

Before

# UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 67 of 2016

**In the matter of:**

Application seeking approval of the Power Purchase Agreement between Uttarakhand Power Corporation Ltd. and M/s Uttar Bharat Hydro Power Private Limited.

**In the matter of:**

Uttarakhand Power Corporation Ltd.

... Petitioner

AND

**In the matter of:**

M/s Uttar Bharat Hydro Power (P) Ltd.

... Respondent

CORAM

**Shri Subhash Kumar      Chairman**

**Date of hearing: December 09, 2016**

**Date of Order: January 16, 2017**

This order relates to the Petition filed by Uttarakhand Power Corporation Ltd. (hereinafter referred to as "UPCL" or "Petitioner" or "Licensee") seeking approval of Draft PPA to be executed by it with M/s Uttar Bharat Hydro Power (P) Ltd. (hereinafter referred to as "Respondent") for procurement of power from Sarju-II SHP (12.6 MW) of the Respondent situated in Distt-Bageshwar in the State of Uttarakhand.

## **1. Petitioner's Submissions**

- 1.1. UPCL had filed a Petition dated 03.11.2016 seeking approval of the Commission on the draft Power Purchase Agreement for purchase of energy generated from the Respondent's small hydro power plant 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 issued by the Commission.

- 1.2. The Petitioner submitted that as per the provisions of the Electricity Act, 2003 read with provisions of UERC (Conduct of Business) Regulations, 2014 and Distribution and Retail Supply License, the Petitioner is required to get the approval of the Commission on the Power Purchase Agreement entered into with the Generating Company.
- 1.3. The Petitioner further submitted that the Respondent was desirous of selling the entire energy scheduled to be generated from its project and the applicant company is desirous of purchasing the entire energy on the terms and conditions as agreed between the parties as per the terms and condition laid down in the original PPA dated 16.12.2002 and Supplementary PPA dated 26.02.2015.
- 1.4. The copy of the Petition was forwarded to the Respondent for comments.
- 1.5. The Petition was heard on 09.12.2016 and the Petition was admitted.

## **2. Commission's Views & Decisions**

### **2.1. Legal Requirement for approval of PPA**

- 2.1.1. A PPA is a legal document incorporating operational, technical & commercial provisions to be complied in accordance with the relevant rules & regulations.
- 2.1.2. 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 the 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.
- 2.1.3. Further, the Distribution and Retail Supply Licence issued by the Commission lays down certain conditions of license, which amongst others also has 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; ..."*

*(Emphasis added)*

- 2.1.4. Further, Regulations 7(2) & 7(3) of the UERC (Tariff and other Terms for Supply of

Electricity from Non-Conventional and Renewable Energy Sources) Regulations, 2013 (RE Regulations, 2013) specifies that:

*“(2) The distribution licensee on an offer made by the said RE based Generating Stations and Co-generating Stations shall enter into a power purchase agreement in conformity with these Regulations and relevant provisions of other Regulations and the Act. The distribution licensee shall sign the PPA within two months of offer made by the generating company, failing which the generating company may approach the Commission for suitable remedy.*

*(3) The distribution licensee shall make an application for approval of power purchase agreement entered into with the generating station in such form and manner as specified in these regulations and Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 as amended from time to time.”*

*(Emphasis added)*

2.1.5. Accordingly, in accordance with the requirement of the Act and the Regulations referred above, UPCL as a distribution licensee was required to seek approval of the PPA entered or proposed to be entered by it from the Commission.

## **2.2. Commission’s Analysis of the PPA and Order on the same**

2.2.1. The PPA has been entered into between UPCL and the Respondent for supply of power from the Small Hydro Power Plant of 12.6 MW capacity situated in district Bageshwar in the State of Uttarakhand.

2.2.2. The Supplementary PPA dated 26.02.2015 alongwith the original PPA dated 16.12.2002 submitted by UPCL has been examined in light of the relevant rules & regulations. The Commission observed that certain clauses in the PPA submitted by UPCL are inconsistent with the provisions of the Act/Regulations. Such observations have been discussed in the subsequent sub-Paras. UPCL is required to take note of the same and incorporate necessary corrections in the PPA while executing the PPA with the project developers.

a) Clause 2.2.13 of the original PPA provides definition of Commercial Operation Date as follows:

*“Commercial Operation Date (COD) of Unit/Project means the date(s) on which the unit(s) of the project achieves the Commercial Operation.*

The above mentioned clause needs to be corrected and be replaced in accordance with the Regulation 3(1)(l) of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 as follows:

*“Date of commercial operation or Commissioning (CoD)” in relation to a unit means the date declared by the generator on achieving maximum continuous rating through a successful trial run and in relation to the generating station, the date of commercial operation means the date of commercial operation of the last unit or block of generating station and expression ‘commissioning’ shall be construed accordingly. In case of Small Hydro Plants the date of commissioning shall, however, not be linked to achieving maximum continuous rating, but the generator will have to demonstrate the same within three years of commissioning.”*

b) Clause 2.2.17 (A) shall be added after Clause 2.2.17 in the original PPA as follows:

*“2.2.17 ‘Commission’ means the Uttarakhand Electricity Regulatory Commission.”*

c) Clause 2.2.18 of the original PPA provides definition of “Control Centre” as follows:

*“Control Centre” means the Corporation’s State Load Despatch Centre located at Roorkee, or such other centre designated by the Corporation from time to time (but not more than one at a time) wherefrom dispatch instructions to the Station/Company shall be issued by the Corporation.”*

The above mentioned definition is not in accordance with the provisions of the Electricity Act, 2003. Further, location of the Load Despatch Centre also needs to be corrected. Accordingly, the above mentioned clause shall be modified as follows:

*“Control Centre” means the State Load Despatch Centre located at Dehradun, or Sub-State Load Despatch Centre located at Kashipur and Rishikesh incorporated wherefrom dispatch instructions to the Station/Company shall be issued.”*

d) Clause 2.2.36 of the original PPA provides definition of Government as follows:

*“Government/Govt. means the Government of Uttaranchal.”*

The same needs to be corrected and should be replaced as follows:

*“Government/Govt. means the Government of Uttarakhand.”*

e) Clause 2.2.41 of the original PPA provides definition of Installed Capacity as follows:

*“Installed Capacity means summation of the name plate kilowatt capacity(ies) of Generating Unit(s) of the Project.”*

The above mentioned clause needs to be corrected and be replaced in accordance with Regulation 3(1)(u) of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 as follows:

*“Installed Capacity” or “IC” means the summation of the name plate capacities of the units in the generating station or the capacity of the generating station (reckoned at the generator terminals).”*

- f) Clause 2.2.47 of the original PPA provides definition of Installed Capacity as follows:  
*“Net Saleable Energy means the Electrical Energy in kWh delivered by the Company at the Interconnection Point, less the Government Supply.”*

The above mentioned clause needs to be corrected and be replaced in accordance with the Regulation 3(1)(kk) of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 as follows:

*““Saleable Energy” means the quantum of energy available for sale (ex-bus) after allowing for free energy, if any, to the home State”*

- g) Clause 2.2.69 of the original PPA provides definition of Net Installed Capacity as follows:

*“Net Installed Capacity means the installed capacity of the project less the Summation of the capacities matching to the Govt. royalty, auxiliary consumption, transformation losses incurred in delivery of power upto the interconnection point. The auxiliary consumption, transformation losses and transmission losses shall be considered as 2% of the installed capacity.”*

Since for SHPs auxiliary consumption including the transmission losses of 1% has been specified in the Regulations, hence, the provision of 2% auxiliary consumption as mentioned above is not consistent with the Regulations. Accordingly, Clause 2.2.69 shall be read as:

*“Net Installed Capacity means the installed capacity of the project less the Govt. royalty and auxiliary consumption incurred in delivery of power upto the interconnection point.”*

- h) Clause 7.16 of the original PPA states as follows:

*“On the last day of each month, the Company shall prepare a statement in respect of water spillage and loss of generation, if any at the station to be considered for determination of saleable Deemed Generation during the month. The above statement duly signed together with the*

*copies of the relevant log book(s) and other supporting data shall be supplied at the time of recording of joint meter reading on first day of each month. This statement shall be reconciled and signed by the designated officers of the Corporation and the Company."*

The definition of "Saleable Deemed Generation" as per clause 2.2.59 and "Water Spillage" as per clause 2.2.68 of original PPA has been deleted as per the Supplementary Agreement to the Power Purchase Agreement signed on 26.02.2015 between the Petitioner and the Respondent. However, In view of the same the clause 7.16 of the original PPA has no relevance, hence the same should be deleted.

- i) Reference to Clause 7.16 in the clause 8.1 of the original PPA has no relevance as clause 7.16 is no longer required as discussed above, hence the reference to said clause in clause 8.1 should be deleted.
- j) Clause 12.2 of the original PPA talks about force majeure events and states as follows:

*"Subject to Section 12.6, Force Majeure shall mean any event or circumstances or combination of events and circumstances that wholly or partly prevents or unavoidably delays any party in the performance of its obligation under the Agreement, but only if and to the extent that such events and circumstances are not within the reasonable control directly or indirectly, of the affected party and could not have been avoided even if the affected party had taken reasonable care. Such events may include acts of the governments/GOI either in its sovereign or its contractual capacity, war, civil war, quarantine restrictions, freight embargoes, radioactivity and earthquakes to the extent they, or their consequences satisfy the above requirements."*

The above mentioned clause needs to be corrected and be replaced in accordance with the Sub-clause (o) of Clause (1) of Regulation 3 of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 which specifies as follows:

*"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 diligence, that party is not able to prevent, including, without limiting the generality of the foregoing:*

- i. Lightning, storm, earthquakes, flood, natural disaster and action of the natural elements;*
- ii. Acts of public enemy, blockades, insurrections, riots, revolution and sabotage;*
- iii. Unavoidable accident, including but not limited to fire, explosion, radioactive contamination*

*and toxic dangerous chemical contamination;”*

k) Clause 13.2 and 13.3 of the original PPA speaks about arbitration as follows:

*“13.2 Arbitration*

- a) Except as otherwise provided in the Agreement, all disputes arising out of or relating to the Agreement shall be referred to arbitration if the dispute is not resolved during the period as per Section 13.1.*
- b) The Arbitration shall be conducted in accordance with “The Arbitration and Conciliation 1966” or amendments thereof.*
- c) The arbitration shall be conducted at Dehradun India. The laws of India shall govern the validity, interpretation, provisions contained in the Agreement.*
- d) The language to be used in the arbitration shall be the English Language.*
- e) Judgment upon the award rendered in such arbitration and/or for any interim relief or direction or otherwise, during the pendency of arbitration proceedings and upto the date of making of the award in such arbitration, may be entered in any court of competent jurisdiction, at Dehradun having jurisdiction in respect of any application made for the filing of the arbitration agreement.*

*13.3 The Agreement shall be subject to the jurisdiction of High Court of Uttaranchal at Nainital.”*

The above clauses needs to be deleted as they are in contradiction to the provision of the Electricity Act 2003 and UERC (Conduct of Business) Regulation, 2014 and should be replaced by the following:

*“If the dispute/dissatisfaction remains unresolved, either party can file a petition before UERC, whose decision will be final and binding on both the parties. UERC shall be empowered to determine the exact nature and modalities of the procedure to be adopted in resolving the matter. However, if the Commission feels appropriate to refer the dispute to be resolved by Arbitration, the procedure specified in the Indian Electricity Act, 2003 read with the Indian Arbitration and Conciliation Act, 1996 and UERC (Conduct of Business) Regulations 2014 as amended from time to time shall be followed to the extent applicable.”*

l) Clause 15.1 of the original PPA relating to Amendment states as follows:

*“The Agreement can be amended only with the written consent of both the parties.”*

The above clause needs to be amended and shall be replaced by the following:

*“Any waiver, alteration, amendment or modification of this agreement or any part hereof shall not be valid unless it is in writing, signed by both the parties and approved by UERC.”*

m) Clause 15.17 of the original PPA relating to Indemnity states as follows:

*“The Company shall be fully responsible for any damage or loss arising out of the construction, operation or maintenance of the project to any property or persons and also undertake to indemnify the corporation on such account.”*

The above clause needs to be amended and shall be replaced by the following:

*“The Generating Company shall indemnify, defend, and render harm free, UPCL, its members, directors, officers, employees and agents, and their respective heirs, successors, legal representatives and assignees, from and against any and all liabilities, damages, costs, expenses (including attorney fees), losses, claims, demands, action, causes of action, suits and proceedings of every kind, including those for damage to property of any person or entity (including the Generating Company) and/or for injury to or death of any person (including the Generating Company’s employees and agents), which directly or indirectly result from or arising out of or in connection with negligence or willful misconduct of the Generating Company.*

*UPCL shall indemnify and render the Generating Company, its directors, officers, employees and agents, and their respective heirs, successors, legal representatives and assignees harmless from and against any and all liabilities, damages, costs, expenses (including outside attorneys fees), losses, claims, demands, actions, causes of action, suits and proceedings of every kind, including those for damage to the property of any person or entity (including UPCL) and/or injury to or death of any person (including UPCL’s employees and agents), which directly or indirectly result from or arise out of or in connection with negligence or willful misconduct by UPCL.”*

n) Para 10 of the Supplementary Agreement to Power Purchase Agreement signed on 26.02.2015 provides as follows:

*“The Clause 8.2 of the Original Power Purchase Agreement shall be substitute by the following:-*

*UPCL shall make full payment against such Monthly Bills to the Generating Company from the date of the receipt of original monthly bill with complete documents with following rebate*



*options:*

- (i) UPCL shall avail 2% rebate for prompt (within 07 working days) payment.*
- (ii) UPCL shall avail 1% rebate for payment within 30 (Thirty) working days."*

The above mentioned clause needs to be corrected and be replaced in accordance with the Regulation 22 of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 as follows:

*"The Clause 8.2 of the Original Power Purchase Agreement shall be substituted by the following:*

- (1) For payment of bills through the letter of credit on presentation, a rebate of 2% shall be allowed.*
- (2) Where payments are made by a mode other than through the letter of credit but within a period of one month of presentation of bills by the generating company, a rebate of 1% shall be allowed."*

3. The above mentioned observations/corrections pointed-out in the PPA submitted by the Petitioner are required to be rectified by both the parties. The Petitioner is required to submit compliance within 15 days of the Order.
4. Ordered Accordingly.

**(Subhash Kumar)**  
**Chairman**