

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Application filed by M/s Swasti Power Engineering Ltd. for condonation of delay in filing of the Petition for determination of Project Specific Tariff in respect of Bhilangana 22.5 MW HEP in accordance with UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010.

AND

In the matter of:

M/s Swasti Power Engineering Ltd. ... Applicant

AND

Uttarakhand Power Corporation Ltd. ... Respondent

CORAM

Shri Jag Mohan Lal	Chairman
Shri C.S. Sharma	Member
Shri K.P. Singh	Member

Date of Hearing: January 09, 2014

Date of Order: March 27, 2014

The Order relates to the application dated 16.07.2013 filed by M/s Swasti Power Engineering Ltd. (hereinafter referred to as "Generator" or "Applicant" or "Petitioner") for condonation of delay in filing the Petition for determination of Project Specific Tariff in respect of Bhilangana 22.5 MW HEP in accordance with UERC RE Regulations, 2010.

1. Background

- 1.1. The generator commissioned its Bhilangana 22.5 MW HEP, on 11.10.2009. Initially a Power Purchase Agreement dated 24.8.2005 was executed by the generator with M/s PTC India Limited for sale of the entire power generated at the Bhilangana generating station

excluding the free royalty power to be given to the Government of Uttarakhand. Since the matter of selling of power, from the Project, outside the State to M/s PTC India Ltd. was pending before the Hon'ble Appellate Tribunal, it signed the PPA dated 03.07.2009 with the Respondent for sale of power generated from its project and has, accordingly, been supplying power ever since the commissioning of the project. The Commission vide Order dated 17.12.2012 also resolved the disputes between the generator and UPCL in the matter of with-holding of energy bills on account of validity of the PPA being questioned by UPCL. Based on the Commission's direction vide aforesaid Order both the parties entered into supplementary PPA dated 10.01.2013.

- 1.2. The Applicant in the present application dated 27.05.2013 sought following reliefs:
 - i. Condonation of delay in approaching the Commission for determination of the Project Specific Tariff u/s 62 of the Electricity Act, 2003 & RE Regulations, 2010.
 - ii. To allow it filing of Petition under relevant provisions of the Act as well as under Regulation 14 of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010.
 - iii. To relax the Regulation 11(3)(a) of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010 for the purpose of determining the Project Specific Tariff for the Project, and to permit reassessment of the design energy of the project by an agency/organisation empanelled/approved by UERC/CERC and on the basis of the same the Commission determine the Project Specific Tariff of its above mentioned project under Regulation 14 of RE Regulations, 2010.
 - iv. To pass such other order as this Commission may deem fit and proper in the facts and the circumstances of the case.
- 1.3. The Commission observed that the Application was not in accordance with UERC (Conduct of Business) Regulations, 2004 and the same was intimated to the Applicant vide letter dated 06.06.2013. The Applicant vide its reply dated 16.07.2013 resubmitted the same. Accordingly, a hearing was held on 09.01.2014 so that the Applicant & UPCL may present their respective views in the matter. UPCL vide its letter dated 06.01.2014 submitted its reply. However, during hearing the Applicant informed that copy of UPCL's reply was not provided to it and, therefore, the Commission directed UPCL to provide a copy of the aforesaid reply dated 06.01.2014 to the applicant. During hearing, the applicant was also directed for

submission of rejoinder to UPCL's reply within 10 days time if they so desire. Similarly, UPCL was also directed to make counter reply within 10 days from the date of receipt of rejoinder from the applicant. Both the parties were directed to provide a copy of their proposed submissions, as above, to other party.

- 1.4. UPCL vide its reply dated 06.01.2014 submitted that since the Petitioner had not filed a petition for determination of Project Specific Tariff , the delay condonation application submitted in advance without the main petition was not maintainable. UPCL submitted that Section 94(2) of the Act pertains to powers of the Commission to pass such interim Order in any proceeding, hearing or matter before the Appropriate Commission, and the said provision was not applicable as no proceedings or matter was yet pending with the Commission. UPCL also submitted that Regulation 74 of UERC (Conduct of Business) Regulations, 2004 invoked by the applicant pertains to inherent powers of the Commission and the filing of the petition for determination of project specific tariff, after expiry of the stipulated period for the same, was prohibited under the specific provisions of the relevant regulation. The inherent powers could be exercised only in absence of specific provisions and not to by-pass and circumvent the specific provisions of the Regulations, moreover, there existed no such circumstances which required exercising of inherent power by the Commission. UPCL also submitted that the Petition was barred by Clause 2.1 of PPA dated 03.07.2009 & supplementary PPA dated 10.01.2013 and provisions of RE Regulations, 2010.
- 1.5. UPCL in its above reply while referring to Regulations 2, 11, 14, & 15 of the RE Regulations, 2010, also referred to the Commission's Order dated 04.10.2013 and submitted that the similar issue had also been dealt with by this Commission wherein requests of small hydro developers, namely M/s Birahi Ganga Hydro Power Ltd., M/s Rishiganga Power Corp Ltd & M/s Himalaya Hydro Power Pvt. Ltd., for determination of Project Specific Tariff was not considered by the Commission. UPCL also submitted that delay in the present case could not be condoned and without prejudice and without admitting anything, even otherwise there was no reason and justifiable cause for condonation of delay.
- 1.6. The Applicant vide its rejoinder dated 20.01.2014 submitted that delay in asking for determination of project specific tariff, was neither intentional nor deliberate, it was on account of unforeseeable circumstances preventing it from filing the petition. It also submitted that it had entered into PPA dated 03.07.2009 with the Respondent since it was not in a position to comply with its obligation under the PPA dated 24.08.2005 entered into with M/s PTC on account of the denial of Open Access permission by State of Uttarakhand. It submitted that execution of PPA dated 03.07.2009 took place since the generating units of

the Project were ready for commissioning and as Open Access/Connectivity was not granted, it would have resulted in bottling up of generation from the Project. With regard to tenure of the PPA, it submitted that the same was conditional, subject to the outcome of the judicial adjudication on the issue relating to its right to sell power outside the State of Uttarakhand to M/s PTC and thus, it was not certain as to whether it would sell its power to the respondent or to M/s PTC with whom it had already entered into a PPA dated 24.08.2005.

- 1.7. On the above reply, the Applicant also submitted that after the judgment dated 11.01.2011 by Hon'ble APTEL in Appeal No. 88/2010 it had requested the Respondent vide letters dated 23.03.2011 & 30.04.2011 for execution of the PPA duly removing the conditional tenure clause discussed in the para herein above, however, the Respondent failed to execute the same. The Applicant also stated that the Respondent created uncertain situation by unilaterally disconnecting the supply of energy from the Project on 03.11.2011 from 220 kV line charged at 33 kV without making reliable and adequate alternate arrangements despite specific condition in the MoU dated 12.06.2007 and the agreement reached between the Applicant, UPCL and PTCUL during the meeting held on 05.03.2008 for wheeling the energy generated by the Project as per the discussion/direction of the State of Uttarakhand on 26.12.2006. Further, it submitted that unilateral action of UPCL/PTCUL led to energy spillage to the extent of around 17 MU during the period from December 2011 to November 2012. It, further, submitted that these reasons led the Applicant to have legitimate doubt regarding the Respondent's intention to purchase the power generated from the Project. The Applicant also submitted that due to delay in execution of the PPA duly removing the tenure condition clause as discussed in the above para, the Applicant was not able to file its petition for determination of the Project Specific Tariff.
- 1.8. The Applicant further submitted that after being assured of the legally valid & approved PPA dated 10.01.2013 and on assessing & collating all the facts it filed application dated 16.07.2013. The generator also submitted that Supplementary PPA specifically stated that the tariff for sale of power be such as determined by the Commission and therefore, the RE Regulations, 2010 was completely applicable to the said HEP.
- 1.9. The Applicant further submitted that the CUF of the Project was based on derived discharge data as contained in the DPR of the Project prepared in the year 2003. However, the Applicant mentioned that it has been measuring the water discharge at site few kilometers downstream of weir and has the water discharge data for last 11 years. The Applicant averred that DPR design discharge data was proving to be completely off the mark based on

the actual discharge available since the commercial operation of the project. The Applicant also submitted that the Project witnessed very low CUF than what was estimated at the time of preparation of the DPR by an independent agency based on the data made available to it for river Bhagirathi. It, further, submitted that Power Potential Studies carried out at the time of the preparation of the DPR were not based on the discharge data of the river Bhilangana and rather the same was arrived and calculated on the basis of the data available in respect of Bhagirathi river. The Applicant also submitted that the same adversely affected the financial viability of the Project and the Applicant was unable to service even its debt as well as servicing of its equity.

- 1.10. The Applicant submitted that the judgment in other cases decided by the Commission, referred by the Respondent, wherein the Commission had rejected the request of the developers for condoning the delay in filing the Application for fixation of Project Specific Tariff, did not emanate from the conditions and circumstances of PPA with conditional tenure clause and the legitimate doubt and impossibility arising therefrom as in the case of the Petitioner.
- 1.11. The Commission vide letter dated 03.02.2014 asked the Petitioner to submit justification/clarification with respect to its submission that the Supplementary PPA dated 10.01.2013 states that the tariff for sale of power generated from the project shall be such as determined by the Commission and, therefore, the RE Regulations, 2010 was completely applicable to the Project. The generator vide letter dated 10.02.2014 submitted that as per Clause 2.1 of the PPA dated 03.07.2009 UPCL would accept power from the Project at the levelised rate specified for such plant in Schedule 1 of UERC RE Regulations, 2008 as amended from time to time. The Applicant submitted that the combined reading of the above mentioned clause 2.1 of PPA and supplementary PPA dated 10.01.2013 would lead to conclusion that it was agreed between the parties that the tariff for power generated from the Project shall be such as would be determined by the Commission as per RE Regulations, as amended from time to time and therefore RE Regulations, 2010 were applicable for determination of tariff for the Project.
- 1.12. The Respondent (UPCL), vide its counter reply dated 18.02.2014, reiterated its earlier submission with respect to maintainability of the Petition. It has also submitted that the Applicant was well aware that the Application for determination of Project Specific Tariff and also for amending the regulations, has to be made accordance with the provisions of CBR. The Respondent further averred that the Applicant just by moving the Application, without paying any fee as legally applicable on the reliefs claimed, wanted the Commission

to first decide upon the delay condonation application, so that if ultimately the delay was not condoned than it would not have to incur the loss of paying fee.

- 1.13. The Respondent submitted that the Applicant made wrong statement that it was not in a position to comply with its obligation under the PPA dated 24.08.2005 on account of denial of Open Access permission by the GoU as it entered into a PPA dated 03.07.2009 with the Respondent. The Respondent further submitted that the PPA dated 03.07.2009 was executed even before filing an application for grant of Open Access by the Petitioner before the Commission. UPCL vide its reply submitted that if the Petitioner intended to sell power outside the State under the already executed PPA dated 24.05.2005 with M/s PTC and the Project was ready for commissioning as per schedule, then it should have applied for Open Access well in advance so that it would have saved the Project from bottling up energy generated. The Respondent also denied the submission made by the Applicant with respect to doubt about the future off take of the power generated from the Project. In this regard, Respondent also submitted that the Applicant never filed any appeal against the Order of the Commission refusing grant of Open Access and even after the Hon'ble APTEL's judgment, where it was again given the opportunity for moving an application for Open Access, the Applicant did not apply for the same, making it very clear that the Applicant did not want to sell power outside the State. The Respondent also submitted that the Applicant had raised and accepted the bills as per RE Regulations, 2010 and had also ultimately executed supplementary PPA with the Respondent on 10.01.2013 which was approved by the Commission. The Respondent further submitted that the PPA with M/s PTC was terminated before signing of supplementary PPA with the Respondent.
- 1.14. The Respondent in its above reply further submitted that the tenure of the PPA and tariff opted by the Applicant had no correlation at all. Replying to the Applicant's contention that delay in execution of the long term PPA was on account of the act and conduct of the Respondent, the Respondent denied the submission of the Applicant and submitted that even otherwise the same cannot be a cause for non filing of petition for determination of Project Specific Tariff.
- 1.15. The Respondent submitted that after coming into force of RE Regulations, 2010, the Petitioner had been raising and accepting payment, accordingly, and the option once exercised could not be permitted to be changed. The Respondent, on above grounds, requested the Commission to dismiss the Application with cost.

2. Commission's views and decision

2.1. Regulation 11(2) of RE Regulation, 2010 specifies as under:

"The RE Based Generating Stations and Co-generating Stations, except those mentioned under Proviso 1 & 2 to sub- Regulation (1) of Regulation 2, may opt for the generic tariff, as determined based on norms specified in these Regulations for different technologies, or may file a petition before the Commission for determination of "Project Specific Tariff". For this purpose RE Based Generating Stations and Co-generating Stations shall give its option to the distribution licensee at least 3 months in advance of date of commissioning or one month after the date of issuance of these Regulations, whichever is later. The option once exercised shall not be allowed to be changed during the validity period of the PPA."

Emphasis added

Thus, the above reading of Regulation 11(2) makes it clear that:

- (a) The generators have to either opt for generic tariff or file a petition for determination of project specific tariff.
- (b) The generators are required to give their options to the distribution licensee atleast 3 months in advance of the date of commissioning of their projects or one month after the date of issuance of the Regulations, whichever is later.
- (c) The option once exercised shall not be allowed to be changed during the validity period of PPA.

2.2. Since the date of commissioning of the Project and signing of PPA with Respondent by the Applicant was prior to the date of notification of RE Regulations, 2010, therefore, in accordance with the above mentioned Regulations, the Applicant was required to intimate its option to the distribution licensee within one month from the date of issuance of these Regulation, i.e. by the end of August, 2010. The Commission also observed that the Applicant, vide its letter dated 27.11.2010, had informed the Commission about the consent given by the Applicant to Respondent for opting normative levelised tariff in accordance with RE Regulations, 2010. Also, the Applicant had been raising the bills and accepting the payment, in accordance with the RE Regulations, 2010, further corroborating the Applicant's action that it had exercised its option of generic levelised tariff in accordance with these Regulations.

2.3. The Commission is of the view that if the Applicant had been keen on selling power outside the State, i.e. to M/s PTC (trading licensee) then it ought to have exercised its right of Open Access at least subsequent to the order of Hon'ble APTEL allowing sale outside the State for

SHP in accordance with the Implementation Agreement with State Government, continued to supply power from its Project to the Respondent. Hence, despite the specific orders of Hon'ble APTEL, the Applicant was interested in supplying power from its project to the Respondent. Taking cognizance of the submissions and pleadings during the course of the proceedings, the Commission finds that the Applicant had signed PPA with the Respondent on 03.07.2009 and the condition on Tariff incorporated in the PPA provided tariff/rates were to be in accordance with the relevant regulations of the Commission as amended from time to time. Accordingly, with the enforcement of subsequent RE Regulations, 2010 w.e.f. 01.07.2010, the Applicant should have promptly acted and exercised option in accordance with Regulation 11(2) of these Regulations. Abiding by the provision of the RE Regulations, 2010, the applicant would have been able to either opt for generic tariffs or opt for project specific tariff. Hence, the Commission doesn't accept the contention of the applicant that due to uncertainty of offtake of power, it was unable to file project specific tariff petition before the Commission in accordance with the provisions of the Regulations.

2.4. In addition to the above, the Commission also observes that the Applicant had made representation before this Commission in the matter of dispute arising out of the Power Purchase Agreement dated 03.07.2009. The Commission vide Order dated 17.12.2012 held that the aforesaid PPA was not a valid long term PPA and issued direction for execution of fresh/ Supplementary PPA. Relevant extract of the Order is as following:

"16. Taking cognizance of the terms and conditions of the PPA dated 03.07.2009 entered between the Petitioner and the Respondent, the Commission is of the view that the said PPA cannot be construed as a valid long term agreement particularly on account of the conditions provided in the agreement. Some of the conditions are reproduced below:

"WHEREAS, the Generating Company desires to sell entire 22.5 MW (Plus 10% overload) power scheduled to be generated in the Generating Company's facility to UPCL pending resolution of legal issues regarding the sale of power other than consumer outside the state of Uttarakhand subject to the following conditions:

- 1. Company's right in regard to sale of power outside the State of Uttarakhand to PTC and others on the Final decision on the issue by UERC/Tribunal/Court if the decision is in the favour of the Company*
- 2. The terms and conditions contained in the PPA and the rights and obligations specified would be subject to the final decision on the legal issues of the sale of power by the company to PTC. However, generating company shall give two months notice to UPCL before termination of this agreement."*

"19. Duration 19.1 Unless terminated by default, this agreement shall be valid till the expiry of 30 years or after two months from receipt of notice from Generating Company if the final decision on the legal issue is in favour of Generating Company regarding the sale of power to other than consumer

outside the state of Uttarakhand to PTC and permitted the company to give the power outside the State to PTC, whichever is earlier.”

It is noted that both recital and duration of PPA are not only conditional but also bestow unilateral power of termination to the Petitioner. In view of this, the Commission holds that the power purchase agreement, as it exists today, is not a valid long term agreement.”

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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 within three days of receipt of option of the Petitioner.*

Based on the above, the Applicant signed a Supplementary PPA dated 10.01.2013 with the Respondent. The Commission is of the view that a PPA is a legal document having terms & conditions mutually agreed between the two parties and clause 2.1 of the PPA stipulates that the Applicant shall supply power from its Project at the rate specified in accordance with the RE Regulations and amendments issued from time to time. Even after signing of the Supplementary PPA, the Applicant continued to raise generation bills on the Respondent including acceptance of the payment at the generic tariff specified under the aforesaid Regulations. Conclusively it can be inferred that the Applicant has been supplying power from its project under the generic tariff option in accordance with the RE Regulations, 2010 and the present application is an afterthought.

- 2.5. On the Applicant’s submission that in accordance with PPA dated 03.07.2009 & Supplementary PPA dated 10.01.2013, the tariffs for sale of power generated from its Project shall be such as determined by the Commission and, therefore, RE Regulations, 2010 is completely applicable to the Project. The Commission finds it pertinent to reproduce clause 2.1 of the PPA dated 03.07.2009 which reads as:

“2.1 UPCL shall accept and purchase 22.5 MW (Plus 10% overloading) of power made available to UPCL system from the Generating Company based on Small hydro with capacity up to 25 MW at the levelised rate specified for such plant in Schedule-1 of Uttarakhand Electricity Regulatory

Commission (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 as amended from time to time."

Without delving much into the above averment made by the Applicant, by just plain reading of the aforesaid clause it is amply clear that the applicable rate were levelised tariff as specified in schedule-1 of RE Regulations which is nothing but generic tariff and at no place any condition on determination of the Project Specific Tariff has been incorporated in the aforesaid PPAs. Hence, the Commission rejects the interpretation made by the Applicant on the conditions of PPA with regard to the tariff opted by it. Further, the Commission also takes cognisance of Regulation 11(2) of RE Regulations, 2010 which clearly provide that tariffs once opted by the generator under the aforesaid Regulation are not allowed to be changed during the validity period of the PPA and as per the Regulations, the validity of the above mentioned PPAs is for the useful life of the small hydro projects.

- 2.6. Based on the above discussion, the present request of the Applicant for condonation of delay for filing Petition for determination of project specific tariff does not pass the test of maintainability with respect to the provisions of the regulations. Accordingly, it is held that the Condonation application filed by the Petitioner, for delay in filing of Application for determination of project specific tariff, is not maintainable in accordance with the provisions of RE Regulations, 2010 and therefore, cannot be accepted. The Applicant's request to allow it to file Project Specific Tariff petition cannot be entertained for reasons mentioned hereto above.
- 2.7. Applicant has also pleaded for relaxation in regulations for reassessment of design energy of the Project. In this regard, relevant Regulation 11(3)(a) of RE Regulations, 2010 stipulates as under:

"(3) Project Specific Tariff, on case to case basis, shall be determined by the Commission in the following cases:

(a) For projects opting to have their tariffs determined on the basis of actual capital cost instead of normative capital cost as specified for different technologies under Chapter 5, the CUF (generation) for recovery of fixed charges shall be taken as that envisaged in the approved DPR or the normative CUF specified under Chapter 5 for the relevant technology, whichever is higher;"

The Commission would clarify that the Applicant's request for reassessment of design energy would amount to relaxation of normative CUF, allowed to generators who have opted generic tariff like this Applicant. However, event of choosing factoring either DPR CUF or the normative CUF for the purpose of determination of tariff under the RE Regulations comes only in case of determination of Project Specific Tariff under the above

provision of the Regulations. As the Applicant's request for condonation of delay in filing of application of Project Specific Tariff has been held as not maintainable, therefore, Applicant's request for relaxation in regulations for reassessment of design energy for the aforesaid reasons is also not sustainable.

2.8. The Application being not maintainable is hereby disposed off.

2.9. Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Jag Mohan Lal)
Chairman