

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Petition seeking determination of project specific tariff for 10.5 MW Small Hydro Power Project under Section 62 and 86 of the Electricity Act, 2003 read with Regulation 13 of Uttaranchal Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2013.

In the matter of:

Uttar Bharat Hydro Power (P) Ltd

... Petitioner

And

In the matter of:

Uttarakhand Power Corporation Ltd.

...Respondent

CORAM

Shri Subhash Kumar Chairman

Shri C.S. Sharma Member

Shri K.P. Singh Member

Date of Hearing: April 7, 2015

Date of Order: May 29, 2015

The Order relates to the Petition dated 16.01.2015 filed by Uttar Bharat Hydro Power Limited (hereinafter referred to as "the Petitioner" or "the generator") seeking determination of project specific tariff for its 10.5 MW Small Hydro Power Project on Sarju River at Kapkot, Bageshwar District, Uttarakhand under section 62 and 86 of the Electricity Act, 2003 read with Regulation 13 of UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2013 (hereinafter referred to as "RE Regulations, 2013").

1. Background and Submissions

- 1.1 A Petition was filed under section 62 and section 86 of Electricity Act 2003 read with Regulation 13 of RE Regulations, 2013 by the Petitioner seeking determination of project specific tariff for sale of energy generated by its 10.5 MW Small Hydro Power Project (hereinafter referred to as "the Project/Plant") to Uttarakhand Power Corporation Limited (hereinafter referred to as "UPCL").
- 1.2 The Petitioner has setup a project having an installed capacity of 10.5 MW in the name of Sarju III SHP. Prior to commencement of works, the cost of the Project as appraised by the financial institutions providing term loans to the Petitioner was estimated at Rs. 89.55 Crore. As stated by the Petitioner, due to reasons beyond its control like delays in obtaining permissions from statutory authorities, delay in transfer of land for laying down the transmission line and natural disasters, implementation of the Project got delayed and the Project Cost increased to Rs. 125.92 Crore.
- 1.3 On 30.06.2014, the Petitioner issued a letter to UPCL submitting that the testing of the sub-station at Kapkot was carried out by Electrical Inspector, Uttarakhand and approval of energisation of the same was granted. Accordingly, the Petitioner requested UPCL to complete the metering at the Plant. The meter was installed by UPCL on 11.07.2014 and the Petitioner declared COD of the plant on the same day.
- 1.4 The submissions of the Petitioner in the petition, reply for deficiency note and the Rejoinder are as follows:-
 - 1.4.1 On 16.12.2002 a Power Purchase Agreement ("PPA") was executed between the Petitioner and UPCL for the purchase of the entire electric energy received from the Project at the Interconnection Point.
 - 1.4.2 On 10.02.2010, the Additional Secretary, Government of Uttarakhand, vide its letter informed the Petitioner that, it had received instructions to give permission to the Petitioner for increasing the capacity of its small hydro power project from 2 MW to 10.5 MW. The following terms under which the said permission was provided are noteworthy:
 - (a) The Petitioner would deposit an amount of Rs. 27.50 Lakh by way of a bank draft with the Secretary, Energy, Government of Uttarakhand as additional premium

- relative to increment in the capacity of the Project; and
- (b) In the time limit prescribed for commercial production of the Project, an additional time of 15 months from the date of the said approval (i.e. 10.02.2010) would be given and after which delay surcharge would be payable as per the rules.
- 1.4.3 In November 2010, a DPR was prepared and issued by the Department of Water Resources Development and Management, IIT, Roorkee for the Project having an installed capacity of 10.5 MW with revised cost estimates of Rs 89.55 Crore for construction of the Project.
- 1.4.4 On 28.03.2011, Punjab National Bank (“PNB”) sanctioned a Term Loan of Rs. 21.28 Crore for the construction of the Project. The sanction letter further directed the Petitioner to enter into an IA with GOU for the increased capacity of the Project.
- 1.4.5 On 03.06.2011, a Supplementary IA (“Second Supplementary IA”) was executed between the GOU and the Petitioner thereby amending the IA dated 28.04.2004. The Supplementary IA dated 03.06.2011 increased the capacity of the Project from 2.0 MW to 10.5 MW and the Scheduled Commercial Operation Date was stated to be 15 months from 10.02.2010, being the date on which the Additional Secretary, Government of Uttarakhand gave permission for increasing the said capacity. The Second Supplementary IA further stated that, the Petitioner would sign a PPA with UPCL for the entire saleable energy generated from the Project.
- 1.4.6 On 13.10.2011, in terms of the provisions of the Second Supplementary IA executed between the GOU and the Petitioner, the Petitioner entered into a PPA with UPCL for the sale of power of 10.5 MW generated from the Petitioner’s Project.
- 1.4.7 On 04.01.2012, Power Finance Corporation (“PFC”) in response to the Petitioner’s Loan application dated 15.10.2010, granted in-principle approval to the Petitioner for a Rupee Term Loan to the extent of Rs. 22.685 Crore for the Project. However, the Board of Directors of the Petitioner could not reach an agreement with PFC with regard to the terms of the Loan Agreement. Thereafter, the Project Cost as appraised by PFC was accepted by PNB and PSB vide letter dated 02.01.2013. Further, on 10.10.2012, PSB sanctioned the restructuring of the Rupee Term Loan of Rs. 18.72 Crore. The sanction

letter further stated that the Commercial Operation Date of the Project was revised from October 2011 to October 2013. However, the Petitioner declared CoD on 11.07.2014 after the installation of the meter at the Project by UPCL.

1.4.8 The Petitioner also submitted that the Commission in exercise of its powers under Sections 61(h), 86(1)(e) read with Section 181(zp) of the Electricity Act had notified the RE Regulations, 2013 on 15.04.2013. The RE Regulations provided the terms and conditions and the procedure for determination of tariff of renewable energy generating stations including that of the Petitioner (small hydro power projects).

1.4.9 Further, it was submitted that, Regulation 10(2) of the RE Regulations, 2013 provided that the RE Based Generating Stations and Co-generating Stations, may file a petition before the Commission for determination of "Project Specific Tariff". Regulations 10(3) of the RE Regulations, 2013 further provided that, the Commission shall determine Project Specific Tariff for projects opting to have their tariffs determined on the basis of actual capital cost instead of normative capital cost. The relevant extract of the RE Regulations is reproduced below:

"The RE Based Generating Stations and Co-generating Stations, except those mentioned under Proviso 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 of the project or commissioning of the 1st unit, in case of multiple units or one month after the date of issuance of these Regulations, whichever is later. This option once exercised shall not be allowed to be changed during the validity period of the PPA."

1.4.10 The Petitioner also requested the Commission to consider the Capital Cost up to the date of commissioning of the Project being Rs. 125.92 Crore and allow the determination of tariff. The Petitioner also submitted that the Commission may adopt generic tariff as provisional tariff for the power supplied by the Petitioner's Plant till the fixation of final Project Specific Tariff for the Petitioner's Project in terms of Regulation 13(2) of the RE Regulations, 2013.

1.4.11 In response to the clarifications sought by the Commission, the Petitioner submitted

that, it had exercised its option under RE Regulation, 2013 and that RE Regulations, 2010 do not apply to its plant and the Petitioner requested the Commission to determine Project Specific Tariff. The Petitioner stated that its Project was commissioned on 11.07.2014, i.e. after coming into force of the RE Regulations 2013. Therefore, it was submitted that the Project would be governed by the RE Regulations 2013. Furthermore, it was submitted that there was no saving clause under the RE Regulations 2013 regarding provisions of the RE Regulations, 2010. Accordingly, coming into force of RE Regulations, 2013 repealed all the provisions of the RE Regulations, 2010. It was further submitted that under the provisions of the Electricity Act, 2003, ("Act"), Tariff Policy and National Electricity Policy, it was the obligation of the Commission to promote "renewable energy source." Also reproducing several provisions of the Tariff Policy, National Electricity Policy and the Electricity Act, the Petitioner stated that the Commission was mandated to promote Renewable energy sources including their financial viability. The Petitioner also submitted that due to the delay in achieving commissioning of the Project on account of reasons beyond the control of the Petitioner, the Project Cost had escalated substantially and in the event it is only paid Generic Tariff, the operation of the Project would become unviable.

1.4.12 The Petitioner vide rejoinder dated 06.04.2015 denied the submissions of the Respondent and had again relied on the Commissions mandate to promote RE. It submitted that due to the delay in achieving commercial date of operations of the Project on account of reasons beyond the control of the Petitioner, the Project Cost had escalated substantially and allowance of Generic Tariff to it would make the Project unviable. In this context, the Petitioner submitted that the Commission was tasked with the duty to promote renewable energy sources in terms of the Act, Tariff Policy and National Electricity Policy. It also stated that even if assuming that the option had been exercised by the Petitioner to opt for generic tariff the Commission had the power to reopen the PPA dated 13.10.2011 in order to promote renewable source of energy.

1.4.13 The Petitioner also denied the Respondent's submission and stated that the Respondent had wrongly contended that the Petitioner did not seek any changes in the PPA executed between the parties nor had the Petitioner expressed its unwillingness to sell

the power from the Project at levelized rates as provided in the RE Regulations 2010. It was submitted that in terms of Regulations 10(2) of the RE Regulations 2013, the Petitioner had two options i.e. opt for the generic tariff as determined based on norms specified in the RE Regulations 2013 or file a petition before the Commission for determination of "project specific tariff" 3 months before achieving commercial operations date or one month after date of issuance of the said regulations. It was submitted that the Project achieved Commercial Date of Operations on 11.07.2014. Accordingly, the Petitioner exercised its option under RE Regulations 2013 for determination of Project specific Tariff. The Petitioner had intimated the Respondent as well as the Commission that it opts for project specific tariff and that generic tariff may be paid till fixation of final project specific tariff for the Project.

1.4.14 The Petitioner further submitted that it was a trite law that that once any law/regulations are repealed, such regulations cannot be bought back with unless saved in some form in the repealing law itself.

1.5 Submissions of the Respondent in its Reply to the Petition are as follows:

1.5.1 The Respondent in its reply to the petition submitted that the Petitioner had entered into a power purchase agreement dated 13.10.2011 with it whereby the Petitioner accepted to make available 10.5 MW power to UPCL at the levelized rate and the option of generic tariff was accepted by the Petitioner as per the provisions specified under the RE Regulation, 2010 as per Clause 2.1(vii) of the Power Purchase Agreement and the Petitioner had declared the expected date of commercial operation as 21.12.2012.

1.5.2 The Respondent also submitted that the RE Regulations, 2010 were effective when the PPA was executed and the option of generic tariff was accepted by the Petitioner with the knowledge that if the option is once exercised by the Petitioner, Regulation 11(2) of RE Regulation, 2010 prohibited the Petitioner from changing the said option during the validity period of the PPA.

1.5.3 Further, the Respondent stated that RE Regulation, 2010 were repealed by RE Regulation, 2013 which was notified on 15.04.2013 and the Commission thereafter issued an amendment to RE Regulation, 2013 which was notified on 15.10.2013 whereby Chapter IV and V of the RE Regulation, 2010 were reinstated. It also submitted that the

Petitioner entered into legally valid PPA with UPCL and the financial closure of the generating station of the Petitioner was achieved before coming into force of RE Regulation, 2010, and the Petitioner opted to be covered by generic tariff under RE Regulation, 2010. Therefore, the rights of Parties have crystallized and that the Petitioner cannot now avail any benefit under the RE Regulation, 2013.

1.5.4 The Respondent also submitted that the provision of RE Regulation, 2013 and RE Regulation, 2010 were to be read harmoniously and the Petitioner under the provisions of Regulation specified by Commission and the Electricity Act, 2003 cannot be permitted to exercise the option for applicability of tariff twice for the same project.

Moreover, it stated that the Petitioner had not sought any changes in the PPA executed between the parties neither had expressed his unwillingness to sell the power from their hydro project to UPCL at levelized rates as provided in RE Regulation 2010.

1.5.5 UPCL submitted that the Petitioner had shown a very high per MW capital cost. The Respondent further submitted that in the year 2011 when the Petitioner was entering into the PPA with UPCL it was fully aware about the capital cost and had an expected date of commissioning as December, 2012, yet the Petitioner opted for generic tariff which clearly shows that the capital cost is shown to have been incurred by the Petitioner are not only hypothetical but also does not appear to be true.

1.6 A hearing was also held in the Commission on 07.04.2015 wherein the Petitioner and the Respondent made the same arguments as submitted in the petition and written submissions made before the Commission.

2. Commission's Views and Decision

2.1 Before going into the merits of the Petition, the Commission first examines whether the option of determining project specific tariff for the Petitioner who has already accepted the generic tariff as determined by the Commission under the RE Regulations, 2010 is tenable or not. Another issue that needs to be settled is whether the RE Regulations, 2013 are applicable to the Petitioner or whether RE Regulations, 2010 are the governing Regulations for the PPA executed between the Petitioner and the Respondent.

2.2 As is clear from the facts stated above that the PPA was executed between the Petitioner

and the Respondent as per RE Regulations 2010 on 13.10.2011, wherein both parties were expected to have the knowledge that option once exercised cannot be changed. The PPA was executed after signing of the second supplementary Implementation Agreement dated 03.06.2011 between the GOU and the Petitioner. The relevant extract of the PPA is reproduced hereunder:

“ 2.1 UPCL shall accept and purchase entire 10.5 MW power made available to UPCL system from generating Company based on any of the following sources and technologies:-

.....

vii) Any new source of technology which would qualify as Renewable Energy only after approval of Commission based on the Ministry of Non-Conventional Energy Sources (MNRE) approval in accordance with the terms and conditions of this agreement, at the levelised rate for such plant in Schedule I of Uttarakhand Electricity Regulatory Commission (Tariff and other terms for supply of Electricity from Renewable Energy Sources and non-fossil fuel based co-generating stations) Regulations, 2010 as amended from time to time. ”

2.3 In this regard, reference is drawn to Regulation 11(2) of the UERC (RE) Regulations, 2010. The relevant extract of the Regulation is reproduced hereunder:

*“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, it is noted that the Regulations prohibit exercising any change in the option.

2.4 The cost overrun in commissioning of the Project as alleged by the project developer cannot be considered a sufficient reason for revoking an express provision of the Regulation. Moreover, based on the submissions of the Petitioner in the petition, reply to the deficiency note and its rejoinder, wherein it has stressed on the Commission’s mandate

for promoting renewable energy. According to Point no 1.4.11 & 1.4.12 above, the reason submitted by the Petitioner for determining Project Specific Tariff was that the Commission is mandated to promote Renewable energy. The Commission is aware of the mandate entrusted to it to promote RE under the Act and Policies issued by Government of India. In light of the same, it had allowed generic tariffs and also other terms related to connectivity, etc. in its RE Regulations, 2010 and 2013. However, the Commission also has to function under the ambit of the Regulations notified by it. The Petitioner has itself exercised and accepted the option of Generic Tariff having knowledge of the express provisions of the Regulations and only because the Commission is mandated to promote RE, is not a reasonable justification submitted by the Petitioner for deviating from the Regulations. The Commission has to maintain a balance of interests so that the generators do not suffer unnecessarily but also the burden of excess tariff cannot be loaded on to the consumers. An express provision of the Regulation cannot be relaxed for promotion of renewable energy when the intention behind notification of that particular Regulation itself is promotion of RE. The Commission had specified the RE Regulations giving preferential tariff for Renewable Energy and it is a step to fulfill the same mandate. It is amply clear that determining project specific tariff at this stage shall now be deviating from the provisions of the RE Regulations, 2010 under which the PPA between the Petitioner and the Respondent is executed while the same PPA still regulates the sale of 10.5 MW of power between the Petitioner and the Respondent.

2.5 A similar issued had come up before the Commission in the matter of Applications filed by RE generators (M/s Birahi Ganga Hydro Power Ltd., M/s Rishiganga Power Corp. Ltd. & M/s Himalaya Hydro Pvt. Ltd.) seeking determination of project specific tariff. On the said petition, the Commission had passed an Order dated 04.10.2013. The relevant extract of the Order is reproduced hereunder:

"2.3.5 It is amply clear that Petitioner-1 & Petitioner-2 had signed PPA in respect of their SHPs with the Respondent after notifications of RE Regulations, 2010. PPA entered by Petitioner-3 with the Respondent was during the period when UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 (RE Regulation, 2008) were applicable. However, the project got commissioned after the date of notification of RE Regulation, 2010 and, therefore, provisions of RE Regulation, 2010 were

applicable to it. Accordingly, the Petitioner should have taken all the necessary action in accordance with third proviso of Regulation 2(1) of RE Regulation, 2010 for modification of its PPA with UPCL to make it consistent with RE Regulation, 2010.

2.3.7 Relying upon its Regulation, the Commission takes cognisance of Regulation 11(2) of RE Regulations, 2010 which clearly provide that tariffs once opted cannot be changed during the validity period of the PPA and as per the Regulation, the validity of the above mentioned PPAs is for the useful life of the small hydro projects. Hence, the present request of the Petitioners for determination of project specific tariff does not pass the test of maintainability w.r.t. the provision of the regulations and the same cannot be accepted and is liable to be rejected."

Accordingly, the Commission decides the matter as per law in accordance with the Regulations specified by the Commission. The request of the Petitioner to relax an express provision of the Regulation as they have incurred cost and time overrun cannot be allowed and, hence, rejected.

- 2.6 The Commission now addresses the second issue of validity of restoration of RE Regulation, 2010 after it was repealed by RE Regulations 2013. Though the RE Regulations, 2010 have been repealed by RE Regulation, 2013 on 15.04.2013, thereafter, the Commission issued amendment to the RE Regulations, 2013 and notified the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2013 whereby Regulation 3 of Chapter 1, Chapter 4 and Chapter 5 of the RE Regulations, 2010 have been reinstated. The Petitioner's PPA has been executed under the RE Regulations, 2010 as clarified above and, thus, the RE Regulations, 2010 shall be applicable even after the RE Regulations, 2013 repealed the prior Regulations. The Petitioner has raised the question on the legality of the amendment reinstating Chapter 1, Chapter 4 and Chapter 5 of the RE Regulations, 2010. The Commission is of the view that legality of Regulations and Amendments cannot be challenged in the Commission itself as Commission is not the right forum to question the legality of the legislations and the Petitioner has wrongly raised the issue of legality of such legislation in the petition for fixation of Tariff.
- 2.7 It has been contended by the Respondent that as the Petitioner in the PPA executed has opted for the generic tariff prescribed in the RE Regulations, 2010, the same tariff shall apply. The Commission now examines this contention. The relevant provisions of the RE

Regulations, 2013 are reproduced hereunder:

“These regulations shall apply in all cases where supply of electricity is being made from Renewable Energy Sources and Non-fossil Fuel Based Co-generating Stations, commissioned after coming in effect of these Regulations, to the distribution licensees or local rural grids within the State of Uttarakhand.

Emphasis added

- 2.8 From the facts of the petition, the reply and the Rejoinder it is evident that the project was commissioned on 11.07.2014, i.e. after the notification of RE Regulations 2013. Therefore, in accordance with the provisions of the RE Regulations 2013, this project gets covered by the relevant provisions of the RE Regulations, 2013. Keeping in view the submissions made by the Petitioner and the Respondent, the provisions of the RE Regulations, 2010, RE Regulations, 2013 and the PPA executed between the two parties the Commission decides to provide generic tariff to the Petitioner under the provisions of the RE Regulations, 2013. The Commission has already clarified in the previous paras that because the Petitioner had already exercised its option in the PPA and accepted to sell 10.5 MW of power to the Respondent on generic tariff specified by the Commission under the RE Regulations, 2010, the Petitioner cannot now seek project specific tariff at this stage. Accordingly, the Commission directs the Petitioner to sell power under the provisions of the same PPA but at the generic tariff specified in the RE Regulations, 2013 as the project was commissioned after the said Regulations came into force.
- 2.9 As already discussed in the previous Paras, since the Petitioner’s plant is not eligible for granting project specific tariff, hence, the Commission is not going into the merits of the capital cost claimed by the Petitioner.
- 2.10 The Petition is hereby disposed off.
- 2.11 Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Subhash Kumar)
Chairman