

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 11 of 2019

In the matter of:

Petition seeking implementation of Order passed on 10.04.2014 by the Commission for Vanala Small Hydro Power Electric Generating Station (15 MW) unit of M/s Him Urja Pvt. Ltd.

AND

Petition No. 21 of 2019

Petition seeking implementation of Order passed on 21.12.2012 by the Commission for Vanala Small Hydro Power Electric Generating Station (15 MW) unit of M/s Him Urja Pvt. Ltd.

AND

Petition No. 20 of 2019

Petition seeking implementation of Order passed on 17.03.2016 by the Commission for Rajwakti Small Hydro Power Project (4.4 MW) unit of M/s Him Urja Pvt. Ltd.

In the matter of:

M/s Him Urja Pvt. Ltd.

... Petitioner

AND

In the matter of:

Uttarakhand Power Corporation Ltd.

... Respondent

CORAM

Shri D.P. Gairola Member (Law)

Shri M.K.Jain Member (Technical)

Date of Hearing : June 11, 2019

Date of Order : July 29, 2019

The Order relates to the Petitions dated 11.03.2019 filed by M/s Him Urja Pvt. Ltd (hereinafter referred to as "Petitioner") seeking implementation of the Commission's Orders dated 21.12.2012 and 10.04.2014 for Vanala SHP and Order dated 17.03.2016 for Rajwakti SHP

since the payments as ordered by the Commission have been released after deduction of prompt payment discount though the payments were made beyond the dates as directed by the Commission.

Since the issues raised in the three Petitions were similar in nature, the Commission vide its Order dated 02.04.2019 had decided to club the same.

1. Background

- 1.1. With regard to the Commission's Order dated 21.12.2012 in the matter of the Petition filed by the Petitioner seeking determination of tariff of its Vanala SHP, it is to be noted that the Petitioner was supplying power to Uttarakhand Power Corporation Ltd. (hereinafter referred to as "UPCL" or "Respondent") under short term Power Purchase Agreement (PPA) dated 15.05.2010 valid upto 14.05.2011. However, UPCL had terminated the PPA in July, 2010. The Petitioner approached the Hon'ble Supreme Court under Writ Petition and the Hon'ble Apex Court directed that the payment should be made in accordance with the terms and conditions of the PPA till the final decision. Accordingly, the Petitioner had continued to supply power in accordance with the directions of the Hon'ble Apex Court and received the payments till August, 2012. The Writ Petition was withdrawn by the Petitioner and subsequently, UPCL stopped making payment from September, 2012 onwards. The Petitioner had filed a Petition before the Commission for determination of the project specific tariff from the date of commissioning of the Vanala SHP and also requested the Commission to direct UPCL for making outstanding payment from September, 2012 to November, 2012.

The Commission vide its Order dated 21.12.2012 directed UPCL to execute a long term PPA with the Petitioner and release the payments due to the Petitioner within three days of the date of Order, i.e. by 24.12.2012 as agreed by them and submit the compliance. UPCL, aggrieved by the said Order, filed a Review Petition which was rejected by the Commission vide Order dated 08.01.2013 and UPCL was once again directed to make payment within three days of the Order, i.e. by 11.01.2013.

- 1.2. With regard to the Commission's Order dated 10.04.2014 in the matter of determination of tariff for Vanala SHP, it is to be noted that the Commission vide letter dated 04.12.2012 had approved a provisional tariff of Rs. 3.50/kWh till the finalisation of tariff for the Vanala SHP. Subsequently, the Commission vide Order dated 10.04.2014 had determined the final tariff of

Rs. 4.00/kWh against the provisional tariff of Rs. 3.50/kWh. Further, the Commission had directed UPCL to pay the arrears to the Petitioner for the difference in the project specific levelised tariff determined by that Order and the provisional tariff i.e. Rs. 3.50/kWh in six equal monthly instalments.

- 1.3. With regard to the Commission's Order dated 17.03.2016 in the matter of Petition filed by UPCL seeking clarification of Order dated 07.01.2016 passed by the Commission directing UREDA to grant accreditation to M/s Him Urja Pvt. Ltd. on their application dated 22.06.2012 and also directed UPCL to pay the Petitioner in lieu of the right of RECs surrendered to UPCL at the rate of Rs. 1.45/kWh of energy received by UPCL from 05.10.2012 till 29.02.2016 in three equal instalments. 1st payment was to be made within 5 days of the date of the Order and balance instalments were to be paid in first week of April, 2016 and May, 2016.

2. Petitioner's submissions

- 2.1. The Petitioner submitted that UPCL did not comply with the directions given by the Commission vide its Orders dated 21.12.2012, 10.04.2014 and 17.03.2016 for making payments within the specific time as directed by the said respective Orders.
- 2.2. The Petitioner submitted that the Commission vide Order dated 21.12.2012 had directed UPCL to release the payments due to the Petitioner within three days of the Order i.e. by 24.12.2012. The Petitioner also submitted that in another matter, the Commission vide Order dated 10.04.2014 had directed UPCL to pay the arrears to the Petitioner for the difference in the project specific levelised tariff determined by the Order dated 10.04.2014 and the tariff, i.e. Rs. 3.50/kWh for Vanala SHP, being paid to the Petitioner in six equal monthly instalments. Further, the Commission vide Order dated 17.03.2016 had directed UPCL to pay the Petitioner in lieu of the right of RECs surrendered to UPCL at the rate of Rs. 1.45/kWh of energy received by UPCL from 05.10.2012 to 29.2.2016 in three equal instalments and according to the Commission's direction, 1st instalment was to be made within five days of the date of the Order and balance two instalments were to be paid in first week of April, 2016 and May, 2016.
- 2.3. The Petitioner submitted that UPCL did not make the payment on the date as directed by the Commission vide its orders and also deducted prompt payment discount of 2% as per respective PPA which has no application in the present cases where directions have been issued by the Commission to make payment on certain dates. The Petitioner also submitted

that UPCL has misinterpreted and wrongly applied the Order of the Commission to the extent that the payments are to be made on the dates as ordered by the Commission and the terms and conditions of the PPA have no application in these cases.

- 2.4. The Petitioner submitted that in the matter of prompt payment discount deducted by UPCL while complying with the directions given by the Commission vide its Order dated 21.12.2012, it had requested UPCL vide letters dated 10.05.2013, 17.11.2014, 28.09.2016 and 13.02.2019 to pay the discount wrongly deducted along with interest on delayed payment @ 1.25%. However, till date no payment has been made by UPCL. Accordingly, the Petitioner requested for interest till 28.02.2019 on the discount deducted. Details of the same are as follows:

Month	Invoice Amount	Payment due date as per UERC order	Payment received on	Amount received	Discount deducted	Delayed days	Interest on Delayed Payment @1.25% pm	Interest on discount from 10.01.2013 @1.25%pm
Sep-12	1,82,85,960	24.12.2012	10.01.2013	1,79,20,241	3,65,719			
Oct-12	2,91,69,420	24.12.2012	10.01.2013	2,85,86,032	5,83,388			
Nov-12	1,67,43,300	24.12.2012	10.01.2013	1,64,08,434	3,34,866			
Sub-total	6,41,98,680			6,29,14,706	12,83,974	17	4,48,511	11,81,959
Dec-12	1,15,18,500	10.01.2013	10.01.2013	1,12,88,130	2,30,370			
Total	7,57,17,180			7,42,02,836	15,14,344			

- 2.5. Further, with regard to prompt payment discount deducted by UPCL while making payment as per the directions of the Commission vide Order dated 10.04.2014, the Petitioner submitted that it had requested UPCL vide letter dated 29.11.2014 to pay the prompt payment discount alongwith the interest thereon. However, UPCL had not made any payment till the date. The Petitioner also requested for the interest @ 1.25% p.m. on the wrongly deducted prompt discount till 28.03.2019. Details of the same are as follows:

Instalments due date as per order	Instalment amount	Payment received on	Amount received	Discount deducted	Delayed days	Interest on Delayed Payment @1.25% pm	Interest on discount from 27-11-2014 to 28-2-2019 @1.25%pm
Apr,14	87,94,224	17.11.2014	86,18,340	1,75,884	201	7,26,427	6,98,386
May,14	87,94,224	27.11.2014	4,30,53,436		180	6,50,532	
Jun,14	87,94,224				150	5,42,110	
July,14	87,94,224				119	4,30,074	
Aug,14	87,94,224				88	3,18,038	
Sep,14	87,94,224				58	2,09,616	
Total	5,27,65,344					5,16,71,776	

- 2.6. Further, with regard to the prompt payment discount deducted by UPCL while making payment as per the directions of the Commission vide Order dated 17.03.2016, the Petitioner submitted that it had requested UPCL vide letter dated 31.03.2016, 28.06.2016, 28.09.2016 and 13.02.2019 to pay the prompt payment discount which was wrongly deducted on the payment

of 1st instalment as the payment is not part of the PPA. However, UPCL had not made any payment till the date. The Petitioner also requested for the interest @ 1.25% p.m. on the wrongly deducted prompt discount till 28.03.2019. Details of the same are as follows:

S. No.	Instalment amount	Due date of payment as per order of UERC	Actual date of Payment	Net Amount received	Discount deducted by UPCL	No. of delayed day of payment	Interest @1.25% p.m. as per PPA on delayed payment	Interest on discount from 23.05.2016 to 28.02.2019 @1.25%pm
1	2,93,36,616	22.03.2016	30.03.2016	2,87,49,884	5,86,732	8	96,449	2,56,796
2	2,93,36,616	07.04.2016	07.04.2016	2,87,49,884	5,86,732	--	---	2,54,625
3	2,93,36,615	07.05.2016	23.05.2016	2,87,49,884	5,86,731	16	1,92,898	2,43,775
Total	8,80,09,847			8,62,49,652	17,60,195		2,89,347	7,55,196

3. Respondent's replies and Petitioner's rejoinders

3.1. The Respondent, i.e. UPCL, submitted that the Petitioner has not mentioned the legal provisions under which the Petitions have been filed and has rather mentioned that the Petitions are for seeking implementation of the respective Orders. The Respondent also submitted that the orders have already been implemented which is also admitted by the Petitioner itself.

The Petitioner vide rejoinder submitted that the orders of the Commission have been wrongly implemented therefore these Petitions have been filed. The Petitioner submitted that it has right to claim correct implementation of Orders through Petition for clarification also. As per Regulation 66 of the Conduct of Business Regulations, the Secretary of the Commission shall ensure enforcement and compliance of the Orders passed by the Commission.

In counter reply, the Respondent once again reiterated that the implementation of the orders have already been done hence the Petitions are not maintainable and there is no provision for implementing the order as has been sought by the Petitioner.

3.2. The Respondent submitted that the relief sought by the Petitioner is barred by limitation and is also not in accordance with the regulations or provisions therein, in fact the same are even against the terms and conditions of PPA executed between the parties. The Petitions are also bad for delay and latches.

The Petitioner vide its rejoinder submitted that the case of the Petitioner is squarely covered by CERC in its judgment dated 09.05.2013 in the case of Bhushan Power and Steel

Ltd. vs. GRIDCO Ltd. Further, The Limitation Act, 1963 is not applicable to the proceedings of Electricity Regulatory Commission, being a quasi judicial proceeding. This proposition has been confirmed by Full Bench of Hon'ble APTEL in the judgment dated 13.03.2015 in the case of Lafarge India (P) Ltd. vs. CGSERC as also in the judgment of the Hon'ble Supreme Court of India in the matter of TN Generation & Distribution Corporation Ltd vs. PPN Power Generation Co. Pvt. Ltd.. The Electricity Regulatory Commission is also not bound by the procedural or evidential trapping of the civil court. Therefore, the Petitions are not barred by limitation. The Petitioner also submitted that it had approached the Respondent many time for implementation of the orders correctly but the Respondent did not consider appropriate even to reply to any of the communication of the Petitioner.

In its subsequent reply, the Respondent submitted that the judgment of CERC passed vide Order dated 09.05.2013 wherein the question of limitation had been discussed relying upon certain judgments of the Hon'ble Supreme Court, CERC did not consider the preliminary objection of limitation on face of the case when CERC found that the Petitioner was diligently pursuing his claim and hence, there is no inordinate delay. In the said order of CERC other judgments of Hon'ble Supreme Court were discussed wherein the Court had refused to intervene when found the Petitioner guilty of laches. The Respondent also submitted that the Hon'ble Supreme Court vide its judgment dated 16.10.2015 in the matter of Andhra Pradesh Power Coordination Committee vs. Lanco Kondapalli Power Ltd. in Civil Appeal no. 6036 of 2012 has held that the claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court if the Commission exercises its power under Section 86(1)(f) of the Electricity Act, 2003. Therefore, when the adjudicatory function is exercised by the Commission, limitation as prescribed for the ordinary suit would apply in accordance with the provisions of the Limitation Act, 1963. The Respondent submitted that in light of the aforementioned judgment of the Hon'ble Supreme Court, the ruling cited by the Petitioner will not apply and from the fact of the case it is abundantly clear that the Petitions are barred by limitation.

- 3.3. With regard to Order dated 21.12.2012, the Respondent submitted that the contention of the Petitioner that PPA was not applicable at that time is wrong even in the light of letter dated 04.12.2012 and order dated 21.12.2012 of the Commission wherein the Commission had specifically clarified that only after the execution of the PPA, the provisional tariff of Rs.

3.50/kWh shall be applicable for Vanala SHP. Moreover, any commercial transaction between the Corporation and the generator can only be done after having legal and valid agreement and same should be in line with the relevant Regulations issued by the Commission from time to time. The Respondent also submitted that the PPA executed between the parties and also the relevant regulations permits the Respondent to deduct rebate on making the payment within one month of raising the invoice. The Respondent also submitted that being aggrieved by the said Order the Respondent had filed a review Petition and the Commission vide Order dated 08.01.2013 directed the Petitioner to release the outstanding payment due to the Petitioner within three days of the Order, i.e. by 11.01.2013 and in compliance to the same the payment was made by UPCL within the time granted as per said Order.

The Petitioner vide its rejoinder submitted that Regulation 59 to 63 of UERC (Conduct of Business) Regulations, 2014 provides for inherent powers as also deviation, power to remove difficulties etc. Similar powers are available to the State Commission under tariff Regulations for renewable energy. Further, referring to Hon'ble Supreme Court judgment dated 05.07.2016, the Petitioner submitted that the Commission in its order dated 21.12.2012 directed the Respondent to make payment within prescribed dates. However, UPCL did not adhere to the dates given in the respective orders and further resorted to deduction of 2% on the basis of the prompt payment discount as provided in the PPA for monthly payment of bills raised by the Petitioner. The Petitioner also submitted that UPCL did not pursue its rights under the PPA regarding deduction of prompt payment or the time period of one month allowed under the PPA when strictures were being issued by the Commission for non-payment of dues within the specific period.

3.4. The Respondent also submitted that the orders of the Commission have to be interpreted harmoniously with the provisions of the Regulations, if the Regulations provide a time to make payment and also for the rebate to be deducted then no illegality in complying with the provisions of the Regulations can be found with the act of the Respondent. The Petitioner has mentioned that prompt payment discount was deducted though the payment was made beyond the dates as directed by the Commission which shows that the Petitioner is assuming that the prompt payment rebate was deductible only if the payment was made within the time mentioned in the Order, understanding and interpreting the said order in this manner

would make it inconsistent with the provisions of the Regulations.

The Petitioner vide rejoinder submitted that the argument that the payment has to be in accordance with the PPA and UPCL can make payment only in accordance with the PPA is misplaced. The Commission has varied the rates of the power as well as the schedule of payments, therefore, only so called prompt payment discount cannot survive unless so saved by this Commission in its Order. The dates of payment given in the order have considered the convenience of the UPCL by spreading out payment wherever feasible. The Petitioner also submitted that the PPA is creation of the Commission and it has powers to provide for and supplement the contents of the PPA as it deems fit. Such provisions exist in the PPA itself.

In counter reply, the Respondent submitted that the Petitioner has not argued before the Commission that the rebate deducted was not as per the provisions of the PPA but only submitted that the provisions of the PPA would not apply without any justification or basis for making such submission. The Respondent also submitted that it has been making payments to the Petitioner after deducting the rebate as per the provisions of the PPA, these deduction are made on all the payments irrespective of nature. Further, the Petitioner had on various times given its written consent for making early payments after deducting the rebate, hence, the question is not whether or what rebate is to be deducted but the Petitioner has emphasized that when the payments are to be made in compliance of the Order of the Commission, UPCL ought not have deducted the rebate. Such proposition being wrong, there is no ground for presuming that the rebate should not be deducted as per the terms and conditions of the agreement and also as per the practice followed by the parties for making timely payments. The Respondent also submitted that it would be highly malafide and unjust if any party at the time of receiving prompt payment accepts the same and obtains benefits of the early payment and thereafter claims undue benefit by alleging that rebate should have not been deducted.

- 3.5. The Respondent submitted that the Petitioner had made irrelevant correspondence in the matter of deduction of prompt payment rebate without any basis. The representative of the Petitioner who came to submit the letters was informed that their request is not tenable and is against the PPA and Regulation. Further, it appeared that the Petitioner had agreed to the suggestion of the Respondent and had stopped making any such demand thereafter. The

Respondent also submitted that the Petitioner has not suffered any damage neither any short payment was made by the Respondent. The prompt payment is not a discount but is a benefit conferred upon the Respondent for making prompt payment and is to compensate the benefit derived by the Petitioner by receiving payment earlier than the time provided in the Regulations. No damage has occurred to the Petitioner neither Petitioner is entitled to any interest or interest as claimed.

The Petitioner vide its rejoinder submitted that the Regulations provide for the rebate on prompt payment to provide incentive to the utilities in timely payments of the dues. Therefore, in the determination of the tariffs, interest on working capital is allowed and the rebate is allowed if the payment is made by the utility during the period for which interest on working capital is allowed in computation of the tariff. In the present case period of more than two months have elapsed since the generation was made by the generator therefore there cannot be any occasion of such reimbursement. Further, the Petitioner has claimed interest on such illegal deductions made by UPCL from the date of deduction till 28.02.2016 under the principle of compensation to be paid for loss and harassment caused to the Petitioner under Regulation 51 of UERC (Conduct of Business) Regulations, 2014 and as has held by the Hon'ble Supreme Court of India in the case of TN Generation & Distribution Corporation Ltd. vs. PPN Power Generation Co. Pvt. Ltd.

3.6. With regard to Order dated 17.03.2016 in the matter of Rajwakti SHP, the Respondent submitted that the relations between the Petitioner and the Respondent arise only out of Power Purchase Agreement, the parties will have no *locus standi* unless there is a PPA, even the payment related to REC has to be the part of PPA and cannot be dealt as any separate item. The Commission while allowing separate charges for REC component had themselves considered it and for future discourse had directed both the parties to enter into a supplementary PPA.

The Petitioner submitted that the Hon'ble APTEL had allowed REC to the Petitioner on the basis that the Petitioner is not getting preferential tariff. REC has nothing to do with the existing PPA and the Petitioner was free to sell REC in open market however since the Respondent was defaulting in Renewable Purchase Obligation, the Commission ordered that the REC accrued to the Petitioner from 2012 to 31.03.2016 be sold to UPCL at a rate determined by the Commission at Rs. 1.45/unit whereas the prevailing rate of REC in the

market was Rs. 1.50/kWh at that time. Therefore, this transaction has no connection whatsoever with the existing PPA. The Petitioner agreed to sell the REC arising with effect from 01.04.2016 onwards for a period of five years to UPCL under PPA dated 06.04.2016. Further, the Petitioner shall be free to sell its REC in open market after 31.03.2021 onwards.

The Respondent vide its reply submitted that when the Respondent had entered into a PPA to purchase the energy generated by the SHP there was no concept of renewable energy or REC, the Petitioner could claim the REC only against the energy generated by the plant and REC is not a separate right, since the energy generated from the plant is admittedly as per the terms and conditions of the PPA which is also approved by the Commission therefore RECs agreed to be purchased from the Petitioner cannot be beyond the provisions of the existing PPA. The Respondent also submitted that the supplementary PPA executed with regard to RE component to be purchased was part and parcel of the original PPA hence also the contention of the Petitioner is totally wrong because it cannot be said that from a particular date and for future both the power and the RE component are governed by PPAs whereas for a particular duration in the past there can be purchase of REC without any PPA and consent from the Commission.

- 3.7. The Respondent submitted that the Petitioner has not submitted the date of submission of invoices. Further, no payment could be released without proper submission of bills.

The Petitioner vide rejoinder submitted that orders of the Commission are decree and it does not need clutches of bills for implementation of the orders. Whether the Petitioner submits the bill or not is of no consequence as far as implementation of the order is concerned. The Respondent has to comply with the order on the dates as provided in the order irrespective of the bill. The rights to claim the money has accrued to the Petitioner in accordance with the orders of the Commission and not by raising the bills.

The Respondent vide its reply submitted that the Petitioner itself had raised bill for enforcing the Order dated 10.04.2014 in the matter of determination of tariff of Vanala SHP. During the proceedings of the hearing in the matter, the Petitioner admitted that it had raised the invoice and withdrew its contention on this particular matter.

- 3.8. The Petitioner submitted that the fee deposited was not as per UERC (Fees and Fine) (2nd Amendment) Regulations, 2018. The fee should be paid as per Part B (1) of schedule of

Regulation 3 of the said Regulations.

The Petitioner submitted that Regulation 66 of the UERC (Conduct of Business) Regulations, 2014 provides that the Secretary shall ensure enforcement and compliance of the Orders passed by the Commission. Further, the Commission has inherent powers of implementation of its Orders and also initiate the proceedings of penalties and fines and contempt proceedings against the defaulting party.

4. Commission's Analysis and view

- 4.1. The Commission conducted a hearing on the merit of the Petitions on 11.06.2019. Both the parties reiterated their submissions before the Commission. The Commission heard both the parties and carefully considered their written submissions. After examining the relevant material available on records, issues raised by the Petitioner have been dealt in the subsequent paragraphs of this Order.
- 4.2. The Petitioner has approached the Commission referring to three Orders of the Commission vide which the Commission had directed the Respondent to make the payments to the Petitioner within the specific time frame. In the matter, as far as legal provisions under which the Petitions have been filed is concerned, it is to be noted that the Petitioner vide its submission has clarified that the Petitions have been submitted under Regulation 66 of UERC (Conduct of Business) Regulations, 2014 for implementation of the respective Orders of the Commission. Further, the Respondent has argued that the orders of the Commission have been implemented properly hence the Petitions are not maintainable.

In the present cases, the Commission has the jurisdiction to examine whether the Orders of the Commission have been implemented in true spirit of legal provisions or not. The Commission has dealt with the issues raised by the Petitioner and the Respondent in the subsequent paragraphs of this Order.

- 4.3. Before going into merits, it is to be noted that the Respondent has raised an issue stating that the fees submitted by the Petitioner is not in accordance with the UERC (Fees & Fines) (Second Amendment) Regulations, 2018. The fees should be deposited as per Part-B (1), i.e. "*Adjudication of dispute and differences under the Electricity Act, 2003 and regulations specified there under*" of Schedule under Regulation 3 of the UERC (Fees and Fines) (Second Amendment) Regulations, 2018 whereas the Petitioner has submitted the fees as per Part-A

(4) i.e. *Miscellaneous Petitions not covered elsewhere*, of the said Regulations.

It is pertinent to mention that Hon'ble APTEL vide its judgment dated 30.05.2019 in Appeal no. 350 of 2017 in the matter of M/s Ramnad Solar Power Ltd. Versus Tamil Nadu Electricity Regulatory Commission has ordered that the criteria of classifying a Petition as Dispute or miscellaneous depends on the nature of the prayer. If the nature of the prayer calls for the exercise of the regulatory powers of the State Commission than it is regulatory and it will be termed as miscellaneous Petition whereas if the nature of the Petition is such that it is not regulatory but adjudicatory than only it can be termed as a Dispute related Petition. The Relevant extract of the judgment dated 30.05.2019 is as follows:

"xi) ... One may ask what is the criteria for classifying a Petition as DPR or miscellaneous and the answer is nature of the prayer. It is the nature of the prayer which will define the nature of the Petition. If the nature of the prayer calls for the exercise of the regulatory powers of the State Commission than it is regulatory and it will be termed as a miscellaneous Petition whereas if the nature of the Petition is such that it is not regulatory but adjudicatory than only it can be termed as DRP."

In the present Petitions, the prayers made by the Petitioner in the respective Petition are as follows:

(i.) Petition no. 11 of 2019:

"(a) Hon'ble Commission may direct UPCL to pay the amount Rs. 10,93,568/- on account of discount deducted while making the payment.

(b) Hon'ble Commission may direct UPCL to pay the amount Rs. 34,75,181/- on account of interest for delayed payment of instalment and interest till 28.02.2019 on the amount deducted as prompt payment discount.

(c) Pass any other or further orders required in the interest of justice, equity and fairness."

(ii.) Petition no. 20 of 2019:

"(a) Hon'ble Commission may direct UPCL to pay the amount Rs. 17,60,195/- on account of discount deducted while making the payment.

(b) Hon'ble Commission may direct UPCL to pay the amount Rs. 10,44,543/- on account of interest for delayed payment of instalment and interest on prompt payment discount till 28.02.2019.

(c) Pass any other or further orders required in the interest of justice, equity and fairness."

(iii.) Petition no. 21 of 2019:

"(a) Hon'ble Commission may direct UPCL to pay the amount Rs. 12,83,974/- on account of discount deducted while making the payment.

(b) Hon'ble Commission may direct UPCL to pay the amount Rs. 16,30,470/- on account of interest for delayed payment of instalment and interest on discount till 28.02.2019.

(c) Pass any other or further orders required in the interest of justice, equity and fairness."

From the judgment of the Hon'ble APTEL it is amply clear that the nature of the prayer in the Petition will define the nature of the Petition as to whether such Petition calls for exercise of the regulatory powers or the adjudicatory powers of the State Commission. Since, the nature of the prayers, as mentioned above, in the present Petitions calls for the implementation of the Commission's Order 21.12.2012 and 10.04.2014 for Vanala SHP and Order dated 17.03.2016 for Rajwakti SHP of the Petitioner, though not articulated explicitly, shall attract the regulatory powers of the Commission.

4.4. With regard to applicability of the Limitation Act, 1963 in the present cases, the Petitioner has submitted that Hon'ble Supreme Court vide judgment dated 04.04.2014 in case of TN Generation & Distribution Corporation Ltd. vs. PPN Power Generation Co. Pvt. Ltd. held that the State Electricity Regulatory Commission is not bound by the procedural or evidential trappings of the civil court. Therefore, the Limitation Act would not be applicable to the State Electricity Regulatory Commissions. In reply, the Respondent submitted that Hon'ble Supreme Court in its judgment dated 16.10.2015 in the matter of AP Power Coordination Committee Vs. M/s Lanco Kondapalli Power Ltd. had held that limitations specified under the Limitation Act shall be applicable on account of its judicial power while adjudicating under Section 86(1)(f) of the Electricity Act, 2003.

The Commission has gone through both the judgments of the Hon'ble Supreme Court. The Commission has observed that the Hon'ble Court vide its judgment dated 16.10.2015 in the case of AP Power Coordination Committee vs. M/s Lanco Kondapalli Power Ltd. has held that the provisions of the Limitation Act, 1963 shall be applicable to the State Commission where it executes its judicial powers under Section 86(1)(f) of the Electricity Act, 2003 whereas such provisions/limitations shall not be relevant in respect of other powers or

functions of the State Commission which may be administrative or regulatory. The relevant extract of the said judgment is as follows:

“30. ... Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in appropriate case, a specified period may be excluded on account of principle underlying salutary provisions like Section 5 or 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.”

Further, as discussed under paragraph 4.3 of this order, the present Petitions are for implementation of the Commission’s various orders and hence, the Commission invokes its regulatory powers. Therefore, based on the aforesaid judgment of the Hon’ble Supreme Court, limitation specified under Limitation Act shall not be applicable in the present cases.

Further, for the sake of clarity, if the Limitation Act would have applied in the present cases, the Limitation Act specifies a limitation period of twelve years for the execution of any decree or order of the civil court which shall begin when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. In the Present case, the Commission had passed the Orders on 21.12.2012 (review Order 08.01.2013), 10.04.2014 and 17.03.2016. Accordingly, it is clear from the above that none of the Petitions are barred by the limitation as the Petitioner has approached prior to the expiry of twelve years from the date of the respective orders. Further, the Commission would like to reiterate that the provisions of the Limitation Act shall not be applicable in the present cases as regulatory power of the Commission shall be exercised.

4.5. As far as applicability of Orders, PPA or Regulations is concerned, it is worth mentioning that the Orders of the Commission should be read in addition to the provisions of the Electricity Act, 2003 & regulations notified thereunder and cannot have a digressive interpretation. The Orders of the Commission cannot be read in isolation to the prevailing

provisions of the Regulations.

Further, with regard to rebate and late payment surcharge, Regulation 23 and Regulation 24 of RE Regulations, 2010 specifies as follows:

“23. Rebate

***For Payment of bill** through 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.*

24. Late Payment Surcharge

*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.”*

(Emphasis Added)

It is to be noted that as per aforesaid regulations, the distribution company shall be entitled for rebate in case of prompt payment and late payment surcharge shall be levied on the distribution licensee in case of delay in payment of bills irrespective of its nature. Accordingly, all kind of bills whether pertaining to past dues or monthly generation, shall be governed by the aforesaid regulations.

Further, the Respondent submitted that the Petitioner had on various times given his written consent for making early payments after deducting the rebate. The Respondent also submitted that it would be highly malafide and unjust if any party at the time of receiving prompt payment accepts the same and obtain benefits of the early payment and thereafter claims undue benefit by alleging that rebate should have not been deducted. The Respondent further submitted that the orders of the Commission has to be interpreted harmoniously with the provisions of the Regulations, if the Regulations provides a time frame for deduction of rebate on making timely payments, then no illegality in complying with the provisions of the Regulations can be found with the act of the Respondent. There is certainly deviation in the statements of the Respondent. At the one end the Respondent says that the Petitioner has given written consent for making early payments after deducting rebate whereas on the other end it says that provisions of regulations shall prevail.

The Commission has gone through the provisions of PPA and RE Regulations, 2010. With regard to payments including rebate and late payment surcharge, PPA executed as on

21.12.2012 specifies as follows:

“5.4 UPCL shall make full payment against such Monthly Bills to the Generating Company from the date of the receipt of original monthly bill with complete documents with following rebate options:-

(i) UPCL shall avail 2% rebate for prompt (within 07 working days) payment.

(ii) UPCL shall avail 1% rebate for payment within 30 (Thirty) working days.”

The Commission has observed that the aforesaid clause of the PPA was not consistent with the provisions of RE Regulations, 2010. With regard to rebate, Regulation 23 of RE Regulations, 2010 specifies as follows:

“23. Rebate

For Payment of bill through 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.”

Further, Regulation 6(7) of RE Regulations, 2010 specifies as follows:

“Except as provided in First & Second Proviso to sub-Regulation (1) of Regulation 2 above, all Power Purchase Agreement signed by the generating stations existing on the date of notification of these regulations shall be renewed in accordance with these regulations and such renewed PPAs shall be valid for entire life of the RE Based Generating Stations and Co-generating Stations.”

Accordingly, all the existing PPAs were required to be modified in accordance with the provisions of RE Regulations, 2010. Moreover, as discussed in the Order hereinafter, where a generator gets covered under prevailing RE Regulations then all the conditions specified in the said RE Regulations shall be applicable. Hence, provisions of the RE Regulations, 2010 shall prevail in the present case.

4.6. With regard to Order dated 21.12.2012 in the matter of determination of tariff for Vanala SHP, it is to be noted that the Commission had directed the Respondent to make payment within 3 days of the date of Order i.e. by 24.12.2012. Subsequently, UPCL filed a review Petition in the matter which was rejected by the Commission and once again the Commission vide review Order dated 08.01.2013 directed UPCL to make payment by 11.01.2013.

Here, it is worth mentioning that the Petitioner was supplying power to Uttarakhand

Power Corporation Ltd. (hereinafter referred to as "UPCL" or "Respondent") under short term PPA dated 15.05.2010 which was valid till 14.05.2011. However, UPCL terminated the PPA in July, 2010. The Petitioner approached the Hon'ble Supreme Court under Writ Petition and the Hon'ble Supreme Court directed as follows:

"Having heard learned counsel for the respective parties we allow such prayer and direct the Petitioner No. 1 company to generate power and provide the same to the respondent no. 3 and STU and Uttaranchal till decision in special leave petition."

In compliance to the order of the Hon'ble Apex Court, the Petitioner kept supplying power to the Respondent and payments were honored by the Respondent in accordance with the provisions of the short term PPA. Subsequently, the Petitioner withdrew the writ Petition from the Hon'ble Apex Court on 25.07.2012 and all the interim Orders issued by the Hon'ble Apex Court were, therefore, vacated. Accordingly, there was neither any PPA nor any Order binding the Petitioner and Respondent w.e.f. 25.07.2012. However, it also cannot be denied that even after the withdrawal of the writ Petition, UPCL continued to consume the electricity supplied by the Petitioner from its Vanala SHP without execution of any agreement. Further, the Hon'ble APTEL in its judgment dated 23.04.2019 in Appeal no. 287 of 2015 has ordered that where a generator gets covered under prevailing RE Regulations then all the conditions specified in the said RE Regulations shall be applicable. The relevant extract of the said judgment is as follows:

"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"

Accordingly, the terms and conditions specified under UERC (Tariff and Other Terms for Supply of Electricity from non- conventional and Renewable Energy Sources) Regulations, 2010 (hereinafter referred to as "RE Regulations, 2010") shall prevail. Therefore, with regard to rebate and late payment surcharge, Regulation 23 and Regulation 24 of RE Regulations, 2010 shall be applicable to all kind of bills irrespective of nature of payment as discussed under paragraph 4.5 of this Order.

It is to be noted that the amount to be paid to the Petitioner, as per the direction of the Commission vide its Order dated 21.12.2012, were not the monthly payments for the supply of electricity but outstanding payments which should have been paid by the Respondent on

monthly basis in the past itself in accordance with the provisions of the regulations and further no carrying cost was allowed on the outstanding dues in the aforesaid Order. Furthermore, it is to be noted that the Respondent had approached the Commission for review of the Order dated 21.12.2012 and the Commission vide Order dated 08.01.2013 rejected the review Petition directing it to pay the outstanding amounts within 3 days of the Order i.e. by 11.01.2013 and the Petitioner has made the payments on 10.01.2013.

Accordingly, based on the above discussion, the Commission had provided a special dispensation to the Petitioner in the present case and reduced the period for the purpose of rebate as well late payment surcharge to 3 days instead of 30 days for rebate and 60 days for late payment surcharge, considering the fact that RE Regulations, 2010 does not provide for carrying cost and the payments should have already been paid by the Respondent on monthly basis. Accordingly, the outstanding payments were required to be paid within 3 days as specified in the Order while other conditions of the above regulations continued to apply without any deviation.

Further, from the submissions of the Respondent, the Commission observed that the Respondent has paid the outstanding amount on 10.01.2013, i.e. prior to the due date as specified in the review Order dated 08.01.2013 by the Commission. Accordingly, based on the above discussion, the Respondent is entitled for the rebate of 2% if the payment has been made through letter of credit and 1% of the bill amount if the payment has been made through any mode other than letter of credit.

- 4.7. With regard to the Order dated 10.04.2014 in the matter of determination of tariff for Vanala SHP, it is to be noted that the Commission vide Order dated 10.04.2014 directed the Respondent to pay the arrears to the Petitioner for the difference in the project specific levelised tariff determined by this Order and the generic tariff being paid to the Petitioner in six equal monthly instalment.

In the matter, the Petitioner submitted that orders of the Commission are decree and it does not need clutches of bills for implementation of the orders whether the Petitioner submits the bill or not is of no consequence as far as implementation of the order is concerned. In the matter the Commission is of the view that it was not a statutory obligation levied upon the Respondent but the commercial obligation arose due to commercial transaction executed between the parties. The total amount due has to be worked out based

on the energy supplied during that period and the differential tariff approved by the Commission. Hence, the invoice is required for release of payments. Moreover, during the proceedings in the matter, when it was brought to notice of the Petitioner that it had itself raised the invoice for the arrear amount, the Petitioner admitted the same and withdrew its contention on this particular matter.

The Commission had allowed the Respondent to pay the differential amount in six equal monthly instalments as special dispensation considering the fact the Respondent would have made the timely payment and got the prompt payment discount if the same was billed earlier by the Petitioner. Further, the Commission had also taken the cognizance of the fact that there would be a financial shock to the Respondent if it was directed to pay the entire differential amount upfront and since the amount was related to past periods the Respondent would have chosen to defer the payment for later period which could have affected the generator adversely. Accordingly, the Respondent was directed to make the payment to the Petitioner in six equal instalments. The Commission did not hold that no rebate was to be deducted by the Respondent and, therefore, any payments to be made are to be governed by the PPA (with conditions consistent with the prevalent Regulations) and the Regulations unless expressly provided for.

The Commission observed that the Petitioner had raised the invoice on 13.11.2014 for the entire differential amount. Further, the Respondent had made the payment for the 1st instalment on 17.11.2014 and the balance five instalments were paid on 27.11.2014, i.e. within 30 days from the presentation of bill. Accordingly, the Respondent is entitled for 2% rebate if the payment of bills has been done through the letter of credit and only 1% of the invoice amount if the payment has been done through any mode other than letter of credit.

- 4.8. With regard to the Commission's Order dated 17.03.2016 in the matter of seeking clarification of Order dated 07.01.2016 passed by the Commission directing UREDA to grant accreditation to the Petitioner, the Commission had directed UPCL to make payments in lieu of the rights of RECs surrendered by the Petitioner from the date of Accreditation, i.e. 05.10.2012 and upto 31.03.2016 @ Rs. 1.45 per unit of energy received by the utility during the period. The Commission also directed UPCL to ensure payment of the aforesaid amount accrued upto 29.02.2016 in three equal instalments and the payment of first instalments was to be made within 5 days of the date of the Order. Further, remaining two instalments were to be paid

within first week of the month of April, 2016 & May, 2016 respectively. Furthermore, the Commission had directed that payment for energy received for the period 01.03.2016 to 31.03.2016 was to be made alongwith monthly generation bill raised by the Petitioner for the month of March, 2016.

The Commission has observed that the Respondent had executed the PPA for the transaction of REC as on 06.04.2016 which was effective from 01.04.2016 for a period of five years. Accordingly, there was no PPA executed for the procurement of REC from 05.10.2012 to 31.03.2016 by the parties. Therefore, as discussed in above paragraphs, in the absence of any agreement, the RE Regulations shall prevail. Further, Regulation 22 and Regulation 23 of RE Regulations, 2013 specifies that the Respondent shall be entitled for a rebate of 2% if the payment of bills is made through letter of credit and only 1% shall be allowed if the payment is made through any other mode but within 30 days of presentation of the bills. However, in case of delay beyond a period of 60 days from the date of bill, a late payment surcharge at the rate of 1.25% per month or part thereof shall be levied by the generating company.

Taking similar views as in the issue discussed above in the matter of Commission's Order dated 21.12.2012 and review Order dated 08.01.2013, the Commission on this issue also had provided a special dispensation to the Petitioner and reduced the period for the purpose of rebate as well late payment surcharge to 7 days instead of 30 days for rebate and 60 days for late payment surcharge, considering the fact that RE Regulations does not provide for carrying cost and the payments should have already been paid by the Respondent on monthly basis. Accordingly, the outstanding payments were required to be paid within 7 days as specified in the Order while other conditions of the above regulations continued to apply without any deviation.

Further, here it is pertinent to mention that based on the judgment dated 07.01.2016 the Petitioner was fully entitled for accreditation and subsequently registration and issuance of RECs under REC mechanism. The total amount of RECs from 05.10.2012 to 28.02.2016 amounted to Rs. 8.80 Crore. The Commission had allowed the Respondent to pay the amount in three instalments as special dispensation taking cognizance of the fact that there would be a financial shock to the Respondent if the Respondent was directed to pay the entire amount immediately.

Further, it is to be noted that the Commission had directed that payment for energy

received (for the purpose of calculation of REC amount) for the month of March, 2016 was to be made alongwith monthly generation bill raised by the Petitioner for the month of March, 2016. It is explicitly clear from the aforesaid direction that the Commission had treated the payments pertaining to REC and electricity supplied to the Discom as same. Moreover, as discussed under paragraph 4.5 of this Order, Regulation 22 i.e. *Rebate*, and Regulation 23 i.e. *Late Payment Surcharge*, shall be applicable on the presentation of bill irrespective of its nature.

Furthermore, as per the direction of the Commission, the Respondent was required to pay the 1st instalment within 5 days of the issue of Order which is to be read as 5 working days. The Respondent submitted that the invoice was received on 22.03.2016 and 23rd to 25th of March, 2016 happened to be holidays and 26th was last Saturday and 27th happened to be Sunday. UPCL released the first instalment on 30.03.2016. The Commission has observed that the Respondent had paid the 1st instalment within 5 working days. Accordingly, the Respondent is entitled for the rebate.

Further, the Respondent, in compliance to the aforesaid Order of the Commission, had released the 2nd instalment on 07.04.2016. However, 3rd and the last instalment was released on 23.05.2016 which should have been paid by 07.05.2016. Accordingly, there is a delay of 16 days in the payment.

Accordingly, the Commission is of the view that the Respondent is entitled to the rebate of 2% of the bill amount only if the payment has been made through letter of credit and of 1% if the payment has been made within the time specified by the Commission in the order through any mode other than letter of credit and late payment surcharge shall be levied on the Respondent in case payments have been made beyond the time specified by the Commission in the Order.

- 4.9. The Petitioner has claimed the interest on the rebate from the date of payment of the amounts till 28.02.2019. The Petitioner also submitted that it had requested the Respondent to release the discount/rebate amount which was wrongly deducted while making the payments in compliance to the Commission's Orders. The Commission has examined the documents submitted by the Petitioner in respective matter. Details of the respective Orders, payment dates and letters from the Petitioner requesting UPCL to refund the rebate amount are as follows:

S. No	Order dated	Payment date	Letters from the Petitioner requesting for refund of rebate deducted
1	21.12.2012	10.01.2013	10.05.2013, 17.11.2014, 28.09.2016 & 13.02.2019
2	10.04.2014	17.11.2014 & 27.11.2014	29.11.2014
3	17.03.2016	30.03.2016, 07.04.2016 & 23.05.2016	31.03.2016, 28.06.2016, 28.09.2016 & 13.02.2019

It can be seen from the above table that the Petitioner had adopted very lackadaisical approach in the matter. The Petitioner has not been diligently pursuing its claim for recovery of wrongly deducted rebate. In case of Order dated 10.04.2014 it has approached UPCL only once whereas in case of Order dated 17.03.2016, the Petitioner had approached the Respondent initially in 2016 and thereafter in 2019 after a gap of 3 years. Further, in case of Order dated 21.12.2012, it appears from the date of letters that the Petitioner was very irregular and was communicating with the Respondent for the sake of formality only. Moreover, no justification has been submitted by the Petitioner for such irregularity in communicating with the Respondent or reasons for approaching the Commission after so many years. Accordingly, the Commission does not find it prudent to allow any interest from the date of payment till 28.02.2019 except late payment surcharge, if applicable.

- 4.10. The Commission while reducing the rebate has abided by the relevant provisions of the Regulations in this regard only. However, with regard to the claim of the Petitioner on interest, on amount deducted as discount, till 28.02.2019, the Commission has taken cognizance of the inaction of the Petitioner in pursuing the issue promptly with the Respondent and, therefore, does not consider deem fit on the part of the Petitioner to even make any such claim on the carrying cost by way of interest on discount.
- 4.11. Accordingly, if the payment has been released through letter of credit within the time period as specified in the respective Orders, the Respondent is entitled for a rebate of 2% of the bill amount whereas if the payment has been made through any mode other than letter of credit and within the time period specified in the respective Orders, the Respondent shall be entitled for a rebate of 1% only. However, where the Respondent has paid the bills amount after the time period specified in the respective Order, a late payment surcharge at the rate of 1.25% per month or part thereof shall be levied on the Respondent. The Commission directs both the Petitioner and the Respondent to sit together and work out the rebate amount in accordance with the above discussion and the Respondent is directed to refund the excess amount deducted as rebate, if any, within 15 working days from the date of this Order. The

Commission further directs that in case of delay in payment, the Respondent shall be liable to pay the interest at the rate of 1.25% per month or part thereof from expiry of due date till the date of actual payment.

4.12. Ordered accordingly.

(M.K. Jain)
Member (Technical)

(D.P. Gairola)
Member (Law)