

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Application seeking approval of the Commission on the Draft Power Purchase Agreement between Uttarakhand Power Corporation Limited and M/s Greenko Budhil Hydro Power Pvt. Ltd.

In the matter of:

Uttarakhand Power Corporation Ltd. ... Petitioner

AND

In the matter of:

M/s Greenko Budhil Hydro Power Pvt. Ltd. ... Respondent

CORAM

Shri Subhash Kumar Chairman

Shri K.P. Singh Member

Date of Hearing: October 15, 2015

Date of Order: December 26, 2016

This Order relates to the Petition filed by Uttarakhand Power Corporation Ltd. (hereinafter referred to as "UPCL" or "Licensee") seeking approval of the draft PPA it proposes to execute with M/s Greenko Budhil Hydro Power Pvt. Ltd. (hereinafter referred to as "Greenko" or "Generator") for purchase of power of 70 MW capacity from generator's 2X35 MW hydro power generating station.

The written submissions made by the Petitioner and the Respondent's reply along with the submissions of the stake holders and the Commission's views & decisions on the same are discussed in the following paragraphs.

1. Background and Submissions made by the Petitioner & Respondent

- 1.1 UPCL had filed the Petition dated 23.09.2015 under Section 86(1)(b) of the Electricity Act, 2003 and clauses 5.1, 5.2 & 5.4 of the license conditions of the Distribution and Retail Supply license dated 20.06.2003 and Regulation 39 of the UERC (Conduct of Business) Regulations, 2014 issued by the Commission seeking approval of the draft PPA it proposes to execute with M/s

Greenko Budhil Hydro Power Pvt. Ltd.

- 1.2 UPCL submitted that it intends to execute a PPA for procurement of 70 MW capacity from generator's 2X35 MW hydro power generating station of M/s Greenko Budhil Hydro Power Pvt. Ltd., situated on Budhil stream, river Ravi in Bharmaur-Tehsil, District - Chamba, Himachal Pradesh. The Respondent's project has been commissioned on 30.05.2012 and as such, is an operating project.
- 1.3 UPCL had also submitted that it was facing continued power shortage throughout the year and has to depend on short term power purchase by undertaking power purchase through short term tenders and banking arrangement with the utilities. Moreover, UPCL also has to purchase power through IEX on day ahead basis where the rates are volatile and power availability is not firm. Further, UPCL submitted that the Commission while issuing Tariff Order for FY 2015-16 had directed the Petitioner to expedite the process of medium term procurement of power. Accordingly, Petitioner has evaluated all the options for procurement of power under medium term.
- 1.4 The Petitioner further submitted that Ms/ Greenko had signed 2 Nos. Supplementary Implementation Agreement dated 01.03.2014 and dated 03.09.2007 in continuation of the original Implementation Agreement dated 22.11.2005 with Govt. of Himachal Pradesh for 70 MW Budhil Hydro Electric Project.
- 1.5 Further, UPCL submitted that M/s Greenko vide their letter dated 06.08.2015 had given their proposal to UPCL, which is reproduced hereunder:

"We have offered our complete project comprising of 2X35 MWs for sale of power to Uttarakhand, on a long 35 year PPA basis. Since the entire project capacity has been offered to UK state, we understand that Uttarakhand Electricity Regulatory Commission would have jurisdiction for determination of Tariff as per Section 62 of the Electricity Act. Further, Ministry of Power notification dated 31st March 2008, envisages determination of tariff for private hydro-electric projects by appropriate commission on the basis of performance based cost of service regulations. We are in complete agreement to the Tariff determination by UERC for our Budhil hydro project as per the Uttarakhand Electricity Regulatory Commission's (Terms and Conditions for Determination of Tariff) regulation as applicable from time to time."
- 1.6 Further, UPCL in its Petition stated that the Hydro plant is located in Northern Region with approved Long Term Open Access. Therefore, curtailment issues in transmission being faced from Eastern Region and Western Region will not be applicable to this power. There are very

few such options available for power supply in the Northern Region. It also stated that the Petitioner further submitted that the proposal is for power supply from a run of the river project with diurnal storage. In the recent past most of the energy procured by UPCL is in the nature of Thermal Energy and intra-state development of Hydro projects were affected due to floods in the year 2013. The project being renewable in nature will be an eco-friendly source of energy. A significant portion of power from this project during non-rainy season can be flexibly generated during specific times of the day for meeting the peak demand of the State. The ability to provide peaking power would provide flexibility in power supply management.

- 1.7 Hearing for admission was held on 15.10.2015. The Commission heard the Petitioner and the Respondent and admitted the Petition. However, the Commission in its Order held that the approval of PPA would be taken up subsequently after the tariff for the Respondent's generating station is determined by the Commission under Section 62 of the Act. Accordingly, the Respondent was directed to file its tariff petition within 15 days.
- 1.8 The Respondent also sought additional time of 10 days to file the written submission on the PPA submitted by UPCL. The time sought by the Respondent was allowed.

2. Respondent's Submissions

- 2.1 The Respondent vide its letter dated 26.10.2015 submitted its reply on the draft Power Purchase Agreement submitted by UPCL and pointed out towards some provisions of the PPA which were in-consistent with applicable Regulations. The Respondent vide its reply requested for modification/re-drafting of the PPA by UPCL.
- 2.2 The Respondent submitted that in accordance with the Commission's observation vide Order dated 15.10.2015, the tariff for the project has to be determined by the Commission under Section 62 of the Act, for which a separate Petition seeking project specific tariff in accordance with the Regulations specified by the Commission is required to be filed. Therefore, it submitted that the PPA required to reflect the tariff provisions as provided in the Regulations. Therefore, the draft PPA proposed by UPCL, which provides for a generic single part flat tariff for the entire life of the project, and which is more relevant for Renewable Energy projects situated in Uttarakhand and connected to Uttarakhand state grid needs to be modified.
- 2.3 The Respondent further submitted that the project is connected to the CTU (Central Transmission Utility) network at 220 kV level. Therefore, the despatch and scheduling

protocol provided in the Indian Grid Code, 2010 and the Deviation Settlement Mechanism Regulations, 2014 will be applicable to the proposed supply of power to UPCL.

3. Stakeholder's Submissions and Commission's Views on Submissions

3.1 Public Hearing

The Commission also, to provide transparency to the process of tariff determination and give all the stakeholders an opportunity to submit their objections/suggestions/comments on the Petitions filed by the generator published notice in following newspapers:

Table 1.1: Publication of Notice

S. No.	Newspaper Name	Date of Publication
1	Amar Ujala, Uttarakhand Edition	29.04.2016
2	Dainik Jagran, Uttarakhand Edition	29.04.2016

Vide the above notice stakeholders were requested to submit their objections/suggestions/comments latest by 30.05.2016. The Commission received two suggestions/objections on the Petition for approval of Power Purchase Agreement. For the sake of clarity, the objections raised by the stakeholders and responses of the Petitioner have been consolidated and summarised issue wise. In this context, it is also to underline that while finalizing this Order, the Commission has, as far as possible, tried to address the issues raised by the stakeholders.

3.2 Competitive Bidding

Mr. J.P. Badoni vide letter dated 26.11.2015 and Energy Watchdog, vide letter dated 14.10.2015 submitted that the Commission should direct UPCL for adopting the process of inviting competitive bids. In case the Commission decided to proceed in the matter without any such direction, then it is obligatory on its part to invite objections from public.

Petitioner's reply

UPCL, vide its letter dated 01.06.2016 submitted that the power purchase from M/s Greenko Budhil Hydro is on long term basis, i.e. 35 years wherein the rate is to be determined by the Commission as per the Section 62 of Electricity Act, 2003. As per Section 62 of Electricity Act, 2003 there is no provision for procurement of power through tendering process. Moreover, the National Tariff Policy, 2006 which was subsequently amended vide Resolution dated 8th July, 2011 provides as follows:

"Provided that a developer, of a hydroelectric project, would have the option of getting the tariff

determined by the appropriate commission..."

Moreover, UPCL is facing continued power shortage throughout the year and has to depend on short term power purchase by undertaking power purchase through short term tenders and banking arrangement with utilities. UPCL also has to purchase power from IEX on day ahead basis where the rates are volatile and power availability is not firm.

Commission's view:

The points which arose for consideration before the Commission inter alia were whether the compliance with Competitive Bidding Process as envisaged in Clause 5.1 of the National Tariff Policy is mandatory for procurement of power by a distribution company and whether Section 63 of the Electricity Act is the exception to Section 62 and the guidelines issued by the Central Government will operate only when the tariff is being determined by the Competitive Bidding Process. The Commission observed that there are two routes and options provided under the Electricity Act for determination of tariff for supply of power to a distribution licensee by a generating company: (a) tariff determination under Section 62(1)(a) by the Appropriate Commission in terms of Section 79 and Section 86 of the Electricity Act and (b) tariff discovery in terms of the Competitive Bidding Process in accordance with the Guidelines issued by the Government of India which shall be binding on the Appropriate Commission under Section 63 of the Electricity Act.

Section 63 of the Electricity Act and Clause 5.1 of the National Tariff Policy provides that the power procurement for future should be through a transparent Competitive Bidding Process using Guidelines issued by MoP on 19.1.2005. The clarificatory circular dated 28.8.2006 issued by MoP states that Section 63 is an optional route for procurement of power by a distribution licensee through Competitive Bidding Process and in case the same is followed, the Appropriate Commission is required to adopt the said tariff. Even the National Tariff Policy, 2016 has exempted Hydro Power Projects from competitive bidding till 2022 subject to fulfilment of certain conditions. However, after referring to relevant judgments of the Supreme Court and Hon'ble ATE, the Commission holds that the power under Section 62(1)(a) conferred on the State Commission for determination of generation tariff on cost plus basis cannot in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government/Executive. Any executive instructions or notifications which are contrary to any provisions of the statute shall be ultra vires to the parent statute. This is a settled law as laid down by the Supreme Court in (2006) 4

SCC 327 in Kerala Samsthana Chethu Thozhilali Union versus State of Kerala and Ors reproduced hereunder:

“17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature:.

Another judgment of the Hon’ble Supreme Court in **(1992) Supp (1) SCC 150 in State of Madhya Pradesh versus M/s G.S. Dall and Flour Mills** is reproduced hereunder:

“19. The second ground on which the Full Bench has sought to invoke the instructions is also not correct. Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect”.

In the light of the above rationale laid down by the Supreme Court, clause 5.1 of the NTP which is a subordinate legislation would not restrict or whittle down the scope of the statutory powers conferred to a State Commission under Section 62(1)(a) especially when it is noticed that clause 5.1 of NTP would apply to Section 63 only and not to Section 62 which is a substantive provision. As stated above, Section 63 is an exception to Section 62 and the same cannot be taken away by way of a policy document like guidelines – clause 5.1 of NTP.”

The Hon’ble Tribunal has in **Noida Power Company Limited Vs. Uttar Pradesh Electricity Regulatory Commission & Anr (APPEAL NO. 88 OF 2015, Dated: 28th May, 2015) and BSES Rajdhani Case** rejected the contention that tariff determination under Section 62(1)(a) without adopting Competitive Bidding Process will render Clause 5.1 of the National Tariff Policy redundant as the distribution licensees in future will procure power from the generating companies through the negotiated route. The Tribunal observed that:

“It is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. This Tribunal clarified that the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval to the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National Tariff Policy read with Section 63 of the Electricity Act.”

The Commission draws attention of the stakeholders to the judgment of Hon’ble Appellate Tribunal of Electricity dated 31.3.2010 in **BSES Rajdhani Power Ltd. v. DERC & Ors. (Appeal Nos.106 and 107 of 2009)** wherein the Tribunal has held the following:

“That the powers of the State Commission to consider the approval of the procurement of power through negotiated agreements is not in any manner affected by the Guidelines issued by MoP directing the

Competitive Bidding Process for long term power procurement."

The Hon'ble Tribunal in the same Judgment also held that:

"The State Commission's observation that for long term power purchase, only competitive route is available appears to be in teeth of the clear finding of this Tribunal in BSES Rajdhani that the procurement of power through the negotiated route and not through the competitive route is permissible under Section 62 of the Electricity Act notwithstanding Section 63 thereof and MoP Guidelines mandating such Competitive Bidding Process for procuring power on long term basis. Undoubtedly, this Tribunal has also laid down that the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval to PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National tariff Policy. The State Commission, therefore, can in its discretion choose either course. But, exercise of discretion has to be based on rules of reason and justice."

3.3 Signing of PPA

MR. J.P. Badoni vide letter dated 26.11.2015 and Energy Watchdog, vide its letter dated 30.05.2016 submitted that the Commission has showed hurry in issuing order when there will be comparatively less generation in the winter season and in summer season state generating plants are sufficient to meet the requirement. If UPCL wanted to procure power on urgent basis it could procure it from power exchange. Moreover, the burden of 12% free power would also devolve on the consumers of the State.

Petitioner's reply

Petitioner vide its submission dated 01.06.2016 submitted that Long term power purchase planning for RTC power by a State cannot be done through a short term spot market. Further, the rates of exchange fluctuate depending upon demand and supply. In addition to fluctuating price, purchasing power from power exchange for such a large quantum and for such long period entails risks of corridor unavailability and supply shortage, and tedious regulatory approval.

Commission's view

With regards to the objection raised on the Commission's Order dated 20.11.2015, it is pertinent to mention that Tariff determination is a long procedure and requires atleast 3 to 4 months for issuance of the order. Further, had the Commission waited till March, the Licensee would have been required to procure power from any other sources. However, the PPA will assure the availability of power for 35 years from the renewable source of power

with no transmission constraints. The Commission would like to clarify that the 12% free power is in accordance with the Regulations and power purchase cannot be done contradicting the laws applicable. Further, the incidence of this is also devolving on the consumers from power available to UPCL from stations under the control of NHPC, etc.

3.4 Public Notice on PPA and Provisional Tariff

Mr. J. P. Badoni vide letter dated 26.11.2015 submitted that no comments or suggestions has been sought from public by the Commission on the issue of power procurement from the generator by the Licensee and tariff has been fixed at Rs. 4/kWh. Energy Watchdog vide its comment dated 30.05.2016 submitted that the provisional tariff fixed by UERC vide its Order dated 20.11.2015 should be revised to Rs 2.42 per unit, which is the tariff at which Greenko sold its power to IEX prior to selling power to UPCL w.e.f. 01.12.2015.

Commission's view

It is pertinent to mention that the rate fixed vide order dated 20.11.2015 was a provisional tariff and was subjected to be replaced by the final tariff subsequent to the determination of tariff in accordance with the MYT Regulations 2011 and MYT Regulations 2015 specified in accordance with the Electricity Act, 2003 in line with the National Tariff Policy. Moreover, as per Act and the Regulations specified thereunder, there is no legal requirement for public hearing for approval of PPA. UPCL, the beneficiary of power was heard in the matter.

3.5 Power Purchase by Himachal Distribution Licensee

Mr. J. P. Badoni vide letter dated 26.11.2015 questioned the sale of power in Uttarakhand and why the generating company despite being in the State of Himachal Pradesh is not supplying to the distribution licensee of Himachal .

Commission's View

It is pertinent to mention that Himachal Pradesh is a power surplus State and Uttarakhand at present being energy deficit requires firm sources of power. Therefore, the Distribution Company of Himachal Pradesh is not buying power from the generator and UPCL is purchasing the whole capacity of the generator to reduce the demand supply gap and fulfilling the objective of 24x7 power for all.

3.6 Power Plants in Uttarakhand

Mr. J. P. Badoni vide letter dated 26.11.2015 stated that as per the Commissions efforts the

hydro plants in the State of Uttarakhand got clearances from the Government and are on way to completion and commissioning in the near future. In such a scenario why is UPCL buying power from generators established outside the State.

Commission's View

With regard to the objection raised on the power being purchased from Greenko, the Commission after considering the fact that no major hydro power projects are expected to be commissioned in near future and also that exact time for commissioning of the hydro power plants cannot be anticipated in advance. Moreover, demand of power in the State of Uttarakhand has a increasing trend, accordingly, the Commission decided to approve the power purchase agreement between the parties. Also while fulfilling the objective of 24x7 power for all, it is pertinent to mention that firm and long term sources of power are important to ensure and maintain stability in the system.

Further, other issues related to tariff petition raised by the Stakeholders have been appropriately discussed in the tariff order dated 30.11.2016 issued by the Commission for Greenko Budhil HEP.

4. Commission's View on PPA

4.1 A PPA is a legal document incorporating operational, technical & commercial provisions to be complied in accordance with the relevant rules & regulations. Section 86(1)(b) of the Electricity Act, 2003 stipulates that one of the function of the Commission is to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.

4.2 Further, the Distribution and Retail Supply Licence issued by the Commission lays down certain conditions of license, which amongst others provides the following:

"5.1 The Licensee shall be entitled to:

(a) ...

(b) Purchase, import or otherwise acquire electricity from any generating company or any other person under Power Purchase Agreements or procurement process approved by the Commission;

..."

4.3 Regulation 39(3) of UERC (Conduct of Business) Regulations, 2014 specifies as under:

“The distribution licensee shall apply to the Commission for approval of the draft Power Purchase agreement that it proposes to enter into with the supplier. The Commission may pass orders:

(a) Approving the agreement; or

(b) Approving the agreement with modifications proposed to the terms of the agreement; or

(c) Rejecting the agreement.”

The above mentioned provisions empower the Commission to approve the PPA proposed by the distribution licensee. However, the Commission is not bound to do so if the provisions stipulated in PPA are not in accordance with the prevalent laws.

4.4 The Commission while admitting the Petition for approval of draft PPA submitted by UPCL held that the Commission shall approve the PPA after determination of the Tariff for the said project. Relevant extracts of the PPA are reproduced hereunder:

“Heard the Petitioner and the Respondent. The Petition be admitted. However, the approval of PPA would be taken up subsequently after the tariff for the Respondent’s generating station is determined by the Commission under Section 62 of the Act. Accordingly, the Respondent is directed to file its tariff petition within 15 days.

The Respondent also sought additional time of 10 days to file the written submission on the PPA submitted by UPCL. The time sought by the Respondent is allowed.”

4.5 Based on the approved capital cost and norms specified in the UERC (Terms and Conditions for determination of Multi Year Tariff) Regulations, 2015, the Commission has determined tariff of the project for FY 2015-16 and for second Control Period from FY 2016-17 to FY 2018-19 vide its Order dated 30.11.2016. For the purpose of deciding on approval of the PPA, the Commission has worked out the levelled tariff for 33 years (remaining life of the project) as 3.53/kWh. Since availability of power at feasible rates for distribution licensee is not certain, hence, long term supply of power from this project is considered to be reasonable and economical. Accordingly, the Commission has decided to approve the PPA between UPCL and M/s Greenko Budhil Hydro Power Pvt. Ltd.

4.6 The PPA submitted by the UPCL has been examined in light of the relevant provisions of the Act, the Rules & Regulations specified there under and also the Draft PPA admitted by the Commission vide its Order dated 15.10.2015. Further, submissions made by the Respondent in the reply dated 26.10.2015 have been taken into consideration while analyzing the draft

PPA. The Commission observed that certain clauses in the PPAs submitted by UPCL were inconsistent with the provisions of the Regulations and the same were pointed out by the Respondent in its reply. UPCL after taking note of the same incorporated necessary corrections in the respective clauses of the PPA.

4.7 The Commission's decisions in respect of the PPA shall be applicable for all provisions of the PPA submitted by UPCL. The observations/modification to be made in the PPA in line with the Regulations are provided below. The same needs to be incorporated in the PPA.

4.7.1 The Commission observed that the Petitioner has proposed various definitions in the Power Purchase Agreement executed with M/s Greenko Budhil Hydro Power Pvt. Ltd. which are not in line with the UERC (Terms and Conditions for determination of Multi Year Tariff) Regulations, 2015 and needs to be modified. The clauses that need to be modified in Article 1 are as follows:

4.7.2 Clause 3 of the Article 1 of the PPA provides that:

"3. Applicable Laws" means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;"

However, the above definition has to be modified in accordance with the Regulations/Clause existing in the PPAs approved by the Commission and shall be read as follows:

"3. Applicable Laws" means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record/Tribunal or Indian Government instrumentality which is the final authority under law for any interpretation or application, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;"

Accordingly, the Petitioner is required to make necessary correction in the definition of Applicable Law in the PPA.

4.7.3 Clause 4 of the Article 1 of the PPA provides that:

"4. "Appropriate Commission" means Uttarakhand Electricity Regulatory Commission and the Central Electricity Regulatory Commission or such other succeeding authority or commission as may be notified by the Competent Authority from time to time, as applicable to the context hereof;"

Since the Petitioner (distribution licensee) comes under the jurisdiction of Uttarakhand Electricity Regulatory Commission, hence, in accordance with the Electricity Act, 2003, the above definition needs to be modified in accordance with the Regulations to prevent confusion in case of disputes and shall be as follows:

"4. "Appropriate Commission" means Uttarakhand Electricity Regulatory Commission."

Accordingly, the Petitioner is required to make necessary correction in the definition of Appropriate Commission of the PPA.

4.7.4 Clause 6 of the Article 1 of the PPA provides that:

"6. "Auxiliary Energy Consumption & Tie-Line Energy Loss" in relation to a period, means the quantum of energy consumed by auxiliary equipment of the Project, and transformer losses within the Project, and the line losses of the tie-line from the Project upto the Delivery Point, and shall be expressed as a percentage; "

Since the Auxiliary Energy as defined above is inconsistent with the Regulations, hence, the same needs to be modified in accordance with the Regulations and shall be read as follows:

"6. "Auxiliary Energy Consumption" in relation to a period, in case of generating station means the quantum of energy consumed by auxiliary equipment of the generating station, such as the equipment used being used for the purpose of operating plant and machinery including switchyard of the generating station and transformation losses within the generating stations and shall be expressed as a percentage of the sum of gross energy generated at the generator terminals of all the units of the generating station;

Provided that the colony consumption and other facilities of a Generating Station and the power consumed for construction works at the Generating Station shall not be included as part of the Auxiliary Energy Consumption for the purpose of these Regulations."

Accordingly, the Petitioner is required to make necessary correction and provide specific definition of Auxiliary Consumption in the PPA in accordance with the Regulations. However, definition of tie-line energy losses if required may also be provided separately.

4.7.5 Clause 11 of the Article 1 of the PPA provides that:

"11 "Change in Law" means any of the following, occurring after the date of this Agreement:

- i. enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulation, notice, circular, code, rule or direction by any Governmental Instrumentality;*

- ii. *change in interpretation of any of the above by a Competent Court, government or statutory authority;*
- iii. *imposition by any Governmental Instrumentality of any material condition in connection with the issuance, renewal, modification, revocation or non--renewal (other than for cause) of any consent, license, approval, clearance, permit, no objection certificate, concession, right of way, or any other authorization related to the Project;”*

However, the above definition is inconsistent with the Regulations and has to be modified in accordance with the Regulations and the same shall be read as follows:

“11“Change in law” means occurrence of any of the following events having implication for the generating station or the transmission system or distribution system or SLDC’s operations covered by these Regulations:

- a) *Enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law; or*
- b) *Change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or*
- c) *Change by any competent statutory authority, in any condition or covenant of any consent or clearances or approval or licence available or obtained for the project; or*
- d) *Coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government.”*

Accordingly, the Petitioner is required to make necessary correction in the definition of Change in law in the PPA.

4.7.6 Clause 15 of the Article 1 of the PPA provides that:

“ 15. Declared Capacity” or “DC” means the capacity to deliver ex-bus electricity in MW, net of Auxiliary Energy Consumption & Tie-Line Energy Loss, declared by the Project as applicable under the IEGC in relation to a time-block of the day or whole of the day;”

However, the above definition needs to be modified in accordance with the Regulations and shall be read as follows:

“15“ Declared Capacity” or “DC” in relation to a generating station means, the capability to deliver ex-bus electricity in MW declared by such generating station in relation to any time-block of the day or whole of the day, duly taking into account the availability of fuel or water, and subject to further qualification in the relevant Regulation;

Accordingly, the Petitioner is required to make necessary correction in the

definition of declared capacity in the PPA.

4.7.7 Clause 19 of the Article 1 of the PPA provides that:

"19. "Due Date" means the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is delivered either by hand /through post/ fax /email by the Supplier (or, if such day is not a business day, the immediately preceding business day) by which date such bill is payable by UPCL;"

The word "preceding" used in last line of the above mentioned definition needs to be replaced by the word "next" and shall be read as follows:

" 19. "Due Date" means the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is delivered either by hand /through post/ fax /email by the Supplier (or, if such day is not a business day, the immediately next business day) by which date such bill is payable by UPCL;"

Accordingly, the Petitioner is required to make necessary correction in the definition of due date of the PPA.

4.7.8 It has been observed that the definition of "interconnection point", an important aspect for metering purposes of the energy injected/drawn from the generating station, has not been provided. The MYT Regulations, 2015 provides the definition of "interconnection point" as follow:

"(46) "Interconnection Point" means the point where the power from the power station switchyard bus of the Seller is injected into the interstate/intrastate transmission system, as the case may be (including the dedicated transmission line connecting the power station with the intrastate transmission system)."

Based on the above mentioned definition interconnection point is required to be specified/defined in the PPA.

4.7.9 Clause 31 of the Article 1 of the PPA provides that:

"(31) Ninety Percent (90%) Dependable Year" means the year having the annual inflow of water at least equal to that which has the probability of delivering the Design Energy over ninety percent (90%) of the duration during the operating life of the Project;"

However, the DPR of the HEP provides 90% dependable year as the year 1994-95. Accordingly, the above mentioned term shall be read as follows:

"31 Ninety Percent (90%) Dependable Year" means the year 1994-95 based on which design energy of the project has been determined;"

Accordingly, the Petitioner is required to make necessary correction in the definition of Ninety Percent (90%) Dependable Year as provided in the PPA.

4.7.10 Clause 41 of the Article 1 of the PPA provides that:

“41 “Scheduled Energy” or “SE” means the quantum of energy scheduled by the concerned Load Despatch Centre to be injected into the grid, considering Declared Capacity by the Project for a given period, and shall be construed to be at the Delivery Point net of Auxiliary Energy Consumption & Tie-Line Energy Loss, but including the applicable free energy to be given to the Project State;”

However, the above definition needs to be modified in accordance with the Regulations and shall be read as follows:

“41 “Scheduled Energy” or “SE” means the quantum of energy scheduled by the concerned Load Despatch Centre to be injected into the grid by a generating station over a day;”

Accordingly, the Petitioner is required to make necessary correction in the definition of Scheduled Energy as provided in the PPA.

4.7.11 Clause 2 of the Power Purchase Agreement provides for power purchase and sale as follows:

“UPCL shall accept and purchase 70 MW (after deducting royalty to project state) made available to UPCL system from Generating Company at the rate specified by Uttarakhand Electricity Regulatory Commission.

This agreement is subject to approval of Hon’ble UERC and the changes suggested by Hon’ble UERC to be incorporated in this agreement”

Since determination of generation tariff is a continuous process and is being carried out annually on submission of tariff petition by the generator, hence, the generator is required to ensure that it shall prepare and file the tariff petition in accordance with the prevailing tariff regulations within the stipulated timeline. Accordingly, the above mentioned Clause is required to be modified as follows:

“UPCL shall accept and purchase 70 MW (after deducting royalty to project state) made available to UPCL system from Generating Company at the rate determined by Uttarakhand Electricity Regulatory Commission in accordance with the Electricity Act, Policies, Regulations or relevant law as may be amended from time to time.

Provided Supplier is required to ensure filing of tariff petition before the Uttarakhand Electricity Regulatory Commission for determination of tariff of the project in accordance with the Electricity Act, Policies, Regulations or relevant law as may be amended from time to time.

This agreement is subject to approval of Hon’ble UERC and the changes suggested by Hon’ble UERC to be incorporated in this agreement”

4.7.12 Clause 3.1 of the Power Purchase Agreement talks about effective date and term of agreement as follows:

“3.1 Effective Date and Term of Agreement

Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the applicable permits, this Agreement shall become effective upon the execution and delivery thereof by the Parties hereto, subject to the consent of the SERC and, unless extended or terminated pursuant to other provisions of the Agreement, shall continue to be in force for a period of 36 (Thirty Six) years from the Supply Commencement Date in accordance with the terms and conditions set forth herein ("Term of Agreement").”

However, the above provision is inconsistent with the UERC (Terms and Conditions for determination of Multi Year Tariff) Regulations, 2015 and needs to be modified in accordance with the Regulations which is reproduced hereunder for reference:

(83).“Useful life” in relation to a unit of a generating station and transmission/distribution system from the COD shall mean the following, namely:-

Hydro generating station – 35 years

.....

Provided that the useful life for AC and DC substations and GIS for which Notice Inviting Tender is floated on or after notification of these Regulations shall be considered as 35 years.

Provided further that the extension of life of the projects beyond the completion of their useful life shall be decided by the Commission;

Since the life of the project specified in Regulations is 35 years only and the project got commissioned in May, 2012 and the date of signing of PPA is 18.12.2015 whereas scheduling of power itself initiated from December, 2015. Apparently, term of agreement as provided in the PPA submitted by the Petitioner is longer than the useful life provided in the Regulations. Accordingly, the Petitioner is required to make necessary correction in the term of agreement while considering the fact that the project was commissioned on 30.05.2012 and scheduling of power initiated from December, 2015 onwards.

4.7.13 Clause 10.2 of Article 10 of the Power Purchase agreement defines force majeure. The definition of the PPA is reproduced hereunder:

“10.2 A Force Majeure Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising*

- radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site) or any other natural calamity of similar nature;*
- (b) any order or direction, decree of any Competent Authority , Competent Court or any Statutory authority for any reason other than the reason attributable to the deliberate defaults of the concerned Party, which prevents operation of plant, generation or transmission of the electricity, or sale of electricity by the Generating Company, to any utility or consumer, including to the Purchaser;*
 - (c) the discovery of geological conditions, toxic contamination or archaeological remains on the Project area that could not reasonably have been expected to be discovered through an inspection of the Project area and which prevent the operation of the Project as per terms of this Agreement;*
 - (d) Any event affecting the CTU/STU or aiding network congestion/ disturbance in relation to conveyance of power through the transmission system, which materially and adversely affects the obligations of the Supplier/UPCL;;*
 - (e) Change in Law preventing any Party in performing its Obligations under this Agreement;
or*
 - (f) Non-receipt of open access by the Generating company for transmission of power from the Project to UPCL.*
 - (g) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;*
 - (h) Action/ inaction of a Competent Authority which prevents operation of plant, generation or transmission of the electricity, or sale of electricity by the Generating Company, to any utility or consumer.*
 - (i) any political or economic upheaval, disturbance, movement, struggle or similar occurrence which could not have been anticipated or foreseen by a prudent person and which causes the construction or operation of the Project to be financially unviable or otherwise not feasible;*
 - (j) any civil commotion, boycott or political agitation which prevents generation or transmission of electricity by the Supplier for an aggregate period exceeding 7 (seven) days in an Accounting Year;*
 - (k) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Supplier or of the contractors;*
 - (l) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Supplier or any of its contractors to perform*

their respective obligations under this Agreement, provided that such delay, modification, denial, refusal or revocation did not result from the Supplier's or any contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit;"

However, the above provisions are inconsistent with the UERC (Terms and Conditions for determination of Multi Year Tariff) Regulations, 2015 and have to be modified in accordance with the Regulations which is reproduced hereunder for reference:

"Force Majeure Event" means, with respect to any party, any event or circumstance which is not within the reasonable control of, or due to an act or omission of, that party and which, by the exercise of reasonable care and due diligence, that party is not able to prevent, including, without limiting the generality of the foregoing:

- a) Acts of God like lightning, landslide, storm, action of the elements, earthquakes, flood, drought and natural disaster or exceptionally adverse weather conditions;*
- b) Any act of public enemy, wars (declared or undeclared), blockades, embargo, insurrections, riots, revolution, sabotage, terrorist or military action ,vandalism and civil disturbance;*
- c) Unavoidable accident, fire, explosion, radioactive contamination and toxic dangerous chemical contamination;*
- d) Any shutdown or interruption of the grid, which is required or directed by the State or Central Government or by the Commission or the State Load Despatch Centre; and any shut down or interruption, which is required to avoid serious and immediate risks of a significant plant or equipment failure;"*

Accordingly, the Petitioner is required to make necessary correction in Clause 10.2 of the PPA.

4.7.14 Clause 11.4 of the aforesaid PPA provides the Laws applicable on arbitration proceedings. The relevant extract of Clause 11.4 is reproduced hereunder:

"11.4.1" Any Dispute which is not resolved amicably by negotiation, as provided in Article 11.3 , and is not required under Applicable Laws to be adjudicated or referred to arbitration by the Commission, shall be finally decided by reference to arbitration by an Arbitral Tribunal ("Arbitration Tribunal"). Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The place of such Arbitration shall be Delhi and the

language of arbitration proceedings shall be English.

11.4.2 The Arbitral Tribunal shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 11 shall be final and binding on the Parties as from the date it is made, and the Supplier and UPCL agree and undertake to carry out such Award without delay.

11.4.3 The Supplier and UPCL agree that an Award may be enforced against the Supplier and/or UPCL, as the case may be, and their respective assets wherever situated and each Party will cooperate with the other Party for giving effect to the Award.

11.4.4 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

The above provisions are inconsistent with the Electricity Act, 2003 and the Regulations specified by UERC which gives the option to either of the Parties to file a Petition with the Commission, the Commission has powers either to adjudicate the dispute or for referring the same to arbitration. Accordingly, the above mentioned Clause 11.4 and all references made to the same in the PPA needs to be removed to make them in line with the provisions of the Electricity Act, 2003 and UERC (Conduct of Business) Regulations, 2014 which clearly specifies that the Commission has powers to adjudicate upon the dispute between the licensee and generating company and shall appoint the Arbitrator whenever the Commission decides to refer any dispute for arbitration.

4.7.15 Clause 11.5 of the aforesaid PPA provides Adjudication by the Commission. The relevant extract of Clause 11.5 is reproduced hereunder:

11.5 Adjudication by the Commission

11.5.1 In the event a Dispute is required under Applicable Laws to be adjudicated upon by the Appropriate Commission, such Dispute shall, instead of reference to arbitration under Article 11.4, be submitted for adjudication by the Appropriate Commission in accordance with Applicable Laws and all references to Dispute Resolution procedure shall be construed accordingly.

11.5.2 Where any dispute is referred by the Appropriate Commission to be settled through arbitration, the procedure specified in Article 11.4 shall be followed to the extent applicable.

The above given Clauses are inconsistent with the Electricity Act, 2003 and the Regulations specified by UERC which gives the option to either of the Parties to file a Petition with the Appropriate Commission and adjudication of the dispute or referring the dispute to arbitration is the prerogative of the Commission. Accordingly, the above mentioned Clause 11.4 and all references made to the same in the PPA needs to be removed to make them in line with the provisions of the Electricity Act, 2003 and UERC

(Conduct of Business) Regulations, 2014. Therefore, the above clause has to be modified in accordance with the Regulations and shall be read as follows:

11.5 Adjudication by the Commission

11.5.1 In the event a Dispute is required under Applicable Laws to be adjudicated upon by the Appropriate Commission, such Dispute shall be submitted by either parties of the dispute for adjudication by the Appropriate Commission in accordance with Applicable Laws and all references to Dispute Resolution procedure shall be construed accordingly.

11.5.2 Where any dispute is referred to the Appropriate Commission to be settled through arbitration, the procedure specified in the Electricity Act and UERC (Conduct of Business) Regulations 2014 as amended from time to time shall be followed to the extent applicable.

Accordingly, the Petitioner is required to make necessary correction in Clause 11.5.1 and 11.5.2 providing adjudication by the Commission in the PPA.

4.7.16 Clause 11.6 of the aforesaid PPA provides Adjudication by a tribunal. The relevant extract of Clause 11.6 is reproduced hereunder:

11.6 Adjudication by a tribunal

In the event of constitution of a statutory tribunal or other forum with powers to adjudicate upon disputes between the Supplier and UPCL, all Disputes arising after such constitution shall, instead of reference to arbitration or adjudication under Article 11.4 and 11.5 respectively, be adjudicated upon by such tribunal or other forum in accordance with Applicable Laws and all references to Dispute Resolution Procedure shall be construed accordingly.

The above provisions are inconsistent with the Electricity Act, 2003 and UERC (Conduct of Business) Regulations, 2014 specified by UERC which gives the option to either of the Parties to file a Petition with the Commission and adjudication of the dispute or referring the dispute to arbitration is the prerogative of the Commission which clearly specifies that the Commission shall appoint the Arbitrator whenever the Commission refers the dispute for arbitration.

Further, the Electricity Act, 2003 does not provide for any such Statutory Tribunal or other Forum to adjudicate upon the disputes. Hence, there is no need for this Clause. In future, if any such need arises based on the statutory enactments, the PPA may be modified to this effect. Accordingly, the Petitioner is required to remove Clause 11.6 providing Adjudication by a Tribunal in the PPA.

4.7.17 Clause 12.6 of the PPA provides for right of third party power sale in case of payment default. The relevant extract of Clause 12.6.1.1 of the PPA is reproduced hereunder:

“12.6.1.1 It is expressly provided that in case UPCL fails to pay a Monthly Bill or a Supplementary Bill through the mechanism provided in Articles 9.3 and 9.5, the Supplier shall have the right, but not the obligation, to sell the whole or part of the Contracted Capacity and Billable Scheduled Energy to any third party. Provided further that, in case such revenue recovered by the Supplier from third party sale is lower than the revenue which would have accrued had the said payment default not taken place, UPCL shall continue to compensate the Supplier for the shortage in revenues.”

In this regard, the Commission is of the view that being a commercial entity UPCL might face a situation where it may not be able to honour energy bill raised by M/s Greenko in respect of its Budhil HEP in accordance with the payment mechanism mentioned at Clause no. 9.3 & 9.5 of the PPA. The Commission noted that in case of non-payment of any energy bill by UPCL in accordance with Clause no. 9.3 & 9.5 of the PPA another Clause 9.4 also provides for one more mechanism of payment with provision of surcharge. Hence, in case UPCL fails to pay a Monthly Bill or a Supplementary Bill through the mechanism provided in the PPA it shall not become right of the M/s Greenko to immediately sell whole or part of the contracted capacity to any third party without giving opportunity to make payment in accordance with Clause 9.4 of the PPA. Otherwise, Clause 9.4 of the PPA shall become redundant.

In case licensee fails to make payment in any of the payment mechanism laid down in the PPA, i.e. under Clause 9.3, 9.4 & 9.5 then only generator can exercise its right to sell whole or part of the contracted capacity to any third party subsequent to intimation in writing to the licensee for the same. Accordingly, so as to avoid possibility of any dispute on account of existing Clause 12.6.1.1 the same is required to be modified as follows:

“12.6.1.1 It is expressly provided that in case UPCL fails to pay a Monthly Bill or a Supplementary Bill through the mechanism provided in Articles 9.3, 9.4 and 9.5, the Supplier shall have the right, but not the obligation, to sell the whole or part of the Contracted Capacity and Billable Scheduled Energy to any third party.

Provided Supplier shall discontinue supply to UPCL and commence sell of whole or part of the Contracted Capacity and Billable Scheduled Energy to any third party only after prior intimation to UPCL in writing.

Provided further that, in case such revenue recovered by the Supplier from third party sale is lower than the revenue which would have accrued had the said payment default not taken place, UPCL shall continue to compensate the Supplier for the shortage in revenues.”

Accordingly, the Petitioner is required to make necessary correction in clause 11.4.1

providing mechanism of dispute resolution in the PPA.

- 4.8 Accordingly, both UPCL and the generator are directed to incorporate the changes discussed above in the PPA and submit the copy of the signed PPA before the Commission within 15 days of the date of the Order.
- 4.9 Ordered accordingly.

(K.P. Singh)
Member

(Subhash Kumar)
Chairman