

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal No. 61 of 2007

Dated this 30th day of October, 2007

**Coram : Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member**

IN THE MATTER OF:

M/s. Him Urja Pvt. Ltd.

E-14, East of Kailash,
New Delhi – 110 065

... Appellant

Versus

1. Uttarakhand Electricity Regulatory Commission

80, Vasant Vihar, Phase-I,
Dehradun

2. Uttaranchal Power Corporation Limited

Urja Bhawan, Kanwali Road,
Dehradun

... Respondents

For the Appellant : Mr. Jaideep Gupta, Sr. Advocate
Mr. L. Nageswar Rao, Sr. Advocate
Mr. Amit Kapur, Advocate
Mr. Mansoor Ali Shoket, Advocate
Mr. Apoorva Mishra, Advocate
Mr. Avijeet K. Lala, Advocate

Mr. K. K. Manan, Advocate
Mr. Alok Shankar, Advocate

For Respondents : Mr. Suresh Tripathy, Advocate
Mr. Azad S. Chahal, Advocate

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

The appellant, M/s. Him Urja Pvt. Ltd, is engaged in developing and operating small run of the river hydro projects in the State of Uttaranchal, including the 4.4 MW Rajwakti Small Hydro-electric projects located in District Chamoli, Uttaranchal which is the project in question in this appeal. On 23.04.1999, the Uttar Pradesh State Electricity Board (the UPSEB) offered to purchase power from the appellant @ Rs.3.00 per unit with 4% annual escalation of O&M charges less 10% free power. Accordingly, the Power Purchase Agreement (in short PPA) was executed on 15.10.1999. Subsequently, the price was revised to Rs.2.50 per unit. However, the Uttaranchal Electricity Regulatory Commission (the Commission for short) vide its order dated 17.11.2005 re-fixed the tariff for the power produced and supplied to the appellant

which was far below the price fixed by the PPA. This led to filing of appeal No. 205 of 2005.

2) The appellant during the hearing of the appeal No.205/2005 placed certain additional materials which had not been placed before the Regulatory Commission for reasons beyond its control. The Commission pointed out that the appellant would be well advised to seek a review by placing all materials before the Commission as the Commission would be in a better position to appreciate the material and fix the tariff after taking a fresh look on the material. On a joint request made by the parties this Tribunal remanded the matter to the Commission. The appellant was given six weeks to place the material in support of this claim and the Commission was directed to re-determine the tariff as expeditiously as possible. Meanwhile, the UPSEB was directed to continue to pay charges @ Rs.2.50 per unit of electricity supplied by the appellant. A dispensation was given for payment of the dues which had already accrued. The Tribunal also recorded that the appellant had made a statement that it shall sell power generated by it to the UPSEB for 20 years provided the appellant gets a fair return. The appellant filed a de novo tariff petition with relevant material. The Commission after taking into consideration all the material placed before it, pursuant to the de novo petition passed the impugned tariff order fixing the same tariff as was done by the order dated 17.11.2005. Hence, the present appeal.

The Facts :

3) The appellant company was incorporated on 01.02.1995 with a view to, inter alia, generate electricity. The Rajwakti Small Hydro-electric project, the project in question, in the District of Chamoli is a small hydro project established by the appellant in the hills of Uttaranchal. The appellant availed of debt finance from IREDA for which final closure took place in November 1998. In April, 1999, the appellant accepted the offer of UPSEB, (based on the guidelines of Ministry of MNES) at a tariff of Rs.3.00 Per unit with 4% escalation on O&M charges less 10% free power. On 15.10.1999, a PPA was executed between the UPSEB and the appellant wherein tariff was levelised at Rs.3.00 per unit over the saleable energy generated and deemed energy for the entire duration of 30 years. Based on the PPA the appellant commenced the construction work in December, 1999.

4) In October, 2000, the UPPCL, successor of UPSEB, submitted the PPA for approval of Uttar Pradesh Electricity Regulatory Commission. In November 2000 the new State of Uttaranchal was carved out of the existing State of Uttar Pradesh in terms of Uttar Pradesh Re-organisation Act 2000. The project fell in the State of Uttaranchal. In the scheme of re-organisation, UPPCL continued to provide transmission and distribution of electricity in Uttaranchal till a separate corporation was created in Uttaranchal. Uttar

Pradesh Electricity Regulatory Commission (UPERC) continued to act as regulator for the area falling in Uttaranchal. On the establishment of new regulator in Uttaranchal in September, 2002 all pending proceedings were to be transferred to the Regulator of Uttaranchal, i.e. the Commission.

5) In 2001 the UPERC issued "Practice Directions for Renewable Energy Based Independent Power Producers 2001" casting obligation on the licensees for getting new PPAs approved by the UPERC and for filing the existing ones with it. UPERC by its tariff order dated 01.09.2001 approved the power purchase by UPPCL from the micro hydel plants @ Rs.2.25 Per unit with base year 1999-2000 and annual escalation of 5% which worked out to Rs.2.48 per unit. Following this the Government of Uttaranchal asked the appellant to revise the rate to Rs.2.50 per unit. A revised PPA was executed on 22.12.01 with Uttaranchal Power Corporation Ltd., successor of UPPCL in Uttaranchal, respondent No.2. The revised agreement was submitted to UPERC for approval on 26.12.2001. On 24.05.2002 the project was synchronized with the grid with sale of infirm power to UPCL @ Rs.2.50 per unit. Till October 2005 power was drawn from this project at a price of Rs.2.50 per unit.

6) On September 19, 2002 the newly constituted Commission issued UERC (Conduct of Business) Regulations. The Electricity

Act 2003 came into force on 10.06.2003. However, the Uttar Pradesh Electricity Reforms Act 1999 was saved as were instruments like the PPA of the appellant. On 03.09.2003 the appellant re-financed its IREDA loan with State Bank of India at a lower interest rate with an annual benefit of Rs.75 Lacs. Vide tariff order dated 08.09.2003 and 08.12.2003 the Commission adopted power purchase cost at Rs. 2.50 per unit for the purchase from Hydro IPP viz. the appellant. On 25.04.2005, the Commission passed a tariff order on the tariff petition of UPPCL wherein it said that the generating stations which did not get their tariff determined by 30th May, 2005 shall be paid lower of the present tariff paid to them or Rs.0.3869 per unit. The appellant, therefore, filed a petition with the Commission. The Commission passed the first tariff order relating to the appellant on 17.11.2005 fixing the following charges for the project:

(a) At Rs.2.28 per unit at 45% PLF;

(b) Incentive of 25 paise per unit for exceeding 45% PLF (where as the Project has been achieving a PLF of 70%); and

.....

7) The appellant filed appeal No. 204 of 2005 before this Tribunal alleging that the tariff order worked out to a meager Rs.1.261 as against the levelised rate of Rs.2.50 per unit and rendered the

project unviable. The appellant identified various deficiencies in the tariff order. As stated earlier, the appeal was disposed of vide judgment dated 29.03.2006.

The Impugned Order :

8) Upon hearing the appellant on the de novo petition, the Commission passed the impugned order on 09.04.2007. The Commission observed that the appellant had committed itself before the Tribunal to sell power to UPCL for at least 20 years and therefore, the Commission was determining the Annual Fixed Charges (AFC) for the project for the years of 2005-06 to 2022-2023. The Commission accepted the capital cost of Rs.29.7 Crores as on 31.07.2003. It accepted additional capitalization of only Rs.0.48 Crores up to 31.07.2003 thereby rejecting the claimed capital expenditure of Rs.0.34 Crores. On this capital calculation return of 14% was allowed. The Commission restricted the O&M expenses to 4% of the capital cost. The Annual Fixed Charge was determined for the period of 2005-06 to 2022-2023 as given in Annexure-III of the impugned order. The Commission also provided the tariff structure and a recovery mechanism.

9) The Commission also examined the validity of the PPA in which the price of power to be sold by the project was fixed at Rs.3.00 per unit and the subsequent agreement by which a price

was revised to Rs.2.50 Per unit. The Commission ruled that the revised agreement dated 22.12.2001 was required to be approved by the Regulatory Commission under the provisions of Uttar Pradesh Electricity Reforms Act 1999 which was not done in this case. It observed that neither the Uttar Pradesh Electricity Regulatory Commission nor the Uttaranchal Commission ever approved the PPA. It rejected the contention that the approval of Uttar Pradesh Government to the power purchase agreement validated the agreement. Admittedly, the Commission did not accord any approval to the PPA. The Commission accordingly opined that the PPA dated 22.12.2001 was not legally valid and there was no requirement for the Commission to abide by the provisions of the PPA for the purpose of determining tariff.

Grounds of Appeal:

- 10) The impugned order is challenged on the following points:
- a) Misconstruction of the undertaking given in appeal No.204/2005
 - b) Denial of capital expenditure of Rs.0.34 Crores
 - c) Derivative impact on equity on account of b)
 - d) Interest on loan
 - e) Operation and maintenance expenses
 - f) Annual fixed charges
 - g) Tariff structure and recovery mechanism

h) Validity of PPAs executed by the appellant

11) The appellant contends that the appellant had agreed to sell power for 20 years only if the appellant gets a fair return. It accordingly challenges the Commission's premise that the appellant had undertaken to supply electricity for 20 years irrespective of any return. The appellant contends that such long term commitment cannot be imposed on the appellant in total disregard of the PPA dated 22.12.2001.

12) Regarding the denial of capital expenditure the appellant contends that the Commission ignored material like the books of accounts, certificate from the Chief Engineer, certificate from the statutory auditor and minutes of meetings in respect of the additional capital expenditure. It is also submitted that the appellant was entitled to an additional capitalization in terms of UERC (Terms and Conditions) for determination of hydro generation tariff Regulation 2004.

13) Disallowance of Rs.0.34 Crores of capital expenditure would naturally impact the return on equity. The appellant is aggrieved that to this extent the appellant has been denied its claim to recover return on equity on Rs.0.34 Crores through tariff.

14) The Commission's view on interest on loans is disputed as the Commission has not disclosed the rate at which the interest is allowed or any working of the interest calculation. The appellant pointed out that there has been a substantial increase in the interest of rate on rupees and foreign currency loan over the last one year which the Commission has failed to factor in.

15) Coming to the operation and maintenance charges the appellant's grievance is that the Commission has ignored the material placed before it like the books of accounts, audited balance sheet, item-wise details of expenditure incurred, justification for each expenditure etc. It says that the Commission's sealing of 4% based upon the DPR projects is erroneous. The appellant also expresses grievance that out of the 4% escalation allowed, 1% has been demarcated only for insurance whereas the cost of insurance is only about 0.3%.

16) Annual fixed charges, as fixed by the Commission, has been challenged on the ground that the same has been given without any supporting calculations or worksheet and in the process the Commission has denied the appellant Rs.1.91 Crores without any reasoning or justification.

17) The tariff structure and recovery mechanism given by the impugned order is challenged as misconceived and arbitrary. It is

also submitted that the appellant has provided adequate data on design energy and secondary energy of various large hydro power projects so as to assist UERC in fair calculation. Further 12% incentive by way of exemption of free energy for promotion of SHPP given by the State Government also appears to have been included in the tariff which is opposed by the appellant.

18) The validity and the effect of PPA appears to be the most contentious issue of this appeal. The appellant contends that this Tribunal has already held in its judgment dated 14.09.2006 in appeal No. 189/2005 titled Uttaranchal Jal Vidyut Nigam Ltd. Vs. UERC & Others that if there was no Regulatory Commission for the State during the relevant period the question of approval of PPA is inconsequential. Hence, the contract concluded in terms of PPA is binding on the parties and the same could not be re-opened or interfered with by the Regulatory Commission. This Tribunal also held in that judgment that State Government is entitled in law to approve PPA and the Commission was bound to honor the same. Further, it is contended that this Tribunal in its judgment dated 02.06.2006 in appeal No. 180/2005 titled Small Hydro Developers Association Vs. APERC and Another has held that procurement arrangement/PPA is statutory in nature and Regulatory Commission has no authority to interfere with the same. The Regulatory Commission, having approved of the purchase price agreed to between the developer and the UPCL respondent No.2 as

stipulated by the PPA, it is submitted, cannot re-fix the regulatory purchase price by resorting to tariff determination. The appellant contends that the PPA is a valid document. The PPA has been duly submitted to the UPERC and thereafter has been approved of by the Government of Uttaranchal when the revised levelised rate of Rs.2.50 Per unit for 40 years was agreed to and the new PPA was executed for 40 years. It is submitted that at the relevant time the UPERC was officiating as the State Electricity Regulatory Commission for Uttaranchal in terms of Section 63 of UP Re-organisation Act 2000 and thereafter tariff was being fixed at the same rate as per the PPA and hence it was wrong for the Commission to fix a new tariff by disregarding the tariff agreed to in the PPA.

19) The appellant has also invoked the theory of legitimate expectation. It is submitted that the PPA was fashioned on the MNES guidelines and investment into the project was made based on the invitation of the Government of Uttar Pradesh as reflected in the policy declaration of 1995 of Government of Uttar Pradesh. The subsequent PPA of 22.12.2001 was also entered into after prior approval of Government of Uttaranchal and duly submitted to UERC for approval. It is accordingly submitted that its legitimate expectation of getting a return based on the PPA should be approved.

Commission's response & rejoinder of the appellant:

20) The Commission defends the impugned order by filing a reply contending that the entire exercise on the de novo tariff application was made with an open mind. In the reply the Commission has given a chart showing the amount claimed under each head and the amount approved with reasons for variation. On the question of mis-construction of the undertaking, the Commission contends that it has provided a fair return and has approved of 14% return on equity and that it has not tied the appellant down to sell power to UPPCL for 20 years. According to the Commission the appellant is entitled to sell power to anyone subject, however, to tariff determination without AAD. In a rejoinder, the appellant disputes this proposition and says that the Commission has attempted to put un-reasonable restriction on the right to trade. Further, it is contended by the appellant that the Commission has misunderstood and misconstrued the concept of fair return by equating it with return on equity. Fair return, the appellant contends, should be costs plus a reasonable return.

21) So far as additional capital expenditure is concerned, the Commission submits that the Rs.0.34 Crores worth of additional capitalization has not been approved on the basis of SBI certificate and on account of lack of validation. The appellant's rejoinder on this aspect is that the SBI certificate itself shows that expenditure

up to 31.07.2003 had been taken into account in this certificate whereas expenditure incurred was between 01.08.2003 and 31.03.2004 and that the Commission has failed to appreciate the concept of prudence check. The reply and rejoinder on the aspect of derived impact on return on equity follows the submission and rejoinder on additional capital cost. So far as interest on loans is concerned the UERC has given detailed calculation with its reply. The appellant contends that in the earlier tariff order the Commission has not considered swapping charges of foreign exchange component of loan for the forward cover. Coming to operation and maintenance charges, the UERC contends that all records were considered. UERC relies on the DPR figures and claims that the 4% ceiling was based on relevant data. The appellant in this rejoinder submits that the DPR figures are only indicative and not conclusive and that the UERC did not have any valid data on the basis of which the O&M expenses could be ascertained and could be limited to 4% of the DPR. The appellant contends that O&M expense has been sufficiently justified by it.

22) For annual fixed charges, the UERC has come out with detailed calculations with its reply. The appellant disputes the calculation as the same is belated and cannot be accepted at appellate stage. Coming to the tariff structure, the UERC claims to have followed the regulations. It now gives reasons along with calculations for re-calculating the design energy. Coming to the

question of PPAs, the Commission contends that the appellant has not placed on record any approval granted by UPERC. It also contends that PPA dated 22.12.2001 was not received for approval of the Commission. The appellant reiterates that the PPAs are valid.

Decision with reasons :

23) The validity of the PPA is the basic question in this appeal. If the PPA is valid, the price of power determined by the PPA cannot be undone by a tariff order of the Commission. The PPA was initially entered into in 1999 and thereafter was revised and executed again on 22.12.2001. Admittedly, this PPA was submitted to UPERC which was the relevant Commission for the purpose of approval of the PPA at relevant time. After the revised PPA, the tariff was determined at the same rate as was agreed to under the PPA namely at Rs.2.50 per unit. Power was drawn from the project at the same rate till October 2005. Even after the Commission was constituted in September 2002, the same rate was approved of vide its orders dated 08.09.2003 and 08.12.2003.

24) The Uttaranchal Power Corporation Ltd. filed its ARR petition for the year 2003-2004 wherein it included a proposal to buy power from the appellant at the rate of Rs.2.50 per unit ahead of merit order. The order of the Commission on the ARR & Tariff for the

UPCL for the year 2003-04 dated 08.09.2003 mentions that UPCL asked for power purchase cost from IPPs of Rs.2.50 per unit ahead of merit order in line with the policy of the Government for promoting small hydro power station and the agreements already signed by the petition in this behalf. The decision of the Commission in this regard was as under:

“Regarding the petitioner’s contention that purchase from IPPs should be allowed at a price of Rs.2.50/- per unit ahead of merit order, but Commission feels that it has no hesitation to allow power purchase from IPPs as long as the purchase is economic and fits into the merit order.”

25) The table 5.14 given in that order of 08.09.03, the cost of power to be purchased by UPCL from IPPs is given as Rs.2.50 per unit. In the supplementary order of 08.12.03 in which impact of Govt.’s Policy Direction & Affidavit filed on 02.12.03 is considered, the cost of power to be purchased from IPPs again has been fixed at Rs.2.50 per unit. The Commission is now disputing the validity of the PPA on the ground that no approval for the PPA was ever granted by the Commission under the UERC (Conduct of Business) Regulation 2000 & Practice Direction for Renewable Energy Source Based IPPs. The Commission framed the Uttaranchal Electricity Regulatory Commission (Conduct of Business) Regulation 2002 in exercise of powers conferred on it by sub-section 4 of section 9 and

sub-section 1 of section 52 of the Uttaranchal (Uttar Pradesh Electricity Reforms Act) Adaptation and Modification Order dated 2001 which came into effect on 19.09.2002. Regulation 120 of these Regulations provide as under :

“REGULATION OF LICENCEE’S PURCHASE OF POWER

120.(1) The licensee shall file with the Commission in complete form copies of all Power Purchase Agreements already entered into by the licensee.

(2) The Commission shall be entitled to direct that the licensees shall establish to the satisfaction of the Commission that the purchase of power by the licensees is under a transparent power purchase procurement process and is economical and the power is necessary for the licensee to meet its service obligation.

(3) The licensee shall apply to the Commission to approve the draft Power Purchase Agreement that the Licensee proposes to enter into. The Commission may pass orders:

a) approving the agreement; or

b) approving the agreement with modifications proposed to the terms of the agreement; or

c) *rejecting the agreement*

(4) *The provision of Clauses (2) and (3) above or any action taken therein shall not, in any manner, prejudice the exercise of functions and powers of the Commission under any of the other provision of the Act, the Regulations and orders to be issued from time to time.”*

26) Sub Regulation 1 of Regulation 120 requires a licensee to file with the Commission all power purchase agreements already entered into by the licensee. Sub Regulation 3 requires that draft power purchase agreement be submitted for approval of the Commission. The Commission wants to treat the PPA in question, which was executed on 22.12.2001 as a draft power purchase agreement, and consider the same to be invalid as the same was not submitted for approval. The appellant is a generating company and is not a licensee. The agreement was entered into with the licensee and the licensee had to comply with the Regulation. The licensee did not submit the agreement dated 22.12.2001 for approval to the UPERC. The appellant submits that the licensee was not required to submit the PPA for approval of the Commission as the PPA dated 22.12.2001 was already complete and had been entered into validly with the licensee when the UERC (Conduct of

Business) Regulation was brought into force. Regulation 120(1) requires such a PPA to be only filed with the Commission.

27) The copy of the PPA has been furnished before us. The photocopy shows that the PPA was drawn on a stamp paper and was duly signed on behalf of the two parties namely the appellant and the Uttaranchal Power Corporation Ltd. The document also bears the signature of four witnesses. There is no challenge to the sufficiency of the stamp or to the authority of the persons who entered into the agreement on behalf of the two parties. No inherent defect in the agreement as such has been pointed out. There is no reason why this should be treated as draft agreement and not a concluded contract. On the day the Commission came into existence the agreement stood executed and therefore Clause 1 of Regulation 120 and not Clause 3 of 120 can be applied to it. It is submitted on behalf of the Commission that a similar provision had existed in the UPERC (Conduct of Business) Regulation which was notified in the year 2000 and therefore the agreement was required to be approved by the UPERC. However the fact of the matter is that an application seeking approval of the PPA had been submitted to Uttar Pradesh Electricity Regulatory Commission before the Commission was formed in January 2002. The UPERC returned the agreement to the Uttaranchal Power Corporation Ltd. on 05.02.2002 without any decision regarding approval/rejection of the PPA. The letter dated 05.02.2002 from the Secretary of the

UPERC merely advised that the approval be now obtained from the Uttaranchal Electricity Regulatory Commission. The letter is extracted below:

*“Ref: UPERC/Secy/149/2002
Date: 5th February, 2002*

Dear Sri Agrawal,

In view of the fact that Govt. of Uttaranchal has set up Electricity Regulatory Commission of Uttaranchal (ERCU) with effect from 1st January, 2002, draft PPAs of two hydro projects namely Rajwakti and Hanuman Ganga sent to this Commission vide your letter No. 1894/CMD/UPCL/P-4 dated 26th December, 2001 for approval are being returned herewith as this Commission no longer has jurisdiction to adjudicate upon these PPAs.

With best wishes,

*Yours sincerely,
(Rajeev Kapoor)
Secretary*

*Shri A. R. Agarwal,
CMD,
Uttaranchal Power Corporation Ltd.,
Kaulagarh PowerHouse,
F.R.I. Campus,
Dehradun – 248 006*

28) This letter does not support the view taken by the Commission. The advice of the Secretary of UPERC to seek the approval of the UERC cannot overrule the regulation framed either by the UPERC or by the present Commission of Uttaranchal. The Regulations are subordinate legislations. If the Regulations do not require the PPA to be submitted for approval, the letter of the Secretary cannot do so. The fact remains that on the day the Commission came into existence the PPA was a fait accompli, a document duly executed and having the legal force of a concluded contract. It was subject to the Regulation of the UPERC and needful was done by the licensee by submitting the same to the Regulatory Commission. It is true that the agreement was still being referred to as the draft PPA by the Secretary of the UPERC although it was a concluded contract. The Regulations of Uttar Pradesh Electricity Regulatory Commission had come into force in 2000 and accordingly the agreement, which was entered into in December 2001, was subject to the approval of the Uttar Pradesh Regulatory Commission. This perhaps was the reason why the PPA was still being referred to as a draft PPA by the UPERC.

29) It is further to be noted that although the Commission is claimed to have been constituted vide a notification of the Government of Uttaranchal dated 01.01.2002 the Commission had actually not come into existence at that time. The notification dated 01.01.02 is reproduced below:

*“Government of Uttarakhand
Officer Order*

01 January, 2002

No. 03/Nau-3-U/2002- Under Uttar Pradesh Electricity Reforms Act (Uttarakhand Adaptation and Modification) Order, 2001, the Governor hereby grants approval for constitution of a separate Electricity Regulatory Commission in the State of Uttarakhand for determination of electricity tariff for consumers, approval of power purchase agreements between electricity generators and suppliers and for protection of interests of consumers and agencies engaged in generation and distribution in electricity sector.

2- The name of the said Commission shall be Electricity Regulatory Commission of Uttarakhand-ERCU and its headquarter shall be at Dehradun.

*Keshav Desiraju,
Secretary”*

30) This notification merely says that the Governor was giving approval for constitution of the Electricity Regulatory Commission

of Uttaranchal. The Commission was actually formed much later in September 2002. At the time UPERC's letter dated 05.02.2002 was written, the UPERC was functioning as a Regulatory Commission for the State of Uttaranchal also. The relevant provision regarding continuation of UPERC as Regulatory Commission for newly created State of Uttaranchal is available in Section 63 of the Uttar Pradesh Re-organisation Act 2000. The relevant portion of the Section are reproduced below :

*“63. Provisions for Power Corporation Limited, etc. – (1)
The following bodies corporate constituted for the
existing State of Uttar Pradesh, namely:-*

*(a) the Uttar Pradesh Power Corporation Limited, the
Uttar Pradesh jal Vidyut Nigam Limited and the Uttar
Pradesh Rajya Vidyut Utpadan Nigam Limited;*

*(b) the Uttar Pradesh Electricity Regulatory Commission;
and*

*(c) the State Warehousing Corporation established
under the Warehousing Corporation Act, 1962 (58 of
1962)*

*shall, on and from the appointed day, continue to function
in those areas in respect of which they were functioning
immediately before that day, subject to the provisions of
this section and to such directions as may, from time to
time, be issued by the Central Government.”*

.....

.....

(4) Nothing in the preceding provisions of this section shall be construed as preventing the Government of the State of Uttar Pradesh or, as the case may be, the Government of the State of Uttaranchal from constituting, at any time on or after the appointed day, a State Power Corporation, an Electricity Regulatory Commission or a State warehousing Corporation for the State under the provisions of this Act relating to such Power Corporation, Commission or Warehousing Corporation;....”

31) Therefore, it was very much within the jurisdiction of the UPERC to approve or reject the PPA when it was returned to the licensee in February 2001. Thus the licensee did not fail in its duty in submitting the agreement to UPERC for its approval as was required by Regulations. UPERC instead of acting according to the Regulations and according to the Uttar Pradesh Re-organisation Act 2000 returned the agreement advising the licensee to submit the same before the Uttaranchal Electricity Regulatory Commission. At that time there was no Electricity Regulatory Commission for the State of Uttaranchal and therefore the licensee could not submit the same to any such Commission. Can the licensee be faulted for violation of the Regulation? The answer certainly is “NO”.

32) In fact, even the Commission considered the PPA as a valid and enforceable document since at no point of time before the impugned order, the Commission ever questioned the validity of the agreement and for three years after the constitution of the Commission tariff for power generation by the appellant continued to be fixed at Rs.2.50 per unit as noticed above. Therefore, we have no hesitation to say that even if it is presumed that the PPA dated 22.12.2001 requires any approval of the UERC, the approval can be deemed to have been granted by UERC's adherence to the price of power as determined by the PPA. The UERC cannot now discard the PPA and fix the tariff on its own on the basis of factors other than the PPA.

33) It may be mentioned here that a similar situation arose before this Tribunal in the case of Uttaranchal Jal Vidyut Nigam Ltd. Vs. Uttaranchal Electricity Regulatory Commission & Others, Appeal No.189/05 which was decided by a judgment dated 14.09.2006. In that case a PPA had been executed on 18.12.2000 and the Commission had taken a view that the PPA was invalid for want of approval of the Commission. This Tribunal had the following to say on the validity of such an agreement :

“42. Factually there was no Regulatory Commission for the State of Uttaranchal during the relevant period. Therefore, the question of approval of PPA or non-approval

is inconsequential. Contract concluded in terms of PPA is binding on the parties and the same could not be re-opened by the Regulatory Commission on any later date nor the commission is the authority to interfere with the terms of PPA entered between the parties.”

34) In the above situation the Commission has no option but to give effect to the PPA executed between the appellant and the Uttaranchal Power Corporation Ltd. The earlier order dated 29.03.2006 which occasioned the passing of the impugned order, does not categorically state the pleas raised by the appellant before this Tribunal at that time. The only reason mentioned in that order for remanding the matter back to the Commission is the joint request made by the parties. The Commission assured this Tribunal that it would consider the material that may be placed before it and it would take a fresh look and fix the tariff according to law. The appellant however, has placed before this Tribunal the written submissions made to the Commission. The appellant sufficiently pressed its point regarding the validity of the PPA. The Commission has not applied the correct principles in rejecting the PPA and proceeding to fix the tariff for generation of electricity by the appellant without reference to the PPA. Hence, the order of the Commission needs to be set aside on this short ground alone.

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

Pronounced in open court on the **30th day of October, 2007.**

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member

The End