

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 01 of 2013

In the matter of:

Petition dated 25.12.2012 filed by M/s Swasti Power Engineering Limited, under Regulation 74(1) of UERC (Conduct of Business) Regulations, 2004 read with section 94(2) of Electricity Act, 2003

In the matter of:

Application for review of Order dated 17.12.2012 issued by Uttarakhand Electricity Regulatory Commission on the petition filed by M/s Swasti Power Engineering Limited regarding dispute between M/s Swasti Power Engineering Limited and Uttarakhand Power Corporation Limited arising out of the Power Purchase Agreement dated 03.07.2009.

AND

In the matter of:

M/s Swasti Power Engineering Limited.

Petitioner

VERSUS

Uttarakhand Power Corporation Limited.

Respondent

Coram

Shri Jag Mohan Lal Chairman

Shri C.S. Sharma Member

Shri K.P. Singh Member

Date of Hearing: January 03, 2013

Date of Order: January 08, 2013

ORDER

1. Background and History

(a) The Petitioner, M/s Swasti Power Engineering Limited had earlier filed Petition dated 06.12.2012 before the Commission under section 86(1)(f) of the Electricity

Act, 2003 for adjudication of the dispute between the Petitioner and the Respondent arising out of the Power Purchase Agreement dated 03.07.2009.

(b) The Petitioner had then, interalia, sought the following reliefs:

- i. *Hold and direct the Respondent to remit the tariff as per the tariff of Rs. 3.30 per unit as determined by the Hon'ble Commission and applicable for the supply of electricity by the Applicant to the Respondent.*
- ii. *Hold that the unilateral adjustment/withholding of payment by the Respondent is contrary to the terms of the PPA and illegal.*
- iii. *Pass such other orders as this Hon'ble Commission may deem fit and proper in the facts and the circumstances of the case.*

(c) The Commission, while disposing off the Petition, passed an Order dated 17.12.2012 and decided the following which has been reproduced below:

"21. Based on the above, the Commission holds that the Petitioner's plea for making payment at the preferential tariff prescribed in the RE Regulations, 2010 is not sustainable as they, as of now, do not have a valid long term PPA with Respondent which is a pre-requisite according to that regulation. However, considering the submissions made by the Petitioner during the proceedings and taking a holistic view in the matter, the Commission decides to give the Petitioner an option to either enter into a fresh long term PPA or execute a supplementary agreement to the existing PPA with the Respondent consistent with the provisions of the RE Regulations, 2010, for sale of power for the entire useful life of the plant. The Commission further allows a period of 30 days from the date of this Order to exercise the option of executing fresh/supplementary PPA. The Respondent shall execute PPA in three days of receipt of option of the Petitioner.

22. The Commission further decides that if a valid long term PPA is executed, as above, after execution of the long term Power Purchase Agreement between the Petitioner and the Respondent, the tariff provided in RE Regulation, 2010 shall be applicable for the Petitioner's plant from date of effectiveness of these regulations. Further, the Respondent shall ensure that all the payment which will become due, as a consequence, to Petitioner shall be settled based on this tariff rate within 3 days of signing of such agreement."

2. Submission of the Petitioner in its Petition dated 25.12.2012

- (a) The Petitioner filed a Petition dated 25.12.2012 under Regulation 74(1) of UERC (Conduct of Business) Regulations, 2004 read with section 94(2) of the Electricity Act, 2003, informing that, in compliance of the Commission's Order dated 17.12.2012, wherein the Commission had specifically given an option to the Petitioner to execute the Long Term Power Purchase Agreement or to enter into a Supplementary Agreement to PPA dated 03.07.2009, the Petitioner on 18.12.2012 intimated in writing to the Respondent, its willingness to supply power generated from its 22.5 MW Bhilangana Hydro Electric Project (Project) to the Respondent on a long term basis and further called upon the Respondent to execute the Supplementary Power Purchase Agreement to existing PPA dated 03.07.2009. However, the Respondent in clear violation of the directives of the Commission refused to execute the Supplementary Power Purchase Agreement and asked the Petitioner to enter into a fresh Long Term PPA.
- (b) The Petitioner in its above Petition dated 25.12.2012 has further submitted that, in compliance of the Commission's Order dated 17.12.2012, it requested the Respondent to release the entire outstanding dues for sale of power generated from the Project to the Respondent for the month of September 2012 to November 2012, however, as stated by the Petitioner the same has not been released to them till date by the Respondent.
- (c) The Petitioner in the said Petition has, inter alia, prayed the following:
- i. Allow the above application in favour of the Petitioner and against the Respondent and thereby direct the Respondent to immediately enter into and execute the Supplementary agreement to the power Purchase Agreement dated 03.07.2009 in terms of the option exercised by the Applicant/petitioner vide its letter dated 18.12.2012 and*
 - ii. Direct the Respondent to immediately release and pay to the Applicant/Petitioner the outstanding payments in the form of tariff for sale of energy generated from the project in compliance of RE Regulations, 2010 or*
 - iii. Pass such other order as this Hon'ble Commission may deem fit and proper in the facts and the circumstances of the case.*

3. Respondent's Reply to the above Petition

- (a) The Respondent in most of the issues raised in the Petition has submitted in its reply dated 02.01.2013 that since a Review Petition dated 28.12.2012 has already been filed by the Respondent in connection with the Commission's order dated 17.12.2012, it does not consider any need to submit any reply at this point of time. However, on the issue raised in para 6 of the Petition that the officials of the Respondent have totally refused to execute the Supplementary Agreement to the PPA dated 03.07.2009 with the Petitioner and rather asked the Petitioner to enter into a fresh Long terms PPA, the Respondent has submitted the following and the same has been reproduced below:

"The contents of para-6 are not agreed and denied. It is submitted in the matter that the respondent company vide its letter No. 2722/UPCL/Com/CH-17.CE dated 24.12.2012 and No. 2775/UPCL/Com/GH-17/CE dated 28.12.2012 requested that petitioner to sign the power purchase agreement but the petitioner did not contact to the respondent so far to sign the agreement."

4. Review Application dated 28.12.2012 filed by the Respondent

- (a) Meanwhile, the Respondent had filed a Review Application in connection with the Commission's Order dated 17.12.2012. In this Application the Respondent has submitted the "Cause of Action" and the same is reproduced below:

"4 Cause of Action:

The order issued by Hon'ble Commission on 17.12.2012 on the petition filed by the generator is against the provision of law and an account of some mistake/error apparent on the face of the record. This order will adversely affect the financial health of the applicant company. Therefore, the applicant company is filing this application to review the above order issued by the Hon'ble Commission."

The Respondent has further submitted "Ground of review/ relief" and the same is reproduced below:

"5 Ground of Review/Relief:

Hon'ble Commission in its order dated 17.12.2012 held that the PPA dated 03.07.2009 is not a valid long term agreement and an option has been given to the generator either to enter into a fresh long term PPA or execute a supplementary agreement to the

existing PPA. Further Hon'ble Commission held that on execution of such PPA, the Tariff provided in Regulations, 2010 shall be applicable for the power supplied by the generator to the petitioner company from the date of effectiveness of Regulations, 2010 should be applicable from the date of PPA under these Regulations and hence, Hon'ble Commission erred by holding that the tariff provided in Regulations, 2010 shall be applicable from the date of effectiveness of Regulations, 2010"

The Commission decided to club both the matter namely the Petition dated 25.12.2012 filed by M/s Swasti Power Engineering Limited and the Review Application dated 28.12.2012 filed by the Respondent and hold a hearing on 03.01.2013.

5. Submission of the Petitioner and the Respondent during the hearing

- (a) The Petitioner stated that it had executed a PPA with the Respondent for sale of power generated for its plant on 03.07.2009 and the plant was commissioned in August 2009 and power generated from the plant is being supplied to the Respondent continuously from the date of the commissioning of the project.

The Respondent was paying the energy bills submitted to it upto 30.06.2010 at the tariff rate as per RE Regulations, 2008 and thereafter, as per RE Regulations, 2010 upto August 2012. On 16.07.2012 the Petitioner stated that it requested the Respondent for executing an agreement on APPC mode for 18 months and to terminate the existing PPA dated 03.07.2009.

The Petitioner further submitted that:

- i. As per the provisions in the existing PPA dated 03.07.2009, it had the right to terminate the contract if the decision for Open Access for taking power out of the State comes in favour of the Petitioner.
- ii. The Respondent vide letter dated 24.09.2012 requested the Petitioner to sign a long term PPA with it for sale of power at preferential tariff for meeting its Renewable Purchase Obligations fixed by UERC.
- iii. The Respondent unilaterally stopped payment of the energy bills w.e.f. from September 2012 which is totally unjustified.

- iv. Vide its letter dated 05.11.2012 it gave its consent for signing of long-term PPA with the Respondent. However, neither the long term agreement has been executed by the Respondent nor the payment for supply of power has been made to the Petitioner since September 2012.
- v. The Respondent is neither agreed to purchase power at APPC rate, which shall enable the benefit of availing RE certificate (REC) to the Petitioner nor the Respondent is willing to pay preferential tariff as per RE Regulations, 2010.
- vi. As per the conditions in the existing PPA dated 03.07.2009, the Respondent shall accept and purchase 22.5 MW of power made available to Respondent system from the Petitioner plant at the levelised rate specified in Schedule-1 of RE Regulations, 2008 as amended from time to time.

(b) The Respondent submitted before the Commission that in the Order dated 17.12.2012 the Commission has given the option of signing a fresh long term PPA or a Supplementary Agreement to the existing agreement and accordingly, the Respondent stated that it has already informed the Petitioner to enter into a long term PPA. On this the Commission enquired from the Respondent that whether this option was given to Petitioner or to the Respondent, to which the Respondent stated that it was given to the Petitioner. It appears that the Respondent has not comprehended the Order and has erroneously considered itself to be a Petitioner in the proceedings. The Respondent accepted its mistake in understanding the direction in the Order.

The Commission also enquired from the Respondent whether its Review Application is maintainable or not and how they intend to sustain their contention of mistake or error apparent in the order dated 17.12.2012 issued by the Commission. The Respondent submitted that in para 21 of the Order it has been stated by Commission that the Petitioner does not have valid long term PPA. The Commission advises the Respondent to read the complete para 21 of the Commission's Order dated 17.12.2012, which is self explanatory. The Commission had held that as of now the existing PPA cannot be treated as a

valid long term PPA and that the anomalies and the conditions in the existing PPA which are not consistent with RE Regulations, 2010 have to be either amended or deleted. On these views of the Commission expressed during the hearing, the Respondent showed its unawareness to such conditions which are required to be amended or deleted in the existing PPA so as to make it consistent with the RE Regulations, 2010. On this submission of the Respondent the Commission advised the Respondent to read the entire Order in which all such anomalies and the conditions which are inconsistent with the said Regulations have been dealt and discussed.

6. Commission's View

(a) Section 94(1)(f) of the Act empowers the Commission to undertake review, which can be exercised in the same manner as a Civil Court would exercise such powers under section 114 and Order XLVII of the Code of Civil Procedure, 1908 (CPC). Under the said provisions, review of the Order is permitted on the following specific grounds only, namely:

- i. Discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time of passing of the Order.*
- ii. Mistake or error apparent on the face of the record;*
- iii. If there exist other sufficient reasons.*

(b) Given this unambiguous position of law as spelt out above, the Commission is of the opinion that the contention of Respondent that the Commission had erred in its Order is totally frivolous and misconceived, as the Commission had held that PPA as it existed between the Petitioner and the Respondent is not a valid long term PPA and had, therefore, directed the Respondent in its Order dated 17.12.2012 to either enter into a fresh PPA with the Petitioner or align the existing PPA to RE Regulation, 2010 and thereafter, release all the outstanding dues of the Petitioner at the preferential tariff approved by the Commission within 3 days. The Respondent could neither buttress his claim of error apparent in the Order dated 17.12.2012 nor furnish any details of Order being inconsistent with provision of law.

Thus, the Petition filed by the Respondent does not pass the tests of review as underlined in CPC and hence, the Petition is not maintainable.

It is, however, observed that the Respondent has been taking stands and actions which contradict the earlier ones. They continued to pay the Petitioner at the generic rate, as specified in RE Regulations, 2010, for almost 2 years and then recovered the assessed extra payment in 2 months. A chaotic environment is being created by this inconsistent behaviour of the Respondent. At the cost of being repetitive, the Commission once again undertakes examination of whole gamut as under:

- (c) The Respondent had executed a PPA with the Petitioner on 03.07.2009. Since then the Respondent is continuously receiving power from the Petitioner's plant at the tariff rate as per RE Regulations, 2008 up to 30.06.2010 and thereafter as per RE Regulations, 2010 upto August 2012. As per the PPA signed, the tariff agreed upon by both the parties was at the levelised rate specified for such plant in schedule-1 of RE Regulations, 2008 as amended from time to time. In this regard, the contention of the Respondent that the RE Regulation, 2008 does not necessarily require long term PPA and, therefore, the rates as per the Schedule annexed to RE Regulations, 2008 can be applied to generators selling power under short term PPA is unfounded. Further, the contention of the Respondent that it had erroneously made payment to the Petitioner at the rates specified under RE Regulation, 2010 is misconceived. The tariffs specified under RE Regulation, 2008 were also for long term as the Commission has specified levelised tariffs under these Regulations considering the life of SHPs to be 35 years. Further, Regulation 8(5) of RE Regulation, 2008 specifies as under:

"The generating plant shall enter into a power purchase agreement with the distribution licensee of the area in which the plant is located for a period of at least 20 years from the date of its commissioning, in line with the Model Power Purchase Agreement. The parties to the agreement may make plant/site specific changes in the Model PPA not inconsistent with the Act, these Regulations and other relevant Regulation. Such changes shall however be subject to approval of the Commission."

Further, Regulation 30(1) of RE Regulation, 2008 specifies as under:

“The life and PPA period of wind/biomass/bagasse projects shall be 20 years. For SHPs, however, the life shall be 35 years and PPA period as 30 years. After the expiry of PPA period, first right of purchase shall be that of distribution licensee.”

Thus, from the reading of the above provision of RE Regulations, 2008 it is clear that those Regulations were also applicable on plants having long term PPA with the Respondent.

(d) Despite the directions of the Commission, the Respondent failed to sign the PPA with the Petitioner within 3 days of the receipt of option by the Petitioner. Further, the Respondent also submitted before the Commission that they should be given sufficient time for compliance of the orders/decisions considering the fact that if the Respondent is aggrieved by such order/decision of the Commission it gets sufficient time to file a review Petition before the Commission. The Commission would like the Respondent to take note that under the Act, after issuance of the Commission’s Order, both the Petitioner(s) as well as Respondent(s) have only the legal recourse either to comply with such orders/decisions within the stipulated time provided in the said orders/decisions and submit a compliance report, if directed to do so in such orders/decisions, or the Petitioner(s)/Respondent(s) may file a review application before the Commission in accordance with the relevant provisions of the Act/Regulations. However, the Petitioner(s)/Respondent(s) cannot inordinately delay the compliance of the orders/decisions of the Commission on the pretext of filing a review petition.

The Respondent must bear in mind that it has obligations under RE Regulation, 2010 and UERC (Compliance of renewable purchase obligation) Regulations, 2010 which it has to meet by purchase of power from RE sources or through purchase of REC’s from the exchange. Recently, the Commission had issued an order dated 19.12.2012 in the matter of non-compliance by UPCL of RE Regulations, 2010 and RPO Regulations, 2010 wherein the Commission had directed UPCL to carry forward the unmet RPO for FY 2011-12 for both solar as well non-solar sources to 2012-13 which shall be met alongwith the RPO for FY 2012-13. Further, the Commission had also referred to dilly-dallying on the part of UPCL in executing PPAs with RE generators on flimsy pretexts and had cautioned UPCL that if such improvement is not seen in the immediate future,

the Commission would be constrained to proceed against UPCL appropriately. However, it appears that the Respondent has again ignored the directions of the Commission.

- (e) En-passant, the Commission would like to record its displeasure on the happenings in this case. The Respondent continued to make payments at a rate which according to them was higher than permissible for almost 2 years and then chose to recover the excess paid in two months. Apparently, for these two months nothing was paid to the Petitioner, thereby, rendering even O&M activities difficult. After specific orders were issued by the Commission, the Respondent still did not enter into a Supplementary Agreement as opted by the Petitioner in accordance with the Commission's order dated 17.12.2012 and choose to prefer this Review Application which is neither maintainable nor sustainable on merit. The intent appears to be to continue availing power from this renewable source, avail attached benefits by counting it towards its RPO and continue to dither on making due payments. The actions, as aforesaid of the Respondent, raise serious doubts on their commitment to meet their RPO. It also suggests misuse of its dominant position. Its actions are also obstructing Commission's efforts to promote renewable generation as also investment in State in electricity sector. The Commission would like to caution the Respondent that it's working on cross-purpose with the objective of Commission as also to the mandate of the Electricity Act, 2003 will not be conducive to their growth. The Secretary is directed to bring up this matter as and when the Respondent's renewable purchase obligation is reviewed by the Commission. The Respondent is also given one last opportunity to mend its ways failing which action will be taken against it under the Act.
- (f) The Commission has taken note of the fact that the Petitioner in compliance of the Commission's Order dated 17.12.2012 had vide letter dated 18.12.2012 intimated the Respondent its desire to sign a Supplementary Agreement with it and supply power generated from its station on long term basis. However, the Respondent, in violation of the directives of the Commission in the aforesaid Order dated 17.12.2012, did not sign the Supplementary Agreement within 03 days of receiving the request from the Petitioner. For this act of gross violation of

Commission's directives, the Respondent is liable for appropriate action under the Act. Accordingly, the Commission has decided to take a view on whether or not to initiate action against the Respondent under section 142 of the Electricity Act 2003 at a later stage.

(g) Further, going by the submission of the Respondent that Commission's order dated 17.12.2012 will adversely affect its financial health, it appears that either the Respondent is ignorant of the Commission's orders issued from time to time or are unable to comprehend them logically. The Commission while approving the power purchase cost for the Respondent in the Tariff Order for FY 2012-13 had already allowed purchases from Swasti SHP at the rates specified under RE Regulations, 2010. Hence, there is no question of the Commission's order impacting the financial health of the Respondent adversely.

(h) Summing up:

- i. In light of the facts brought out above, the Petition filed by the Respondent does not pass the tests of review and is thus, not maintainable. The review Petition is, therefore, dismissed.
- ii. The Commission had directed the Petitioner to submit a draft Supplementary Agreement to the existing PPA before the Commission so that the PPA between the Petitioner and the Respondent becomes consistent with RE Regulations, 2010. Accordingly, the Petitioner submitted such draft on 04.01.2013. After taking cognizance of the draft Supplementary Agreement submitted by the Petitioner the Commission approves the same (Copy of the draft enclosed) and directs the Respondent to adopt and sign the same with the Petitioner within 3 days of this Order. The Commission further directs the Respondent to pay the outstanding payments of the Petitioner within 03 days of signing the Supplementary Agreement.

Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Jag Mohan Lal)
Chairman

**SUPPLEMENTARY AGREEMENT TO POWER PURCHASE AGREEMENT DATED
03.07.2009 BETWEEN SWASTI POWER LTD. (FORMERLY, M/S SWASTI POWER
ENGINEERING LTD.) AND UTTARAKHAND POWER CORPORATION
LIMITED.**

This Supplementary Power Purchase Agreement is executed on theday of January 2013 between Uttarakhand Power Corporation Ltd., having its registered office at Urja Bhawan, Kanwali Road, Dehradun, hereinafter referred as '**UPCL**'

AND

M/s Swasti Power Ltd. (formerly known as M/s Swasti Power Engineering Ltd.), a company registered under the Company's Act 1956 and having its registered office at 6-I, Pocket-2, New Kondali, Mayur Vihar, Phase-3, Delhi-110096 and corporate office at Plot111, Road 72, Jubilee Hills, Hyderabad-500033, hereinafter referred as '**Swasti**'

Whereas **UPCL** entered into Power Purchas Agreement with Swasti on 03.07.2009 for purchase of power and

Whereas **Swasti** owns and operates a Small Hydro Electric Generating Station having an installed capacity of (3x7.5) 22.5 MW (plus 10% overload) situated at Ghansali on river Bhilangana, District-Tehri Garhwal, as provided in above Power Purchase Agreement dated 03.07.2009 and

NOW, THEREFORE, in consideration of the premises, mutual covenants, conditions set forth herein and in compliance of Order dated 17.12.2012 of Hon'ble UERC in the matter of petition dated 06.12.2012 filed by **Swasti**, it is agreed by and between the parties as follows:

- A. That the provisions of Power Purchase Agreement dated 03.07.2009 detailed on page no. 2 therein stands deleted and be replaced by the followings:

Whereas the Generating Company is engaged in the business of Power generation from its plant situated at Ghansali, District –Tehri Garhwal, more particularly described in Annexure I attached hereto and made a part hereof.

Whereas UPCL is a distribution licensee operating in the State of Uttarakhand and has a license to supply power in the entire state,

Whereas the Generating Company has implemented the power project by installing plant and equipment having an installed capacity of (3x7.5) 22.5 MW (plus 10% overload) situated at Ghansali on river Bhilangana, District –Tehri Garhwal,

Whereas the Generating Company desires to sell the 22.5 MW (plus 10% overload) power scheduled to be generated in the Generating Company's facility to UPCL

- B. That the clause 19 of Power Purchase Agreement dated 03.07.2009 stands deleted and be replaced as given below:

19. DURATION

*19.1 Unless terminated by default as described in clause 20 below, this agreement shall be valid till the expiry of **35 years** from the date of commercial operations of the project.*

19.2 The agreement may be renewed or extended for such period as may be mutually agreed between the Generating Company and UPCL on expiry of the initial term described at 19.1 above.

19.3 UPCL reserves the first right of purchase after the expiry of the initial term of PPA.

- C. Whereas **Swasti** had filed an Appeal before Hon'ble ATE for Open Access. The said appeal was allowed by Hon'ble ATE vide its order dated 11.01.2011 enabling **Swasti** to apply for Open Access and directing the Hon'ble Commission to grant the same.

However, now **Swasti** at its own free will and in compliance of Order dated 17.12.2012 of Hon'ble UERC in the matter of petition dated 06.12.2012 filed by **Swasti**, wants to enter into this Supplementary Agreement to Power Purchase Agreement dated 03.07.2009 with UPCL without claiming any benefit out of the said Order dated 11.01.2011 of Hon'ble ATE unconditionally and without any cost to any party.

- D. That the following additional clause shall be part of power purchase agreement dated 03.07.2009.

- (i) This agreement shall be subject to approval of UERC and any change suggested by UERC in this agreement shall be incorporated in the PPA being executed now.
- (ii) The generating company agrees that it shall be responsible and shall inter alia bear all financial & legal implication if the execution of any other agreement signed earlier between the generating company and other party is affected because of signing of this Power Purchase Agreement.
- (iii) If the power evacuation arrangement for the generating station is changed because of 220/33 kV substation at Ghansali proposed to be constructed by PTCUL or because of any other changes in the future, then relevant changes, if required, in PPA may be incorporated by signing a supplementary agreement.

All other terms and conditions of the Power Purchase Agreement signed between Swasti and UPCL on 03.07.2009 shall remain unaltered and shall apply mutatis mutandis.

In witness whereof the parties have executed and delivered this Supplementary Agreement to the Power Purchase Agreement dated 03.07.2009 as of the date above written.

**Corporation:
Uttarakhand Power Corporation Ltd.**

**Company:
Swasti Power Ltd.**

Chief Engineer (Commercial)

Authorized Representative

Witness:

Witness: