

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Dispute between M/s Bhilangana Hydro Power Limited and Power Transmission Corporation of Uttarakhand Limited regarding illegal and incorrect bills for monthly transmission charges and invocation of letter of credit.

AND

In the matter of:

M/s Bhilangana Hydro Power Limited.

...Petitioner

AND

In the matter of:

Power Transmission Corporation of Uttarakhand Ltd.
State Load Dispatch Centre.

...Respondent No. 1
...Respondent No. 2

Coram

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

Date of Hearing: 09th January 2014

Date of Order: 27th March 2014

ORDER

The present Petition was filed by M/s Bhilangana Hydro Power Ltd (hereinafter referred to as Petitioner) under Sections 86(1)(e), 86(1)(f) and 86(1)(k) of the Electricity Act,2003 (hereinafter referred to as Act) and under Regulation 58 of UERC (Terms and Conditions of Intra-State Open Access) Regulations,2010 against Power Transmission Corporation of Uttarakhand Ltd (hereinafter referred to as Respondent No.1 or PTCUL). The Petitioner

has alleged that Respondent No. 1 was abusing its dominant position and was acting in violation of the terms of the Transmission Service Agreement (TSA), executed between the parties on 25.10.2008, by raising illegal and arbitrary demands for incorrectly calculated monthly transmission charges (MTC), arrears and late payment surcharge on arrears.

2. A hearing in the matter was fixed on 13.11.2013. However at the request of the Petitioner the said hearing was postponed and was subsequently held on 09.01.2014 at 12:00 Hrs in the Commission's office. The Commission heard the Petitioner and the Respondents.
3. The Petitioner, inter alia , raised issues with regard to the interpretation of the following terms of the TSA. These are discussed in the paragraphs hereinafter.

4. **Due date**

- (1) According to the Petitioner, the Respondent No.1 was raising bills for monthly transmission charges from January 2012 onwards and in all the bills it was clearly mentioned that the invoices raised were in accordance with clause 5.2 (Determination of Transmission Charges) and clause 5.3(Delivery of Invoices) of TSA and UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010. As envisaged in the TSA, the amount due was to be payable by the due date and as per the TSA, the due date provided therein was "within 30 days" from date of receipt of the invoice. The Petitioner contended that it had been making payments towards all invoices raised by Respondent No.1 by the due date stipulated in the TSA. According to the Petitioner, notwithstanding the above stipulations on due date in TSA, the Respondent No.1 in the invoice dated 05.01.2013 for the 1st time mentioned the term "due date" as per the Regulation 32 of UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010 as "within 5 working days of receipt of the bill". The relevant extract of the regulation is reproduced below:

"32 Billing, Collection and disbursement

(1) Inter-State Transactions:

...

(v) Open Access customer connected to STU shall pay the bills within 5 working days of receipt of the bill.” ...

- (2) The Petitioner has refuted the above action of the Respondent No.1 and has stated that Respondent No.1 cannot unilaterally and retrospectively revise, as above, the stipulation on due date in the TSA agreed between two parties and further, levy late payment surcharge on bills raised and duly paid in the past. The Petitioner has contended that Respondent No.1, before bringing about any change in the due date, should have had informed the Petitioner about the same, which it failed to do so, therefore, the belated claims of late payment surcharge, in the invoice dated 05.01.2013, for bills raised since January 2012 were not tenable in the eyes of law.

5. Effective date of charging Monthly Transmission Charges (MTC)

- (1) According to the Petitioner, the monthly transmission charges (MTC) bills raised by Respondent No.1 consists of two parts namely part-A consist of MTC for the existing network of the Respondent and Part-B consist of MTC for the dedicated network developed by Respondent No.1 for evacuation of power from the Petitioner's Bhilangana-III SHP to Respondent's 220 kV S/s at Chamba. The Petitioner has submitted that it has been duly making all payments towards undisputed monthly transmission charges and SLDC operating charges for each month (forming Part-A of the invoices raised by the Respondent No.1) on or before the due date.
- (2) The Petitioner contended that the generating station was ready for commissioning on July 2011, however, due to delay in erection of evacuation line from the SHP to 220 kV S/s Chamba, sealing of meters was done on 12.11.2011 and the permission from SLDC (hereinafter referred to as Respondent No. 2) for energising the generator switch yard was granted on 18.11.2011 and subsequently the first machine was synchronised on 20.12.2011. The Petitioner stated that the monthly transmission charges including Respondent No.2 operating charges should have been levied from the date of synchronisation of the machine and not from the date of sealing of meters as claimed by the Respondent No.1. Hence, the Petitioner has averred that

invoices raised by Respondent No. 1 for the months of November and December 2011 are unlawful and accordingly, MTC including Respondent No.2 operating charges for the period 12.11.2011 to 19.12.2011 are not payable by it.

6. MTC, arrears and late payment surcharge

According to the Petitioner, Respondent No.1 cannot claim MTC on Part-B component of the invoices and levy late payment surcharge thereof vide its revised invoices since Part-B is monthly transmission charges for the dedicated network developed by Respondent No.1 for evacuation of power from Petitioner's Bhilangana-III SHP to PTCUL's (Respondent No.1) 220 kV S/s at Chamba and the aforesaid claimed charges are not in accordance with the decisions of the Commission taken in its interim order dated 11.12.2012. The Commission, in the said Order, had taken a view that since the determination of ARR of the transmission system associated with Bhilangana-III SHP was still under consideration before the Commission, therefore the bills raised for transmission charges for the transmission system from Bhilangana-III SHP to 220 kV S/s Chamba by PTCUL (Respondent No. 1) were not backed by proper authority. The Petitioner stated that hence the aforesaid monthly transmission charges, arrears and late payment surcharge are illegal and arbitrary, therefore not payable by it.

7. Invocation of Letter of Credit (L/C) in violation of the interim order passed by this Hon'ble Commission dated 11.12.2012 in the Petition dated 30.11.2012 filed by the Petitioner before the Commission

The Petitioner has stated that in accordance with the interim Order dated 11.12.2012 passed by the Commission that the invoices raised by PTCUL (Respondent No.1) for transmission charges for the transmission system from Bhilangana-III SHP to 220 kV Sub-Station Chamba i.e. Part-B of the invoices, are not backed by proper authority, therefore, the charges for the said transmission system, till they are determined by the Commission, are not payable by it. The Petitioner has further stated that, since it was duly making full payment of the undisputed monthly transmission and SLDC charges pertaining to the existing system of PTCUL on or before the due date and was disputing the transmission charges for transmission system from Bhilangana-III SHP to 220 kV Sub-Station Chamba

i.e. Part-B of the invoices, such invocation of L/C by Respondent No.1 for recovery of disputed MTC, arrear and late payment surcharge was illegal and arbitrary in accordance with second proviso to clause 5.6.1 (c) of TSA.

8. The Petitioner has submitted the following prayers in the current petition before the Commission and the same are reproduced below:

- (1) To quash the invoices raised by Respondent No.1 under cover letters dated 18.10.2012, 22.11.2012, 04.12.2012, 21.12.2012, 05.01.2013, 05.02.2013 and 04.03.2013 for arrears and late payment surcharge on arrears;
- (2) To declare the Due date for the payment of an invoice as the thirtieth day from the date of receipt of an invoice, in terms of the Transmission Service Agreement dated 25.10.2008 and quash all illegal and arbitrary claims for the past arrears and late payment surcharge;
- (3) To quash all claims raised by respondent No.1 towards monthly transmission charges calculated 12.11.2011 to 19.12.2011 along with late payment surcharge;
- (4) To direct respondent to calculate monthly transmission on the basis of the available transmission capacity arrived at by multiplying the installed capacity by the plant load factor which is 64.07% of the installed capacity of the plant and for periods when power was evacuated from the petitioner's power plant;
- (5) To quash the letters dated 22.11.2012, 04.12.2012, 11.02.2013, 06.03.2013, 19.03.2013, and 30.03.2013 seeking invocation of the letter of credit by the Petitioner against a disputed invoice;
- (6) To direct respondent No.1 to refund the sum of Rs. 36,53,908/- paid by the Petitioner on 25.03.2013 under protest along with interest @ 15% per annum;
- (7) To direct respondent No.2 to refund the operating charges amounting to Rs. 76,000/- collected for the period 12.11.2011 to 19.12.2011 along with interest @ 15% per annum.

- (8) To direct the Respondent No.1 to jointly reconcile all charges payable by the Petitioner including the arrears and late payment surcharges;
 - (9) Pass such other and further orders as the Hon'ble Commission may deem fit and proper in the facts and circumstances of the present case.
9. Respondent No. 1 has refuted the charges levelled by the Petitioner that it is abusing its dominant position or is acting in violation of the terms of TSA or is raising illegal and arbitrary demands of incorrectly calculated monthly transmission charges, arrears and late payment surcharge on arrears.
10. Respondent No.1 has stated that it is wrong to say that MTC is to be levied from the date of synchronisation of the first machine i.e. 20.12.2011, as the billing of MTC, according to clause 5.1 of TSA, is to be done from Scheduled/Revised Scheduled CoD, provided evacuation system is ready for connection by this date. Respondent No.1 contended that the Petitioner had in his appeal No. 112 of 2011 filed before the Hon'ble Appellant Tribunal stated that their plant would be ready in 1st week of July 2012 and the same may be treated as revised schedule CoD. Respondent No.1 stated that their evacuation system was ready for energisation on 04.11.2011 and any delay thereafter was not attributable to it.
11. The Respondent No. 1 stated that the meters, to be installed at the generating end alongwith cable, meter box etc. were to be supplied by the Petitioner . Respondent No.1 averred that since there was a delay on the part of the Petitioner in supplying the meters, cable, meter box etc., the joint sealing of the meters could only be done on 12.11.2011. The Respondent No.1 further stated that the evacuation system of PTCUL was ready for energisation on 04.11.2011 and any delay thereafter, is not attributable to Respondent No.1.
12. Respondent No. 1 has further contended that since it has made huge investment in construction of the evacuation system of the Petitioner, it cannot be made to suffer for any delay on the part of the Petitioner.

13. The Respondent No.1 also stated that initially billing date of MTC was from 04.11.2011 which was later revised to 12.11.2011. The Respondent No.1 has stated that, however, on checking the relevant records it is now evident that calculation of MTC is to be done from 04.11.2011.
14. Respondent No.1 has refuted the charges of the Petitioner that it is attempting to unilaterally and retrospectively revise/amend the definition of "Due Date." Respondent No.1 has stated that it is not mentioned anywhere in any invoice or even in the covering letter that the due date for payment of charges shall be 30 days from the delivery of the invoices. The Petitioner is malafidely assuming the same and making wrong interpretation knowing fully well the actual legal position and the due date. Respondent No.1 has further stated that clause 11.11 of TSA categorically state that in case of any discrepancy, the Regulations of the Commission shall prevail. Respondent No.1 has also stated that as per clause 5.4.2 of TSA, the applicable late payment surcharge /rebate shall be governed by the Regulations of the appropriate Commission in this regard. The Regulation 33 of UERC (Terms and Conditions of Intra-State Open Access) Regulations,2010 specifies the rate of LPS and Regulation 32 of the aforesaid Regulations specifies the due date for payment of bills which for Inter-State short-term Open Access customers is within 05 working days of receipt of the bill.
15. Respondent No.1 has also submitted that Petitioner is malafidely representing the invocation of the L/C as a coercive action of the Respondent. Respondent No.1 has further stated that the Petitioner very often made payments after the due date and in some months made payments either partially or made no payments at all. Respondent No.1, as such, had no alternative but to invoke L/C to realise its dues. Respondent No.1 has also submitted that L/C was invoked only for the dues of MTC of the Respondent's existing network i.e. Part-A of invoice and its arrears and LPS thereof and not for the dedicated system.

16. COMMISSION'S VIEW:

- (1) Taking cognisance of the submissions made by the parties in writing and also during the hearing proceedings before the Commission, the Commission is of the view that the dispute between the parties requires to be adjudicated in terms of Section 86(1)(f) of the Act which provides that such dispute has to be adjudicated by the appropriate Commission and also empowers the Commission to direct that the dispute may be adjudicated upon by an arbitrator to be appointed by the Commission. 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, inter alia, 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) 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 be appointed to adjudicate the disputes raised between the parties.

- (3) The Commission is also of the view that the prayers made by the Petitioner in the Petition are also prayers that an arbitrator is competent to grant in law.
- (4) In exercise of powers conferred on it under section 158 of the Act and dictum of Hon'ble Supreme Court quoted in para 1 hereto above, the Commission hereby appoints Shri R.D. Gupta, Ex-Member, Uttar Pradesh Electricity Regulatory Commission, V-4, Prasad Nagar, New Delhi, 110005 (Mobile No. 09968634254) as the sole arbitrator to decide the dispute between the parties on the issues raised by the Petitioner relating to (i) Interpretation of the due date for payment of the bills, (ii) Effective date of charging MTC, (iii) Calculation of MTC, arrears, late payment surcharge; and (iv) Invocation of the L/C by PTCUL.
- (5) 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.
- (6) 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.
- (7) The Arbitration proceedings would be governed by the procedure for the arbitration in accordance with the Arbitration and Conciliation Act, 1996.
- (8) 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 instalments 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.

- (9) The arbitrator would also be entitled to claim reimbursement of actual travelling expenses for travels, if required, in connection with the arbitration.
- (10) The arbitrator may conduct the proceedings as expeditiously as possible, preferably within 3 months of application to be made by the Petitioner as in (5) above.
- (11) The parties may approach the named arbitrator with a copy of this Order to enable the arbitrator to enter into the reference.

The Petition is disposed off accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Jag Mohan Lal)
Chairman