5MW (Plus 10% overload) power scheduled to be generated in the Generating Company’s facility to UPCL pending resolution of the legal issues regarding the sale of power other than consumer outside the State of Uttarakhand subject to the following conditions:-*

1. *Company's right in regard to sale of power outside the State of Uttarakhand to PTC and others on the Final Decision on the issue by UERC/Tribunal/Court if the decision is in favour of the Company*
2. *The terms and condition contained in the PPA and the rights and obligations specified would be subject to the final decision on the legal issues of the sale of power by the Company to PTC. However Generating company shall give two months notice to UPCL before termination of the agreement."*

That the PPA defines the term "**Regulation**" as under:-

*"1.13 'Regulations means the Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms For Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008, as amended from time to time."*

That Clause 2 of the PPA stated as under:-

## **2 Power Purchase, Sale and Banking**

- 2.1 *UPCL shall accept and purchase 22.5MW (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 levellised rate specified for such plant in Schedule I of Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Non –Conventional and Renewable Energy Sources) Regulations, 2008 as amended from time to time.*
- 2.2 *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 'Rates 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.*
- 2.3 *The Generating Company 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.”*

That further Article 5 of the PPA reads as under:-

**“5. BILLING PROCEDURE AND PAYMENTS**

- 5.1 *UPCL shall raise bill for electricity purchased by the Generating Company as per its normal billing cycle in manner as specified by the Commission in the Regulations and such bill shall be payable within the time period stipulated in the General Conditions of Tariff.*
- 5.4 *UPCL shall make full payment against such Monthly Bills to the Generating Company subject to receive with complete documents within thirty (30) working days of the receipt of the Monthly Bill after availing the 2% rebate.”*

That further Article 5.6 and 5.7 of the PPA reads as under:-

- “5.6 *In case of any dispute regarding the bill raised by the Generating Company, UPCL shall file a written objection with the Generating Company within 15 days of the receipt of the bill giving full particulars of the disputed item(s), with full details/data and reasons of dispute and amount disputed against each item. The Generating Company shall resolve the above dispute(s) with UPCL within 30 working days.*
- 5.7. *In case, the dispute is not resolved within 30 working days as provided in Para 5.6 above, and in the event it is decided with the Arbitration as provided in Para 23 of this agreement, then UPCL shall pay 100% of the disputed amount forthwith and refer the dispute for arbitration as provided in this agreement. The amount of excess/shortfall with respect to the said disputed amount on final award of arbitration shall be paid/adjusted; but in case of excess, the adjustment shall be made with interest @1.25% per month from the date on which the amount in dispute was refundable by the generating company to UPCL.”*



That Annexure II to the PPA stated as under:-

**“1.0 SALE AND ACCOUNTING FOR POWER:-**

1.....

2.....

3. *UPCL will purchase Electricity in accordance with provisions of the Regulations of UERC and other statutory authorities and requirements of the State Load dispatch centre.”*

2.13 That a perusal of the aforementioned Clause would make it clear that the Appellant and the Respondent No.2 had agreed to comply with the *Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Non – Conventional and Renewable Energy Sources) Regulations, 2008, (“Regulations, 2008)* for the purposes of payment of tariff under the PPA and further, agreed to comply with all the Regulations as notified by the Respondent No.1 from time to time.

2.14 That the First Unit, Second Unit and the Third Unit of the Project had been commissioned on 12.08.2009, 24.09.2009 & 11.10.2009 respectively.

2.15 That, subject to the rights and the obligations prescribed under the PPA, the Appellant, in compliance of the terms and the conditions of the PPA, started selling the entire power generated from the Project to the Respondent No.2 and started raising monthly energy invoices upon the Respondent, which had duly been cleared by the Respondent from time to time.

2.16 On 30.12.2009, the Respondent No.1 dismissed the Application filed by the Appellant and thereby denied Open Access to the Appellant. It is submitted that the order was based on a clarification provided by the Government of Uttarakhand that there is a severe shortage of electricity in the State and that the hydro generating companies proposed to sell power to a Trading Company which did not fall in the category of consumer.

2.17 That the PTC had challenged the aforementioned order dated 30.12.2009 before this Tribunal in Appeal No. 93/2010.

2.18 That in the mean time, the Respondent No.1 on 01.07.2010 notified the Uttarakhand Electricity Regulatory Commission (Tariff and other Terms for Supply of Electricity from Renewable Energy Sources and Non-Fossil Fuel based Co-generating Stations) Regulations, 2010. As per the provisions of PPA, the Appellant started raising the invoices since July, 2010, for sale energy generated from the Project to the Respondent No.2, while calculating tariff in accordance with the aforesaid Regulations. It may however be noted here that till such period of time the Appeal filed by the PTC before this Tribunal had not been decided by this Tribunal and thus, the Appellant was not even assured as to whether, it will have to sell its power to the Respondent No.2 or to the PTC India Ltd. with whom the Appellant had already earlier entered into a power purchase agreement.

2.19 That this Tribunal vide its order dated 11.01.2011 while setting aside the order dated 30.12.2009 passed by the State Commission had been pleased to hold as under:-

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

2.20 That during the course of the supply of power from the Project to the Respondent No.2 in pursuance to the commissioning of the Project, various disputes have arisen under the PPA between the Appellant and the Respondent No.2 in contravention of the provisions of PPA and the relevant applicable regulations notified by UERC from time to time.

The issues were taken up with the Respondent No.2, however, despite repeated requests from the Appellant, the Respondent No.2 failed to look into the issues raised by the Appellant and thus, the Appellant was left with no other option but to file the Petition bearing no. 02/2015 under Section 86 (1) (f) of the Electricity Act, 2003, before the State Commission.

2.21 That the Appellant therein raised Four (4) different claims before the Respondent No.1, which reads as under:-

1. CLAIM NO. 1:-

*Claim for an amount of Rs. 1,40,31,088/- being the amount of Rs. 1,03,27,091/- refundable to the Petitioner on account*

*of illegal and unlawful deduction of prompt payment rebate by the Respondent @ 2% in place of eligible rate of 1% from the payments released to the Petitioner in respect of the monthly energy bills raised by the Petitioner without opening of the Letter of Credit in violation of the terms and conditions of the PPA read with Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms For Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008, as amended from time to time and an amount of Rs.37,03,997/- as Late Payment Surcharge (LPS) of on the withheld amount from the 61<sup>st</sup> day of the MEBs till 10.11.2014 and for interest calculated @18% p.a. from 10.11.2014 till the date of the actual receipt of the aforementioned amount of Rs. 1,40,31,088/- by the Petitioner.*

2. Claim No.2:-

*Claim Against Illegal and Unlawful deduction of an amount of Rs. 22,07,994/- including an amount of Rs. 1,90,717 in the form of 2% of the prompt payment rebate in respect of payment of Rs. 0.05 paise per unit released in January 2013 as transmission charges payable by the Respondent for the period July, 2010 till December 2012 along with a late payment surcharge of Rs. 20,17,277/- calculated from the 61<sup>st</sup> day of the MEBs till 10.11.2014 and for interest calculated @18% p.a. from 10.11.2014 till the date of the actual receipt of the aforementioned amount of Rs. 22,07,994/- by the Petitioner.*

3. Claim No.3:-

*Claim for an amount of Rs. 32,06,324/- being an amount of Rs. 17,43,024/- illegally and unlawfully deducted by the Respondent equivalent to 2% Prompt Payment Rebate from the amount released to the Respondent for sale of energy generated from the Project from MEBs pertaining to the period from September 2012 to November 2012 and paid after a delay ranging from 37 to 98 days and late Payment Surcharge of Rs. 14,63,300/- calculated @1.25% per month for the delay in payment from the 61<sup>st</sup> day of the MEBs till 10.11.2014 and for interest calculated @18% p.a. from 10.11.2014 till the date of the actual receipt of the aforementioned amount of Rs. 32,06,324/- by the Petitioner.*

4. *Claim No.4:-*

*Claim for an amount of Rs. 5,78,191/-, being an amount of Rs. 4,37,108 which includes 2% prompt payment rebate unilaterally, illegally and unlawfully deducted by the respondent from the supplementary monthly energy bills for the months of April - August 2014, which were paid in October 2014 and an amount of Rs. 1,41,083/- towards late payment surcharge calculated @1.25% per month from the 61<sup>st</sup> day of the supplementary bills till 10.11.2014 and for payment of interest @18% p.a. from 10.11.2014 till the actual payment thereof by the Respondent.*

2.22 The State Commission vide its Impugned order dated 22.09.2015 had been pleased to partly allowed the Claims raised by the Appellant, while rejecting the Claims of the Appellant pertaining to the wrongful deductions of 2% Prompt Payment Rebate by the Respondent No.2 while clearing the invoices raised by the Appellant and further rejected the claim for Late Payment Surcharge @1.25% per month, on the invoices raised prior to the date of execution of the Supplementary Power Purchase Agreement dated 10.01.2013 between the Appellant and the Respondent No.1.

2.23 Being aggrieved by the findings of the State Commission, the Appellant has presented this instant Appeal:-

**3. The oral and written submissions of the learned counsel appearing for the Appellant are as follows:-**

3.1 The Appellant had filed the Petition No. 02 of 2015, inter-alia praying for adjudication of the disputes arising out of the PPA

dated 03.07.2009 executed between the Appellant and the Respondent No.2 for a period of 30 years.

- 3.2 Clause 1.13, 2, 2.3 & 5.1 of PPA provided that parties would abide by the provisions of Uttarakhand Electricity Regulatory Commission (Tariff and other terms for Supply of Electricity from Non-conventional and Renewable Sources) Regulations, 2008 as amended from time to time ("**Regulations, 2008**").
- 3.3 Clause 5.4 of PPA envisaged that R-2 would be entitled to avail 2% rebate subject to making payment of the monthly energy bills within a period of 30 days from receipt of the invoice.
- 3.4 On 06.07.2010, R-1 notified Uttarakhand Electricity Regulatory Commission (Tariff and other terms for Supply of Electricity from Non-conventional and Renewable Sources and non-fossil fuel based co-generating stations) Regulations, 2010 ("*Regulations, 2010*"), which provided that *PPA's of generators would need to be amended to make them in line with these Regulations (as amended from time to time), failing which the provisions of these Regulations shall be deemed to have been incorporated in their PPA's and will have overriding effect over any of the previous provisions.*
- 3.5 Further, Clause 24 of Regulations, 2010 provided that in case of payment of bills is delayed beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% shall be levied by the generating company.

The relevant Regulations as notified from time to time are detailed as under:

RE Regulations, 2008	RE Regulations, 2010	RE Regulations, 2013
<p>37. Rebate</p> <p>For payment of bills through the letter of credit on presentation, a rebate of 2% shall be allowed. If the payments are made by a mode other than through the letter of credit but within a period of one month of presentation of bills by the generating company, a rebate of 1% shall be allowed.</p>	<p>23. Rebate</p> <p>For payment of bills through the letter of credit on presentation, a rebate of 2% shall be allowed. If the payments are made by a mode other than through the letter of credit but within a period of one month of presentation of bills by the generating company, a rebate of 1% shall be allowed.</p>	<p>22. Rebate</p> <p>(1) For payment of bills through the letter of credit on presentation, a rebate of 2% shall be allowed.</p> <p>(2) Where payments are made by a mode other than through the letter of credit but within a period of one month of presentation of bills by the generating company, a rebate of 1% shall be allowed.</p>
<p>38. Late Payment Surcharge</p> <p>In case the payment of bills is delayed beyond a period of 1 month from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company</p>	<p>24. Late Payment Surcharge</p> <p>In case the payment of bills is delayed beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company.</p>	<p>23. Late Payment Surcharge</p> <p>In case the payment of bills is delayed beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month or part thereof shall be levied by the generating company.</p>

3.6 That on 23.03.2011 & 30.04.2011, the Appellant requested the Respondent No.2 to execute fresh long term PPA. That the Respondent No.1 vide its order dated 17.12.2012, directed the Appellant to either to execute a fresh long term PPA or execute a Supplementary PPA in accordance with the provisions

Regulations, 2010. It was further observed that after execution of the long term PPA between the Appellant and R-2, the tariff provided in RE Regulations, 2010 shall be applicable for the project from date of coming into effect of the Regulations, 2010.

3.7 The parties executed Supplementary Power Purchase Agreement on 10.01.2013. The subject matter of the present dispute between the parties in the instant Appeal is the amount of rebate of 2% claimed by the Respondent No.2 instead of 1%, while releasing the monthly energy bills of the Appellant, within the period of 30 days and non payment of Late Payment Surcharge by the Respondent No.2, which is completely against the aforementioned Regulations, notified by the State Commission. The State Commission vide the Impugned Order dated 22.09.2015, has partly allowed the claims of the Appellant by holding that the Claims of the Appellant after the date of execution of the Supplementary PPA dated 10.01.2013 shall be considered and examined in terms of the Regulations, 2010, which led to the filing of the aforesaid Appeal.

3.8 Application of provisions of Regulations, 2008 and Regulations, 2010 upon the PPA dated 03.07.2009:-

- i. Because, Recital 2 of the Regulations, 2010, itself provided that *PPA's of generators would need to be amended to make them in line with these Regulations (as amended from time to time), failing which the provisions of these Regulations shall be deemed to have been incorporated in their PPA's and will*



*have overriding effect over any of the previous provisions.* Thus, the provisions of the Regulation 23 and 24 of Regulations, 2010 shall be deemed to have been effective and have application on the facts of the case. Thus, any amendment to the aforesaid Regulations as notified by the Respondent No.1 would automatically govern the provisions of the PPA and the same would be binding upon the parties.

- ii. Because Hon'ble Apex Court in the matter of PTC India Ltd V/s Central Electricity Regulatory Commission; (2010) 4 SCC 603 (Copy enclosed as Annexure A-2) was pleased to hold that, *"A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations."* It is thus submitted that PPA dated 03.07.2009 is subjected to the Regulations, 2008 & 2010 as framed by the State Commission, and provisions of the Regulations would override the conditions of the PPA, in law.
- iii. Because State Commission vide order dated 17.12.2012 held that in the event of the Appellant choosing to execute the long term PPA or Supplementary PPA, then, the provisions of the Regulations, 2010 for payment of tariff energy would be applicable from the date when the said Regulations had been notified by the Commission i.e. 06.07.2010. Therefore, the provisions with regard to Rebate and Late Payment Surcharge

are fully applicable w.e.f. 06.07.2010 in terms of the Regulations, 2010.

- iv. Because payment of tariff for sale of energy as per Regulations, 2010 w.e.f 06.07.2010 in term of the order dated 17.12.2012, itself amounts to the applicability of the provisions of Regulations, 2010 upon the PPA which also includes provisions relating to Rebate and Late Payment Surcharge and therefore, the findings of the State Commission as rendered in Para 2.8 of the Impugned Order is liable to be rejected.
- v. Because, without prejudice to the submissions of the Appellant that the provisions of Regulations, 2010 are applicable upon the PPA w.e.f. 06.07.2010, it may be noted that the State Commission in Para 2.8 of the Impugned Order held that the provisions which existed in the earlier PPA would prevail for the period prior to signing of a valid long term PPA. Meaning thereby, the provisions of Regulations, 2008, would be applicable with regard to Rebate and Late Payment Surcharge.
- vi. Because the State Commission itself in its order dated 07.11.2014 had itself directed the parties to make changes in the PPA and to align the said PPA in terms of the provisions of the Regulations, 2010.
- vii. Because, the Respondent No.2 had never issued the Letter of Credit in favour of the Appellant, thus, was legally not entitled

to Rebate of 2%, which was in complete violation of the provisions of Regulations, 2008 and 2010.

- viii. Because the parties in the PPA dated 93.07.2009 had specifically agreed that the provisions of Regulations, 2008 as amended from time to time would be applicable upon PPA.
- ix. Because, admittedly the State Commission in Para 2.7 of the Impugned Order had specifically noted *that Regulations, 2008 do not provide that the tariffs determined in the Regulations would only be applicable for projects who enter into a long term PPA with the distribution licensee*. Meaning thereby, that de hors of the fact as to whether the PPA dated 03.07.2009 was a long term PPA or not, Regulations, 2008 as notified by the State Commission, were fully applicable upon the said PPA and R-2 was legally and statutorily obligated to follow the same.
- x. Because the concession as given by the Appellant qua Rebate of 2% vide its letter dated 06.11.2012 cannot under the law be considered to override the Regulations, as notified by the State Commission, which specifically provides that in the event of absence of Letter of Credit, the distribution licensee would only be entitled 1% Prompt Payment Rebate.
- xi. Because the parties with *consensus ad-idem* had specifically followed and abided by the provisions of the Regulations, 2010 for the purposes of determination of tariff for sale of energy generated from the Project and therefore, the

provisions of Regulations, 2010 were fully applicable upon the existing PPA dated 03.07.2009.

- xii. Because there is no mention in the order dated 17.12.2012 that the Appellant's entitlement to the tariff from 06.07.2010 in terms of the Regulations, 2010, is been allowed as a special case under the facts and circumstances of the case and therefore, findings in Para 2.8 of the Impugned Order are liable to be set-aside.
- xiii. Because the findings of the State Commission that the provisions as existed in the earlier PPA would prevail for the period prior to signing of valid long term PPA is itself contradictory to the order dated 17.12.2014 passed by the Hon'ble State Commission, as the State Commission found the Appellant entitled to payment of tariff in terms of Regulations, 2010 from the date of the notification of the Regulations, 2010 i.e. 06.07.2010.
- xiv. Because the order dated 17.12.2012 itself made the Regulations, 2010, applicable upon the PPA with retrospective effect for the purposes of determination and payment of tariff for sale of energy.
- xv. Because the provisions of the PPA entered into between the parties cannot under the law, over ride the provisions of the Regulations notified by the appropriate commission from time to time.
- xvi. Because any condition under the PPA which is contrary to the Regulations framed/notified by the appropriate commission

cannot be read dehors of the Regulations or in violation of the Regulations framed by the commission.

- xvii. Because the Respondent No.2 has been making payments of tariff for sale of electricity generated from the Project as per Regulations, 2008 and thereafter, as per Regulations, 2010 and thus, the findings that the PPA executed between the parties is not subjected to the Regulations prior to 10.01.2013 is liable to be set-aside. The Appellant is being paid tariff, which corresponds to the tariff applicable to long term PPAs. Thus, the rejection of the Claims on the ground that the PPA is not a long term PPA is liable to be set-aside.
- xviii. Because PPA was in fact a long term PPA for a duration of 30 years and incorporation of an additional clause of termination of PPA, cannot make a valid long term PPA to be invalid and considered as a short term PPA.

Because once the consent for execution of the long term PPA was given by the Appellant in March, 2011, the State Commission ought to have considered the fact that it was delays on the part of the UPCL, which had resulted in execution of the PPA after approximately 2 years in January, 2013. Thus, UPCL could not have obtained any benefit of its own wrong.

- 4. The oral and written submissions of the learned counsel appearing for the Respondent no.1/the State Commission are as follows:-**

- 4.1 There are four primary claims that the Appellant had made against the UPCL, namely:-
- (i) Claim No. 1: For Refund of the rebate @ 2% of the Monthly Energy Bill (“MEB”), deducted by UPCL, when such rebate could have allegedly been deducted only @ 1% for the entire period of August 2009 to July 2014;
  - (ii) Claim No. 2: Refund of rebate of 2% deducted by the UPCL from the transmission charges for the period July 2010 to December 2013;
  - (iii) Claim No. 3: Refund of rebate of 2% deducted for energy billed for the months of September 2012 to November 2012;
  - (iv) Claim No. 4: Refund of rebate of 2% on energy sold for April to August 2014 due to the payment made under the Supplementary Bill on the higher tariff:
- 4.2 The principal issue running through the four claims is the applicability of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations 2010 [**“2010 Regulations”**]. The finding of the State Commission on this principal issue are as follows:

*“..2.4 The PPA dated 03.07.2009 was executed between the Petitioner and the Respondent with an exit clause and it was not a long term PPA as per RE Regulations, 2010 specified by the Commission. The PPA was executed by both the parties with due knowledge of the provisions of the Regulations.*

*2.5 The PPA dated 03.07.2009 was entered into by the Petitioner under RE Regulations, 2008. The Commission in a separate matter filed by the Petitioner, had its Order dated 17th December, 2012 with regard to the PPA had held as under:*

*“16. Taking cognizance of the terms and conditions of the PPA dated 03.07.2009 entered between the Petitioner and the Respondent, the Commission is of the view that the said PPA cannot be construed as a valid long term agreement particularly on account of the conditions provided in the agreement. Some of the conditions are reproduced below:*

*“WHEREAS, the Generating Company desires to sell entire 22.5 MW (Plus 10% overload) power scheduled to be generated in the Generating Company’s facility to UPCL pending resolution of legal issues regarding the sale of power other than consumer outside the state of Uttarakhand subject to the following conditions: 1. Company’s right in regard to sale of power outside the State of Uttarakhand to PTC and others on the Final decision on the issue by UERC/Tribunal/Court if the decision is in the favour of the Company 2. The terms and conditions contained in the PPA and the rights and obligations specified would be subject to the final decision on the legal issues of the sale of power by the company to PTC. However, generating company shall give two months notice to UPCL before termination of this agreement.”*

*“19. Duration*

*19.1 Unless terminated by default, this agreement shall be valid till the expiry of 30 years or after two months from received of notice from Generating Company if the final decision on the legal issue is in favour of Generating Company regarding the sale of power to other than consumer outside the state of Uttarakhand to PTC and permitted the company to give the outside the State to PTC, whichever is earlier.”*

*2.6 In this regard, in the Order referred above, the Commission had opined that the Petitioner as well as the Respondent were required to abide by the relevant provisions of that regulation and must enter into a PPA consistent with the Regulations.*

*2.7 The RE Regulations, 2008 do specify that for SHPs the life of the project shall be 35 years and also specifies PPA period as 30 years. However, these regulations do not provide that the tariffs determined in the Regulations would only be applicable for projects who enter into a long term PPA with the distribution*

*licensee. Whereas, RE Regulations, 2010 specify the Tariff period which shall be the period for which tariff is to be determined by the Commission on the basis of norms specified under these Regulations and this Tariff period shall be equal to the useful life of the project, i.e. 35 years for SHPs. Further the Regulations specify that PPA shall be required to be executed with the distribution licensee for the entire Tariff period.*

*2.8 Infact, UPCL had incorrectly made payment to it at tariffs specified under RE Regulations, 2010 even before the Petitioner became eligible to be governed by RE Regulations, 2010. However, taking a holistic view in the matter, the Commission had decided to give the Petitioner an option to either enter into a fresh long term PPA or execute a supplementary agreement to the existing PPA with the Respondent consistent with the provisions of the RE Regulations, 2010, for sale of power for the entire useful life of the plant. The Commission also decided that if a valid long term PPA was executed between the Petitioner and the Respondent, the tariff provided in RE Regulation, 2010 would be applicable on the Petitioner's plant from the date of effectiveness of the regulations.*

*However, mere allowance of tariff as a special case does not afford coverage of PPA by the regulations and cannot be construed to vest right to Petitioner to dispute the amount of rebate deducted by the Respondent or DPS not paid to it for the period prior to signing of the Supplementary PPA.*

*Accordingly, the provisions as existed in the earlier PPA would prevail for the period prior to signing of a valid long term PPA as the PPA entered into by the Petitioner was not in compliance of the RE Regulations, 2010. The Petitioner cannot claim any rebate or late payment surcharge in accordance with the RE Regulations, 2010. Hence, no claim of the Petitioner can be considered for the period prior to signing of the Supplementary PPA as it wasn't covered under RE Regulations, 2010 under which it was billing for power sold to UPCL.*

*2.9 It is furthermore necessary to point out that the Petitioner was fully aware of the provisions of Regulations with respect to Rebate and Delayed Payment Surcharge and infact it had been allowing UPCL higher rebates than that allowed in the Regulations without any protest. If it did not have any issue in offering a higher rebate*



*to UPCL earlier, then there is no explanation for agitating the issue after a period of 5 years from CoD. The claims for refund of rebate for the period prior to signing of long term PPA on 10.01.2013 are not valid and hence are rejected.*

*2.10 RE Regulations, 2010 specifies as under: "Provided further that in all the cases, where legally valid PPAs have been entered into with the distribution licensee or where financial closure of the project has taken place prior to coming into force of these Regulations on the basis of previous Regulations/Orders of the Commission, such generators shall have the option to be covered under these Regulations, in which case these Regulations shall be applicable to them and the generators would be required to convey such option within one month of the notification of these Regulations. The PPAs of such generators would need to be amended to make them in line with these Regulations (as amended from time to time), failing which the provisions of these Regulations shall be deemed to have been incorporated in their PPAs and will have overriding effect over any of the previous provisions." From the above, it is apparent that if a legally valid PPA have been entered into with the distribution licensee by the RE generator or the financial closure of the project has taken place prior to coming into force of these Regulations on the basis of previous Regulations/Orders of the Commission, the PPAs of such generators would need to be amended to make them in line with the RE Regulations, 2010 failing which the provisions of these Regulations shall be deemed to have been incorporated in their PPAs and will have overriding effect over any of the previous provisions.*

*2.11 Both the Parties executed the Supplementary PPA on 10.01.2013 enabling main PPA dated 03.07.2009 to be termed as long term PPA in accordance with the regulations. Therefore, all the claims after 10.01.2013 shall be dealt with in accordance with the governing Regulations..."*

4.3 In the light of this principal finding, all the four claims have been considered on their merits and disposed off as under:-

- (i) In re Claim No. 1, The Commission has concluded, inter alia, as under:-

*“Provision of payment under LC mechanism and corresponding rebate of 2% was made in the regulations to ensure prompt payment of energy bills by the distribution licensee for maintaining smooth cash-flow of the generating stations. Moreover, LC is a payment security mechanism. It is basically a guarantee from the bank that a buyer's payment to a seller would be received on time and for the correct amount and in case the buyer is unable to make payment on the purchase, the bank would be required to cover the full or remaining amount of the purchase. Furthermore, during this period the respondent has made prompt payments to avail higher rebate and that was accepted by the Petitioner. Keeping in view that they have agitated this issue after 18 months, they cannot be allowed both a lower rebate and prompt payment.*

*In sum and substance, while it is held that the Petitioner gets coverage under prevailing Regulation since the said regulation expressly provided such coverage, it nonetheless is relevant that respondent kept on making prompt payment to avail higher rebate and such deduction was not objected to by the Petitioner. It is therefore ordered that whenever payment has been made within 3 working days, the respondent would be entitled for 2% rebate in this period. This adjudication is being made in the particular circumstances of this case and will not have general application...”*

(ii) In re Claim No. 2, the Commission, has inter alia, concluded

as under:-

*“As the Delayed Payment Surcharge was not provided for in PPA, the claim for the same is not sustainable. However, as the payments were delayed beyond 30 days, rebate is not attracted and its deduction is unjustified. The claim of Petitioner for refund of rebate deducted is therefore upheld...”*

(iii) In re Claim No. 3, the Commission has, inter alia, concluded as under:-

*“..In this regard, as already discussed above, the period mentioned above pertains prior to the signing of the Supplementary PPA i.e. 10.01.2013 and hence shall be governed by the terms of PPA and not the regulations. As the PPA did not provide for any Delayed Payment Surcharge, the claim is not sustainable and hence rejected....”*

- (iv) In re Claim No. 4, the Commission has inter alia, concluded as under:-

*“..In view of the above stipulation under the Act, the second amendment to the RE Regulations, 2010 became operational w.e.f. 05.07.2014. Accordingly, claim for both refund of rebate and levy of DPS are upheld with the proviso that such claim shall be recognized from the date of operationalisation of the amendment, i.e. 05.07.2014...”*

**5. The oral and written submissions of the learned counsel appearing for the Respondent No. 2 are as follows:-**

The learned counsel representing Respondent No.2 in his detailed submissions cited order passed by the State Commission and submitted that the State Commission has considered all the aspects related to the case and have done a detailed analysis and the decision taken by the State Commission in the matter is in order.

6. We have heard the learned counsel Mr. Tarun Johri appearing for the Appellant, and the learned counsel Mr. Buddy A. Ranganadhan appearing for the Respondent No.1 and the learned counsel Mr. Pradip Mishra appearing for the Respondent No.2 at considerable length of time and after careful perusal of the Impugned Order passed by the State Commission/1<sup>st</sup> Respondent and after going through the written submission and rejoinder filed by the counsel

appearing for both the parties and after critical analysis of entire relevant material available on records and on the basis of pleadings available on records, the only issue which arises for our consideration in the instant Appeal is:-

*“Whether the State Commission has erred in disallowing the claims made by the Appellant for the refund of excess rebate deducted by UPCL and also refund of the payment of late payment surcharge.”*

7. **Our Findings:**

- i) The Appellant signed a PPA with Respondent No.2 for sale of its power generated from its hydro plant as per the tariff prescribed by the Regulation, 2008.
- ii) As per the Regulation, 2004 (Conduct of Business) notified by the State Commission, the Distribution licensee is supposed to take the approval of the State Commission for all power purchase agreement. However, in this particular case the said Agreement was not placed before the State Commission for approval. The power purchase from Appellant's plant was considered and allowed by the State Commission in the tariff order of the Respondent No.2.
- iii) The State Commission in their order have observed that while signing the PPA in 2009 the Appellant was well aware about the Regulation, 2004 and Regulation, 2008. The Appellant

should have drafted the PPA in line with the Regulations and should have taken the approval of the State Commission.

- iv) The State Commission further observed that though the normal tenure of the PPA was for 30 years but this PPA was a conditional PPA with an exist clause allowing the Appellant to terminate the PPA by giving two months notice to the Respondent No.2. In view of this, the State Commission has observed that this PPA cannot be termed a Long Term PPA in line with the Regulation, 2010.
  
- v) The State Commission has further observed that in fact UPCL i.e. Respondent No.2 had incorrectly made payments to Appellant at tariffs specified under Regulation, 2010 even before the Appellant because eligible to be governed by Regulation, 2010. However, taking a holistic view in the matter the State Commission had decided to give the Appellant an option to either entered into a Long Term PPA or execute a Supplementary Agreement to the existing PPA with the Respondent No.2 in line with the Regulation, 2010 to take the benefit of Long Term PPA as per Regulation, 2010.
  
- vi) In view of the above, the State Commission has observed that no claim of the Appellant can be considered for the period prior to signing of Supplementary PPA as it was not covered under Regulation, 2010.

- vii) The Appellant executed the Supplementary PPA with Respondent No.2 on 10.01.2013 enabling main PPA dated 03.07.2009 to be termed as Long Term PPA in accordance with the Regulation. Therefore, all the claims after 10.01.2013 shall be dealt with in accordance with the governing Regulations.
  
- viii) The State Commission has observed that the Respondent No.2 made prompt payments to avail higher rebate and that was accepted by the Appellant. Keeping in view that the Appellant have agitated this issue after 18 months they cannot be allowed both a lower rebate and prompt rebate.

The State Commission further held that though the Appellant gets covered under prevailing Regulations which expressly provided such coverage, it is none the less relevant that Respondent kept on making prompt payments to avail higher rebate and such deduction was not objected to by the Appellant. It is further ordered that whenever payments have been within three working days, the Respondent No.2 would be entitled to 2% rebate in this period. This adjudication is being made in the particular circumstances of this case and will not have general application.

From the above it is clear that though the State Commission held that the Appellant gets coverage under the prevailing Regulation but in view of the fact that the Respondent No.2 made prompt payments and also the fact that such deductions

were not objected to by the Appellant, therefore, the State Commission did not agree for the claim by the Appellant.

This certainly a deviation from the terms and conditions of the PPA approved by the State Commission. More so, when the State Commission has held that the Appellant gets coverage under the prevailing Regulation, the decision of the State Commission is misplaced.

We are of the considered view that once it is established and held by the State Commission that the Appellant gets covered under the prevailing Regulations then all claims after 10.01.2013 shall be dealt with in accordance with the governing Regulations only.

### **ORDER**

For the foregoing reasons as stated above, the instant Appeal being Appeal No.287 of 2015 filed by the Appellant is allowed.

The Impugned Order dated 22.09.2015 passed in Petition No. 02 of 2015 by the Uttarakhand Electricity Regulatory Commission is hereby set aside in part so far as it relates to the extent of disallowing the claims made by the Appellant for the refund of excess rebate deducted by UPCL and also refund of the payments of late payment surcharge.

The Respondent No.1/the State Commission is directed to pass the order in the light of the observations made in the preceding paragraphs.

The Appellant and the Respondents herein are directed to appear before the first Respondent, Uttarakhand Electricity Regulatory Commission personally or through their counsel without notice on 15.05.2019 to collect necessary date of hearing.

No order as to costs.

Pronounced in the Open Court on this **23<sup>rd</sup> day of April, 2019.**

**(Ravindra Kumar Verma)**  
**Technical Member**

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**REPORTABLE/NON-REPORTABLE**

mk

**(Justice N. K. Patil)**  
**Judicial Member**