

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the Matter of:

Evacuation of Power of Bhilangana Hydro Power Project -III

In the Matter of:

M/s Bhilangana Hydro Power Limited

PETITIONER

VERSUS

Power Transmission Corporation of Uttarakhand

Limited and Another

RESPONDENT

Coram

Shri Jagmohan Lal- Chairman

Shri Anand Kumar- Member

Date of Order: 8th July 2011

ORDER

A petition was filed by M/s Bhilangana Hydro Power Limited before the Commission on 10.05.2011 in the matter of Transmission/Evacuation system for Evacuation of Power of Bhilangana Hydro Project-III.

2. Consequent to the filing of the petition, the Commission vide letter dated 31.05.2011 asked Government of Uttarakhand and PTCUL to file their reply by 15.06.2011.
3. PTCUL through its Director (Project) filed the reply in an affidavit giving reasons why the petition filed by the Petitioner is not maintainable before the Commission. The GoU vide letter dated 09.06.2011 directed PTCUL to incorporate the stand of the Government in the matter in their reply to UERC.
4. The reply of PTCUL was forwarded to the petitioner vide letter dated 27.06.2011 for submission of their reply by 04.07.2011. The petitioner submitted their rejoinder on 28.06.2011 and requested the Commission for early hearing.
5. PTCUL in para 3 of its reply referred to Article 9.2.1 of Article 9 of TSA and alleged that the petitioner has not served any written notice to PTCUL for amicable settlement in this regard before filing the petition in UERC.
6. While replying to para 3 of PTCUL's reply, the petitioner submitted that there are several communications in which the petitioner has highlighted its concern regarding delay in implementation of the evacuation network in terms envisaged under the TSA. In this context, the petitioner has written letters both to the Commission and the State Government. The petitioner also submitted that apart from minutes of meeting, there are records of meetings held under a coordination committee formed by the Commission to coordinate the implementation of the evacuation network. Therefore, it is wrong on the part of PTCUL to say that there was no written notice for amicable settlement before filing the petition. In any event, the petitioner submitted that a written notice for amicable settlement is not a pre-condition to invoking jurisdiction of the Commission which is available under the provisions of the Electricity Act, 2003. The petitioner further submitted that it craves leave to address any legal issues that may arise relating to the interpretation of Article 9.2.1. of the TSA.

7. In the background of the submissions/counter submissions raised by the parties, a hearing for admission of the petition was fixed by the Commission on 05.07.2011 at 12.30 P.M. at Commission's office.
8. The Petitioner was represented by their Senior Legal Counsel whereas, PTCUL was represented by Director (Project).
9. The question of maintainability having been raised by PTCUL, the Chairman UERC asked PTCUL to present its case and Director (Project) PTCUL stated that since the petitioner has not fulfilled the conditions of Article 9.2 of TSA which require either party to serve a written notice to the other party for amicable settlement of dispute, the petition is not maintainable before the Commission. Article: 9 of the TSA refer to "Governing Law and Dispute Resolution". Article 9.2 speaks of 'amicable settlement'. The Article 9.2 read as under:

9.2.1 "Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively "Dispute") by giving a written notice to the other party which shall contain:

- (i) a description of the Dispute;*
- (ii) the grounds for such Dispute; and*
- (iii) all written material in support of its claim.*

9.2.2 The other Party shall within fifteen (15) days of issue of dispute notice issued under Article 9.2.1, furnish:

- (i) Counter-claim and defences, if any, regarding the Dispute; and*
- (ii) all written material in support of its defences and counter-claim*

9.2.3 Within thirty (30) days of issue of notice by any party pursuant to article 9.2.2 both the parties to the Dispute shall meet to settle such Dispute amicably. If the parties fail to resolve the Dispute amicably with thirty (30) days of receipt of the notice referred to in

the preceding sentence, the Dispute shall be referred for Dispute resolution in accordance with Article 9.3”

10. Reference has also been made to article 9.3.2 of TSA which speaks that “in the event of a Dispute remaining unresolved as referred to in Article 9.2.3 hereof and which cannot be referred to the Appropriate Commission as provided under article 9.3.1 hereof, any party to such Dispute may refer the matter to Registrar under the Rules of the Indian Council of Arbitration. Such Dispute shall be resolved by arbitration under the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article.”
11. Learned Counsel for the petitioner on the other hand referred to the case ‘**Gujrat Urja Vikas Nigam Ltd. Versus Essar Power Ltd. reported in (2008) 4 Supreme Court Cases 755** and submitted that any dispute between the licensee and the generating company can be decided by none else except the Commission and as such the argument raised on behalf of PTCUL is without any merit. In the reported case Hon’ble Supreme Court have observed as under:

“In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further, clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in section 86 (1), between the licensee and generating companies can only be resolved by the Commission or any arbitrator appointed by it. This is because there is no restriction in Section 86 (1) (f) about the nature of the dispute.”

12. Learned counsel for the petitioner further submitted that they have on regular intervals written to PTCUL regarding delay, on their part, in implementation of the evacuation network of Bhilangana-III power project and these communications are nothing but written notice for amicable settlement before filing the Petition, hence the Petition is very much maintainable before the Commission.
13. The Commission gave a patient hearing to both the parties and gave a thoughtful consideration to the submissions advanced by the parties.
14. Coming to the contention raised on behalf of the petitioner that they have on regular intervals written to PTCUL regarding delay, on their part, in implementation of the evacuation network of Bhilangana-III power project and these communications are nothing but written notice for amicable settlement before filing the Petition cannot be accepted. All these communications, whatever the nature of the same may be, cannot take the place of a notice as envisaged under Article 9.2.1 of TSA which has been specifically incorporated in the TSA for an amicable settlement of the disputes between the parties. Thus, the argument that these communications are nothing but written notice for amicable settlement is without any force. It thus stands established that the petitioner has not given any notice for amicable settlement of the dispute as envisaged in Article 9.2 of TSA.
15. Coming to the legal argument advanced on behalf of the petitioner as laid down in '**Gujrat Urja Vikas Nigam Ltd. Versus Essar Power Ltd. (Supra)**', the said legal position cannot be disputed. However, the question is whether in view of the said decision of the Hon'ble Supreme Court, Article 9 of the TSA which provides for amicable settlement of the dispute between the parties becomes redundant and the parties are debarred from getting their disputes settled through amicable means and are supposed to rush to the State Commission for adjudication of their disputes. Perhaps this could have never been the intention of the Hon'ble Court to deprive the parties of getting their disputes settled amicably of their own if they so intended. If any intention otherwise is imported, the result would be that the 'Disputes

Resolution' clause in the agreement need not be incorporated as it cannot be given effect to because of the aforesaid case law of the Hon'ble Supreme Court. Thus if the parties fail to settle their disputes amicably as per Article 9.2 of TSA, all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it and not by anyone else.

16. Thus the Commission having considered the submissions advanced on behalf of the parties and also after having gone through the legal position has come to the conclusion that the petitioner should first avail the remedy of amicable resolution of its Dispute in the manner as envisaged in Article 9.2 of TSA. In the event of the Dispute still remaining unresolved, the Parties can then approach the Commission for redressal of their Dispute.

The Petition is disposed off accordingly.

(Anand Kumar)
Member

(Jagmohan Lal)
Chairman