

Before

**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

**Petition No. 03 of 2015**

**In the Matter of:**

Indemnification of the Petitioner for the loss caused due to delay in commissioning of Transmission/evacuation system and the breach of the provisions of the Transmission Services Agreement by PTCUL.

AND

**In the matter of:**

M/s Bhilangana Hydro Power Limited.

...Petitioner

AND

**In the matter of:**

Power Transmission Corporation of Uttarakhand Ltd.

...Respondent

**Coram**

**Shri Subhash Kumar      Chairman**

**Shri C.S. Sharma      Member**

**Shri K.P. Singh      Member**

**Date of Hearing: 19<sup>th</sup> January, 2015**

**Date of Order: 04<sup>th</sup> March, 2015**

**ORDER**

The present Petition was filed by M/s Bhilangana Hydro Power Ltd (hereinafter referred to as Petitioner) under Sections 86(1) (f) of the Electricity Act, 2003 (hereinafter referred to as Act) against Power Transmission Corporation of Uttarakhand Ltd. (hereinafter referred to as Respondent or PTCUL).

## Facts of the Case

2. Bhilangana Hydro Power Limited is a company incorporated under the Indian Companies Act, 1956 and has set up a 24 MW hydro electric power project (Bhilangana-III) on River Bhilangana near Village- Ghuttu, Tehsil Ghansali, District Tehri Garhwal, Uttarakhand. The project was allocated under the competitive bidding process by Government of Uttarakhand in 2003.
3. The Petitioner signed an implementation agreement dated 25.01.2007 with GoU and thereafter, in compliance of clause 8.1 (l) of implementation agreement the Petitioner executed a Memorandum of Understanding with PTCUL on 25.01.2007 for evacuation of power. Under the MoU, STU i.e. PTCUL was required to make arrangement for evacuation of power from the inter connection point i.e. switch yard of Bhilangana-III project.
4. The Petitioner signed Transmission Service Agreement with PTCUL on 25.10.2008 wherein scheduled commercial operation date (COD) of the project was proposed as 31.03.2009. The schedule date of commissioning was revised from time to time by the Petitioner.
5. The Petitioner has demanded indemnification for the loss caused to it due to delay in commissioning of transmission/evacuation system which purportedly resulted in breach of the provisions of the Transmission Service Agreement (TSA) by PTCUL. The Petitioner has prayed the Commission for granting of following relief:

*"a) direct the Respondent licensee to pay an amount of Rs. 59.59 Crores along with late payment interest @15%/annum as prescribed by CERC/UERC to the Petitioner for the loss caused to the Petitioner an account of PTCUL's default;*

*b) Pass such other and further orders as the Hon'ble Commission may deem fit and proper in the facts and circumstances."*

6. The hearing for admissibility of the Petition was held on 19.01.2015 at 12:30 PM in the Commission's office. The Commission in its order of the same date ordered:

*"Heard the Petitioner and the Respondent in the matter. The Commission directs the Petitioner to submit a copy of the Appeal filed by it before the Hon'ble Appellate Tribunal*

*for Electricity against the Order of the Commission dated 08.07.2011 and referred to in this Petition."*

7. As directed the Petitioner submitted a copy of the Appeal filed by it before the Hon'ble Appellate Tribunal for Electricity against the Order of the Commission dated 08.07.2011 and referred to in this Petition.

### **Submission of the Petitioner**

8. The Petitioner stated that under the Transmission Service Agreement PTCUL had an obligation to ensure completion of transmission network for evacuation of the power generated from its Bhilangana-III project prior to scheduled or revised scheduled commercial operation date so that there is no loss of generation.
9. The Petitioner stated that it was in constant touch with the Respondent for ensuring completion of the transmission network before commissioning of the project under revised schedule.
10. The Petitioner contended that it made numerous correspondences with the Respondent and GoU informing of the delay in construction of transmission/evacuation system for the Bhilangana-III project by the Respondent.
11. The Petitioner informed that approval for energisation of Bhilangana-III project was granted by Central Electricity Authority on 30.06.2011 under CEA (Measures relating to Safety and Electric Supply) Regulations, 2010 and Electrical Inspector, GoU, on 01.07.2011.
12. Accordingly, the Petitioner averred that its generating plant i.e. Bhilangana-III project was ready for generation of power from 01.07.2011. However, the evacuation facility i.e. 220 kV Bhilangana-III- Ghansali line, to be made available by the Respondent was not made available till 17.11.2011, resulting in substantial generation loss to the Petitioner.
13. The Petitioner averred that the financial implication of such generation loss w.e.f. from 01.07.2011 to 18.11.2011 comes to around ₹ 59.59 Crores.
14. On the contention of the Respondent that the terms of the TSA did not provide for any compensation for its breach, the Petitioner stated that absence of compensation clause in the TSA does not debar the Petitioner from seeking indemnification for

the loss caused due to breach of contractual obligations by the Respondent. Further, the Petitioner stated that Section 73 of the Indian Contract Act, 1872 entitles it to claim damages for the loss caused due to the Respondent's default.

15. The Petitioner further informed the Commission that vide letters dated 26.06.2014, 11.08.2014 & 27.10.2014 it requested the Respondent to indemnify it for the loss caused. However, the Respondent failed to do so. In fact the Respondent vide its letter dated 26.07.2014 denied and disputed the Petitioner's claim. Therefore, a dispute has arisen between the parties necessitating adjudication by the Commission under Section 86(1)(f) of the Electricity Act, 2003.
16. The Petitioner contended that Hon'ble APTEL vide its Order dated 14.10.2011 gave liberty to it to approach the Commission on other disputed issues if the circumstances so warrant.
17. Pursuant to the directions of the Hon'ble APTEL in its Order dated 14.10.2011, the Petitioner stated that it has filed the present Petition claiming indemnification for the loss of generation on account of delay in commissioning of the evacuation facility by the Respondent.

#### **Submission of the Respondent**

18. The Respondent submitted that the Order of Hon'ble APTEL dated 14.10.2011 clearly implied that the revised COD was 30.10.2011 and the same was not challenged by the Petitioner before any judicial forum. Therefore, all the earlier correspondences of the Petitioner with the Respondent in respect of COD are null and void.
19. The Respondent further contended that the Petitioner has also not specified that under which provisions of Electricity Act, 2003, Regulations and Rules it has assessed and claimed the amount of Rs. 59.59 Crores.
20. The Respondent averred that the present Petition has in fact been filed by the Petitioner to claim compensation for hypothetical generation (deemed generation) without having even started to generate electricity. The Respondent further contended that there is no provision of compensation in the TSA hence this amount of Rs. 59.59 Crores is fictitious and not admissible.

21. The respondent also contended that there is no dispute as Petitioner has neither complied with the clause 9.2 of the TSA nor the Order of the Commission dated 08.07.2011 which has become final in the light of the dismissal of the Appeal by Hon'ble ATE. Further, the correspondences by the Petitioner with the Respondent after the said order of the Commission also do not fall under the category "Notice" as envisaged in the clause 9.2 of the TSA. The Respondent further contended that the Petitioner has never demanded the amount of Rs.59.59 Crores in any of the correspondences.
22. The Respondent further argued that so far as Section 73 of the Contract Act is concerned the Petitioner has not raised any plea regarding the same in the Petition and if the Petition is amended the Respondent shall accordingly file a proper reply to the same. Even otherwise the provisions of Contract Act do not apply in the present case.

#### **Commission's view**

23. The Commission first undertakes to examine the contention of the Petitioner that PTCUL has failed to comply with its obligation, as per the terms of TSA, to ensure completion of transmission line necessary for evacuation of generation from Petitioner's station in a timely manner.

The Petitioner has further, contended that the aforesaid failure is a clear breach of the terms of TSA by the Respondent causing substantial loss to the Petitioner and therefore it is entitled for compensation.

24. The relevant conditions from the TSA reads as under:

"4.1.

*c. to make available the transmission capacity of the PTCUL/UPCL power network prior to Scheduled or Revised Scheduled COD to the Company for safe transmission of power as per this agreement, adhering to the applicable provisions in force by UERC Regulations/Grid Code;"*

The above condition require PTCUL to make its transmission line/network available to the Petitioner prior to Scheduled or Revised Scheduled COD of the

generator. Further, it is also relevant to reproduce definitions of scheduled COD and Revised Scheduled COD as included in TSA, which read as:

*“Schedule COD’ shall mean 31<sup>st</sup> March 2009 on which project is to be commissioned.”*

*“Revised Scheduled COD” shall mean amended dates with respect to Scheduled COD as specified in this Agreement”*

As is evident, the Petitioner did not adhere to the scheduled COD and hence only revised scheduled COD is relevant. The revised Scheduled COD means the amended dates w.r.t. scheduled COD as specified in the agreement. The TSA nowhere specifies what the revised scheduled COD is.

25. Further, considering various correspondences which the Petitioner had with the Respondent, the Commission has observed that the Petitioner, itself was not sure when its project would be ready for commissioning and had changed COD at least thrice.

26. On the issue of commissioning the TSA provides as under:

#### 4.2.1

*“(e) The Company shall, before commissioning the Project and its Interconnection Facilities, obtain all statutory approvals from the Chief Electrical Inspector/Electrical Inspector. Company shall issue a 15 days notice to PTCUL before trial operation and commercial operation of the generating sets and charging Interconnection Facilities.*

*Provided that, the company has incorporated all suggestions given by PTCUL in its proposal in the design and drawing of interconnection facilities.”*

This interalia required the Petitioner to obtain statutory approval both for the project as also for the interconnection facilities of the Chief Electrical Inspector/Electrical Inspector, before commissioning the project. The contention of the Petitioner that since they obtained Electrical Inspector’s Certificate for project on 30.06.2011, 01.07.2011 should be treated as revised COD is farfetched and has no support in the TSA. The certificate of Electrical Inspector, merely certifies that the installation are electrically safe as per I.E. Rules, and is just a prerequisite for commissioning of the project. Further, it will be relevant to refer to Regulation 3(22)

of the UERC (Terms & Conditions for Determination of Tariff Regulation) 2011 which reads:

*"22. Date of commercial operation or COD means:*

*...the date declared by the Generating Company after demonstrating peaking capability corresponding to installed capacity of the generating station through a successful trial run , after notice to the beneficiaries:"*

27. In common parlance also, commercial operation date is one on which the generator demonstrates its ability to generate power at rated capacity. The contention of the Petitioner that the date of certification of project by the Electrical Inspector be treated as COD cannot be sustained. It will also be relevant to have a look on what transpired after the evacuation line was ready. As mentioned by Respondent, the evacuation line was ready on 21.10.2011, was got inspected by Electrical Inspector and after removing deficiencies was energised on 04.11.2011. The metering system at Petitioners' end was not ready even then. As such even after 3 month of contended COD, the Petitioner was not ready to commission the project. In fact project commenced delivering power only from 20.12.2011 about 1½ months after energisation of line. It is evident that subsequent events also do not support the contention of the Petitioner that revised COD had occurred on 01.07.2011.
28. It is agreed that the Petitioner was vigorously following up erection of evacuation line as they were anxious that delay in it may hold up commissioning. The Petitioner filed a Petition before the Commission and did not abide by the advice of the Commission to attempt amicable settlement, appealed in Hon'ble APTEL against this advice. The said appeal was withdrawn by the Petitioner on assurance of PTCUL that it shall complete the evacuation line on or before 30.10.2011.
29. Based on the above analysis, the Commission concludes that the claims of the Petitioner that evacuation line was not ready before the occurrence of revised COD of the project and consequently a breach of TSA occurred cannot be sustained as Petitioner could not establish occurrence of revised COD. It is also noted that the Petitioner did not act for more than 3 years after the Hon'ble APTEL had issued Order on 14.10.2011 and now, has filed this petition after lapse of more than three

years. Filing of the present Petition by the Petitioner appears to be merely an afterthought.

30. Reverting now to the claim of compensation made by the Petitioner of Rs 59.59 Crore for contended breach of TSA, the Commission holds that any claims made by the parties in the agreement should flow from that agreement and cannot be independent of it. The said agreement contains no provision for payment of compensation by either party in case any breach occurs in the performance of their respective obligations.

31. To summarise, the Commission holds that neither a breach of TSA has been established nor the basis for seeking compensation is made out in absence of any provision in the agreement. As the basis of dispute for which adjudication is sought from the Commission is not established, the Commission holds that the Petition is not maintainable and accordingly disposes it off as dismissed.

Order accordingly.

(K.P. Singh)  
Member

(C.S. Sharma)  
Member

(Subhash Kumar)  
Chairman