

**Before**

**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

**In the matter of:**

Application seeking recovery of claim in respect of Deemed Generation under Section 44 (A) of the UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2012 and as amended by UERC's Tariff Regulations of 2013.

**AND**

**In the matter of:**

M/s Himalaya Hydro Pvt. Ltd.

... Petitioner

**AND**

Uttarakhand Power Corporation Ltd.

... Respondent No. 1

Power Transmission Corporation of Uttarakhand Ltd.

... Respondent No. 2

**CORAM**

**Shri C.S. Sharma      Member-Chairman**

**Shri K.P. Singh      Member**

**Date of Hearing: June 20, 2014**

**Date of Order: June 20, 2014**

The Order relates to the Petition dated 14.03.2014 filed by M/s Himalaya Hydro Private Ltd. (hereinafter referred to as "petitioner" or "generator" or "M/s HHPL") for payment of claim made by them of Deemed Generation under Regulation 44 (A) of the UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources)(First Amendment) Regulations, 2012 (RE (First Amendment), Regulations, 2012). The Petitioner alleged that Uttarakhand Power Corporation Ltd. (hereinafter referred to as "Respondent No.-1" or "distribution licensee" or "UPCL") is not remitting the payment of deemed generation charges for the period from 14.08.2012 to 31.03.2013. The Petitioner vide above Petition has prayed as follows:

- (i) To allow the present petition.
- (ii) To order the Respondent No.-1 to pay Rs. 40,78,030.00 as claim amount in respect of Deemed Generation to the Petitioner.
- (iii) To order the Respondent No.1 to rectify the concerned 33 kV evacuation system by installing HT breakers and various other systems necessary for reliable operation of the said system and improve its availability for power evacuation by the Applicant.
- (iv) Any other order or direction, which this Hon'ble Commission may deem fit and proper under the circumstances of the case.

A copy of the Petition was forwarded to UPCL & also to Power Transmission Corporation of Uttarakhand Ltd. (hereinafter referred to as "Respondent No.-2" or "transmission licensee" or "PTCUL") for submission of reply. Respondents were also directed for providing a copy of reply to the Petitioner. The Commission also held hearings in the matter on 05.05.2014 & 09.06.2014. Submissions made by Petitioner & both the Respondents No. 1 & 2 as well as decisions of the Commission in the matter have been discussed in the following Paras.

## **1. Background & Submissions**

- 1.1 Petitioner submitted that during the period from 14.08.2012 to 31.03.2013 it had suffered generation loss in its Motighat SHP (5 MW) on account of non-availability of UPCL's evacuation system beyond the interconnection point resulting in water spillage in accordance with RE (First Amendment), Regulations, 2012. In this regard, M/s HHPL approached UPCL vide its letter dated 25.05.2013 with a request to make the payment of its claim in respect of deemed Generation. Despite several reminders, UPCL did not settle its claim which is clear cut violation of the said regulations which clearly specify that UPCL must settle the Deemed Generation claim within 3 months.
- 1.2 UPCL refuted the claims made by M/s HHPL on the ground that the interruptions in evacuation system were primarily on account of force-majeure as well as due to grid failures which are not attributable to UPCL. Hence, Respondent No. 1 stated that the claims made by the Petitioner are not legitimate. However, UPCL in its submissions has accepted 73.30 Hrs during the period from 14.08.2012 to 31.03.2013 which can be considered for deemed generation.
- 1.3 Respondent No. 2 submitted that in the present matter neither it has been impleaded as

respondent nor any relief has been claimed against it as such, hence, at present no reply is required to be submitted by it. Further, PTCUL submitted that it reserves right to file a detailed and comprehensive reply, if required in the course of proceedings. PTCUL in its reply submitted details of grid failure for the duration of around 71 Hrs. It also submitted that the time of Grid failure as furnished by the Petitioner do not match with the time of Grid failure verified as per log-sheet of various sub-stations of PTCUL. PTCUL also submitted that interruption in evacuation system were on account of force-majeure incidences which cannot be attributed to it.

1.4 The Commission held a hearing in the matter on 05.05.2014 & vide Order dated 06.05.2014 directed the Respondent No. 1 as following:

*“(c) Respondent No. 1 is directed to make written submissions stating for each instance of outage the reasons for claiming force-majeure ensuring that all such claims are consistent with the stipulations provided in the Regulations relating to force-majeure. The Respondent No. 1 is also given leave to make such additional submissions which they intend to use to refute claims of Petitioner alongwith an advance copy to the Petitioner within 15 days of this order.”*

The Commission vide above Order also fixed next date of hearing on 27.05.2014.

1.5 UPCL vide letter dated 26.05.2014 informed that outages data could not be compiled as its Officers were busy in the maintenance & restoration of power supply works related to the natural-calamity hit areas and requested the Commission for adjournment of hearing dated 27.05.2014. The Commission accepted the request of UPCL & rescheduled the date of hearing on 09.06.2014.

1.6 During the course of hearing held on 09.06.2014, Respondent No. 1 informed that it had sent its reply to the Petitioner vide e-mail which the Petitioner accepted of having received the same. The Commission observed that till that day no reply had been submitted by UPCL to the Commission in the matter. However, during the hearing, Respondent No. 1 submitted some document to the Commission. The Commission expressed its displeasure over the delayed submission made by UPCL & vide Order dated 09.06.2014 directed as hereunder:

*“Notwithstanding the above, the Petitioner is directed to submit its rejoinder, if any, on the reply submitted by Respondent No. 1 by 16.06.2014 alongwith with a copy to Respondent No. 1. Moreover Respondent No. 1 is also directed to submit its proper reply before the Commission by 12.06.2014. The next date of hearing in the matter is fixed on 20.06.2014 at 11.30 AM.”*

1.7 Respondent No.1 vide its reply dated 07.06.2014 submitted details of outages alongwith copy of log-books. Petitioner vide its letter dated 16.06.2014 submitted that reply furnished by UPCL is not in accordance with the UERC (Conduct of Business) Regulations, 2004 and also is not in accordance with the Commission's Order dated 06.05.2014. Petitioner also contended that the copy of logbook provided by UPCL is also not legible.

## **2. Commission's Views & Decision:**

2.1 Taking cognisance of the submission made by the Petitioner & Respondents during the course of hearing and as discussed particularly in para 1.4 & 1.7 above, the Commission observes that UPCL did not submit its reply during the timeline as directed by the Commission and even after allowing adjournment of the hearing on the request of UPCL to enable it to submit the required information. UPCL could not submit proper reply including analysis of nature of outages, period of outages and their causes consistent with requirement of Regulations with regard to deemed generation. UPCL, however, preferred to just reproduce details recorded in the logbooks. The Commission also observes that reply submitted by UPCL includes copy of logbooks and that too substantial portion of these copies are not legible in respect of date of occurrence of outage, cause of occurrences of outage etc. Further, apparent discrepancies have also been observed in the abstract of the information compiled and submitted by UPCL vis-à-vis data recorded in the logbooks provided by it. The Commission is of the view that UPCL should have either upheld or refuted the claims submitted by generator in its petition through proper analysis of each instance of outages mentioning cause of each such outages also with a remark that the eventuality is force majeure or otherwise. The Commission expresses displeasure over lackadaisical approach of the licensee (Respondent No. 1) and warns it to refrain from such callousness in future.

2.2 The Commission is of the view that the dispute between a Generator & licensees can be adjudicated in accordance with Section 86(1)(f) of the Electricity Act, 2003 by the appropriate Commission and the aforesaid provision of the Act also empowers the Commission to direct that the dispute may be adjudicated upon by an arbitrator to be appointed by it. The Hon'ble Supreme Court of India has also held in the case of Gujarat Urja Vikas Nigam Ltd Vs Essar Power (2008) 4 SCC 755 (the Mimansa judgment) that the appropriate Commission may either decide the dispute itself or appoint an arbitrator to adjudicate upon the disputes between the parties. The Hon'ble Supreme Court has, interalia, held:

“59. In the present case we have already noted that there is an implied conflict between S. 86(1)(f) of the Electricity Act, 2003 and S. 11 of the Arbitration and Conciliation Act, 1996 since u/s 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under S. 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with S. 11 of the Arbitration and Conciliation Act, 1996. This is also evident from S. 158 of the Electricity Act, 2003.

However, except for S. 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations u/s. 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)

60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 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 cls. (a) to (e) and (g) to (k) in S. 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in S. 86(1)(f) about the nature of the dispute.

61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over S. 11 of the Arbitration and Conciliation Act, 1996. However, as regards, the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003).In other words, S. 86(1)(f) is only restricted to the authority which is

*to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.*

- 2.3 Considering that in-depth study of records would be needed to address the rival contentions of the parties as also the complicated questions of facts and documents that would have to be gone into, the Commission is of the view that it would be appropriate that an arbitrator is appointed to adjudicate the disputes raised between the parties.
- 2.4 The Commission is also of the view that the prayers at (i) & (ii) made by the Petitioner in the Petition are also prayers that an arbitrator is competent to grant in law.
- 2.5 In exercise of powers conferred to it under section 158 of the Electricity Act, 2003 and dictum of Hon'ble Supreme Court quoted in para 2.2 hereto above, the Commission hereby appoints Shri K.K. Garg, H. No. 200, Sector-A, Indrapuri, Bhopal-462022 (Mobile No. 9425012292, e-mail: kkgarg46@yahoo.com) as the sole arbitrator to decide the dispute amongst the parties on the issues raised by the Petitioner in respect of Deemed Generation charges for the period from 14.08.2012 to 31.03.2013 as claimed by Petitioner.
- 2.6 The Petition filed before this Commission would be treated as the statement of claim before the arbitrator. The Petitioner would be at liberty to apply to the Arbitrator, in accordance with law, to file any further and/or amended pleadings documents etc that may be permitted by the arbitrator in accordance with law.
- 2.7 The parties would be permitted to complete their pleadings, filing of documents, leading of evidence etc. in terms of the directions that may be passed by the arbitrator from time to time in accordance with law.
- 2.8 The Arbitration proceedings would be governed by the procedure for the arbitration in accordance with the Arbitration and Conciliation Act, 1996.
- 2.9 The fees of the arbitrator would be Rs 1.5 lac as a consolidated amount for the entire proceedings including all hearings, reading fees etc. The said amount would be for the entire arbitration proceedings including making of the claims and counter claims by the Petitioner and the Respondents respectively in the beginning i.e. at the time of entering of reference before the arbitrator and would also cover, if any, fresh claim(s) and counter claim(s) that are brought before the arbitrator during the course of the proceedings later on. The said fees would be paid to the arbitrator in three installments, i.e. 25% of the fees at the time of entering

of reference before the arbitrator by the parties, next 25% of the fees after the issues are framed by the arbitrator and balance 50% of the remaining fee after the final award is given by the arbitrator.

- 2.10 The arbitrator would also be entitled to claim reimbursement of actual travelling expenses for travels, if required, in connection with the arbitration.
  - 2.11 The arbitrator may conduct the proceedings as expeditiously as possible, preferably within 3 months of application to be made by the Petitioner as in (2.6) above.
  - 2.12 The parties may approach the named arbitrator with a copy of this Order to enable the arbitrator to enter into the reference.
3. As regards prayer of the Petitioner in (iii), it is ordered that a comprehensive timebound plan for appropriate and reliable evacuation of power from Petitioner's plant be formulated by the Respondent within one month of the order and be submitted to the Commission.

The Petition is disposed off accordingly.

**(K.P. Singh)**  
**Member**

**(C.S. Sharma)**  
**Member-Chairman**