

Before

# UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 48 of 2017

**In the matter of:**

Application seeking approval of the Power Purchase Agreement between M/s Himalaya Hydro Pvt. Ltd. and Uttarakhand Power Corporation Ltd.

**In the matter of:**

M/s Himalaya Hydro Pvt. Ltd.

...Petitioner

AND

**In the matter of:**

Uttarakhand Power Corporation Limited.

...Respondent

CORAM

**Shri Subhash Kumar      Chairman**

**Date of hearing: December 12, 2017**

**Date of Order: January 23, 2018**

This Order relates to the Petition filed by M/s Himalaya Hydro Pvt. Ltd. (hereinafter referred to as "M/s HHPL" or "Petitioner") seeking approval of PPA (alongwith supplementary PPA) executed by it with Uttarakhand Power Corporation Ltd. (hereinafter referred to as "UPCL" or "Respondent" or "Licensee") for sale of power from Tanga SHP (5 MW) of the Petitioner situated in Distt-Pithoragarh in the State of Uttarakhand.

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

- 1.1. M/s HHPL had filed a Petition dated 11.11.2017 seeking approval of the Commission on the draft Power Purchase Agreement with UPCL (Respondent) for sale of energy generated from the Petitioner's small hydro power plant under Section 86(1)(b) of the Electricity Act, 2003 read with Regulation 7(3) 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, 2013 and

Regulation 39 of Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2014.

- 1.2. The Petitioner submitted that it was aggrieved by the Respondent's letter No. 4233/UPCL/Com/GH-28/CE dated 12/10/2017 whereby UPCL refused to submit the Power Purchase Agreement dated 05/02/2003 and Supplementary Power Purchase Agreement dated 07/12/2009 executed between the Petitioner and the Respondent for sale and purchase of power generated by the Petitioner's Tanga SHP, for approval before the Commission.
- 1.3. The Petitioner submitted that the Respondent's refusal to seek approval of the Power Purchase Agreement dated 05/02/2003 and Supplementary Power Purchase Agreement dated 07/12/2009 is a violation of the Respondent's obligations under Section 86(1)(b) of the Electricity Act, 2003 read with Regulation 7(3) 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, 2013 and Regulation 39 of Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2014 and clauses 5.1, 5.2 & 5.4 of the Licence conditions of the Distribution and Retail Supply Licence dated 20.03.2003 issued by the Commission, and the Petitioner, therefore, filed the present Petition for approval of the said PPA's by the Commission.
- 1.4. The Petitioner further submitted that it had entered into an MOU dated 7/05/1997 with the Government of Uttar Pradesh whereby it was granted the right to build and operate the Tanga SHP project of installed capacity 3 MW in District Pithoragarh. Subsequently, on 09/11/2000 the State of Uttarakhand (i.e. formerly Uttaranchal) was formed after the State of Uttar Pradesh was reorganized. Pursuant to the above-mentioned MOU, the Petitioner entered into a Power Purchase Agreement (PPA) dated 05/02/2003, whereby the Petitioner had agreed to sell and the Respondent had agreed to purchase the entire electric energy generated by the Petitioner's Tanga SHP (with the then approved capacity of 3 MW).
- 1.5. The Petitioner further submitted that as per the policy of the newly formed State of Uttarakhand, the Petitioner had entered into a fresh Implementation Agreement dated 28/04/2004 (which superseded the MOU dated 7/05/1997 with the Government of

Uttar Pradesh) with the Government of Uttarakhand to implement the Tanga SHP with an installed capacity of 3MW.

- 1.6. The Petitioner further submitted that it had entered into a PPA dated 05.02.2003 with UPCL for sale of power from its Tanga SHP having installed capacity of 3 MW. Thereafter the Petitioner vide supplementary implementation agreement dated 23.11.2007 executed between the GoU and the Petitioner enhanced the project's installed capacity to 5 MW. Pursuant to the capacity enhancement of Tanga SHP to 5 MW, the Petitioner entered into a supplementary PPA with UPCL on 07.12.2009 for sale of entire electricity generated from the Tanga SHP having installed capacity of 5 MW.
- 1.7. The Petitioner further submitted that it had commissioned its Tanga SHP (5MW) with Commercial Operation Date (COD) of 20/03/2017 on the basis of the Implementation Agreement and Supplementary Implementation Agreement executed with the Govt. of Uttarakhand, and the PPA and Supplementary PPA executed with the Respondent. The Petitioner further submitted that based on the said PPAs, Tanga SHP was connected to and synchronized with the Respondent's 33 kV transmission system for power evacuation at the Respondent's 33/11 kV substation at Darati.
- 1.8. The Petitioner further submitted that it has incurred Rs. 76.35 Crore of capital expenditure for the construction of Tanga SHP, including Rs. 46.37 Crore of loans sanctioned and availed from M/s Indian Renewable Energy Development Agency (IREDA), a non-banking financial corporation under the Ministry of Non-Conventional & Renewable Energy (MNRE), GoI. M/s IREDA sanctioned and disbursed the said loans for the Petitioner's Tanga SHP on the basis of the executed PPAs dated 05/02/2003 and 07/12/2009 between the Petitioner and the Respondent. The Petitioner further submitted that it would be able repay its loans to IREDA and survive/sustain its operations as a renewable energy company, only if all the power generated by Tanga SHP is purchased by the Respondent as per the said Power Purchase Agreement and Supplementary Power Purchase Agreement at tariff to be determined by the Commission.
- 1.9. The Petitioner further submitted that it had as per Regulation 10 (2) of UERC RE Tariff Regulations, 2013, vide letter dated 18.06.2016 had intimated to the Respondent its option to seek "Project Specific Tariff" for Tanga SHP, copy of which was also submitted to the Commission on 20.06.2016 and which was accepted by the Respondent without

any objection.

- 1.10. The Petitioner further submitted that it had filed a petition on 14.09.2016 seeking determination of provisional tariff for Tanga SHP under Regulation 13, sub-clause (2) of UERC (Tariff and other terms for supply of electricity from non-conventional and renewable energy sources) Regulations, 2013, in anticipation of commissioning of the Tanga project, based on the capital expenditure actually incurred as on 31.08.2016 of Rs. 67.98 Crore, with the then anticipated final cost of Rs. 72.40 Crore. No objection was raised by the Respondent to the said petition for fixation of provisional tariff at the hearing dated 04.10.2016 and the Commission vide its order dated 05.10.2016 admitted the said petition for provisional tariff. Subsequently vide order dated 06.02.2017 the Commission granted a provisional tariff of Rs. 5.43/kWh to the Petitioner. The Petitioner further submitted that the Respondent accepted the provisional tariff of Rs. 5.43/kWh and was purchasing the power being supplied by the Petitioner's Tanga SHP since its COD of 20.03.2017 and paying the monthly invoices being raised by the Petitioner at the said provisional tariff.
- 1.11. The Petitioner submitted that the Commission while granting the provisional tariff for Tanga SHP directed the Petitioner to file a fresh petition, upon completion of the project, for determination of final tariff based on the actual capital cost. Therefore, the Petitioner filed a petition for determination of final tariff on 05.06.2017 which was heard on 11.07.2017 and admitted by the Commission and no objection was filed by the Respondent at that time also.
- 1.12. The Petitioner further submitted that, subsequent to the admission of the final tariff Petition filed by the Petitioner, the Respondent vide its letter dated 15.07.2017 asked the Petitioner to submit the fees for approval of the PPA of Tanga SHP which was immediately submitted by the Petitioner vide its letter dated 17.07.2017.
- 1.13. The Petitioner further submitted that surprisingly, the Respondent, for reasons best known to it, deliberately did not forward the above mentioned PPA of Tanga SHP and the Demand Draft dated 15.07.2017 for Rs. 50,000/- to the Commission for approval for a period of nearly three months, even though it was the Respondent who had initiated this process vide its letter dated 15.07.2017 which was in complete violation of the following laws and regulations:

- a. Section 86(1)(b) and Section 61 of Electricity Act, 2003 (as amended).
  - b. Clauses 5.1, 5.2 & 5.4 of the Respondent's Distribution and Retail Supply license dated 20.06.2003 issued by the Commission.
  - c. Regulations 7(2) and 7(3) of UERC Tariff Regulations, 2013
  - d. Regulation 39 (1) and (2) of Conduct of Business Regulations (2014)
  - e. Numerous Orders issued by the Commission directing the Respondent to submit all Power Purchase Agreements for approval.
- 1.14. The Petitioner further submitted that the Respondent is acting on its whims and fancies in refusing to send the Power Purchase Agreements of Tanga SHP for approval of the Commission. The Petitioner also submitted that the Respondent has been aware of the Tanga SHP's project cost and claimed tariff ever since the date of filing of the Petition and had accepted the provisional tariff of Rs. 5.43/kWh which was evident from the fact that the Respondent was paying the same since COD of the project, i.e. 20.03.2017.
- 1.15. The Petitioner further submitted that the Respondent, as the distribution licensee, is violating its obligations under Regulations 39(1), 39 (2) and 39 (3) of the UERC (Conduct of Business) Regulations, 2014 to have a transparent and non-discriminatory process for purchase of power. The Petitioner further submitted that it is unlawful on the part of the Respondent to say that it will seek approval of the Power Purchase Agreements only after the tariff is determined. The Petitioner submitted that it had got its financial closure from IREDA based on the PPA signed with the Respondent and has also made investment in the projects, however, such arbitrary and irrational stand taken by the Respondent during the proceedings would also jeopardize the investments made by IREDA as well as the Petitioner. The Petitioner further submitted that the Respondent's conduct is not only threatening the survival of the Tanga SHP but also raises question about the future of entire renewable sector in the State of Uttarakhand.
- 1.16. The Petitioner further submitted that the Respondent on one hand has refused to obtain approval for the PPA for the Petitioner's Tanga SHP, but on the other hand has obtained approvals for PPAs of several generating companies who have also sought project specific tariffs, which were yet to be commissioned and, therefore, unknown to the Respondent at the time it sought the approval of such PPAs like Melkhet, Dunao,

Khutani Power Company, M/s Ramachandra Rao Transmission & Projects Pvt. Ltd, Sarju-III, Sarju-II.

- 1.17. The Petitioner further submitted that it is unlawful and contravention of the letter and spirit of the Regulations 10, 12 and 13 of UERC Tariff Regulations, 2013 for the Respondent to say that it can continue or discontinue the Petitioner's Tanga SHP PPA depending on the tariff determined by the Commission. The Petitioner further submitted that neither the terms of the PPA nor the relevant provisions of the Electricity Act, 2003 nor UERC Tariff Regulations, 2013 permits the continuation or discontinuation of the executed PPA at the convenience of the distribution licensee.
- 1.18. The Petitioner further submitted that being aggrieved by the Respondent's letter dated 12.10.2017 refusing to send the PPA of Tanga SHP for approval of the Commission, the Petitioner requests the Commission to allow it to submit the original PPA alongwith the supplementary PPA and approve the same as per the Regulations framed by the Commission.
- 1.19. The copy of the Petition was forwarded to the Respondent for comments and the Petition was heard on 12.12.2017 for maintainability and was admitted.

## **2. Respondent's Submissions**

- 2.1. The Respondent submitted that as per Regulation 39(1) of Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2014 and Regulation 7(3) of Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources and non-fossil based Co-generating Stations) Regulations, 2013, only distribution licensee has been permitted under the Regulations to file the Power Purchase Agreement.
- 2.2. The Respondent submitted that the instant Petition filed by M/s HHPL is not in accordance with the provisions of Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2014.
- 2.3. The Respondent further submitted that the basis of filing the Petition is upon the contention that the Respondent has refused to submit the Power Purchase Agreement dated 05.02.2003 and Supplementary Power Purchase Agreement dated 07.12.2009 for approval before the Commission. The Respondent submitted that the Petitioner has

misrepresented the contents of UPCL letter as they had not made any refusal as suggested rather has only deemed it proper to wait for determination of final tariff so that UPCL would be in a position to satisfy the Commission regarding economic viability of the project as required by the regulations.

- 2.4. The Respondent further submitted that no irreparable harm would be caused to the Petitioner if approval on the PPA is obtained after determination of tariff of the Petitioner.
- 2.5. The Petitioner's submissions, Respondent's comments and the Commission views/ decision on the same have been discussed in subsequent paras.

### 3. Commission's Views & Decisions

#### 3.1. Legal Requirement for approval of PPA

311. A PPA is a legal document incorporating operational, technical & commercial provisions to be complied in accordance with the relevant rules & regulations.
312. 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.
313. 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)*

314. 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)*

315. 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.

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

321. The original PPA dated 05.02.2003 and subsequently the supplementary PPA dated 07.12.2009 was executed between UPCL and the Petitioner for supply of power from the Small Hydro Power Plant of 5 MW capacity situated in district Pithoragarh in the State of Uttarakhand.

322. The Supplementary PPA dated 07.12.2009 alongwith the original PPA dated 05.02.2003 submitted by M/s HHPL has been examined in light of the relevant rules & regulations.

323. As per Regulation 39(1) of the UERC (Conduct of Business) Regulations, 2014 the distribution licensee is required to file with the Commission in complete form copies of all Power Purchase Agreements already entered into by it. The relevant portion of the Regulation is reproduced hereunder:

*“39. Regulation of Distribution Licensee’s Purchase of Power*

*(1) The distribution licensee shall file with the Commission in complete form copies of all Power Purchase Agreements already entered into by it.*

*(2) The distribution licensee to establish to the satisfaction of the Commission that the purchase of power by it is under a transparent power purchase procurement process and is economical and the power is necessary to meet its service obligation.*

- (3) *The Distribution licensee shall apply to the Commission for approval of the draft Power Purchase agreement that it proposes to enter into with the suppliers. 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.*
- (4) *Nothing contained herein shall affect the obligations of distribution licensee under the existing contract and arrangement for purchase, import or acquisition of electricity from generating companies, electricity trader and from other persons with whom the licensee has agreements or arrangements of power purchase or procurement of energy in accordance with the terms and conditions of such agreement and arrangement consented to or approved by the Commission.*
- (5) *The provisions of sub-regulations (2) and (3) above or any action taken therein shall not, in any manner, prejudice the exercise of functions and powers of the Commission under any of the other provisions of the applicable law, the Regulations and Orders issued from time to time.*

324. Regulation 7(2) & 7(3) of RE Regulations, 2013 as stated before, requires that 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 the Regulations.

325. The Commission in its various Orders have been directing UPCL to submit all the power purchase agreements already signed with the IPPs. The details of such Orders are given hereunder:

a. The Commission in its Tariff order for FY 2003-04 directed UPCL as follows:

*“Petitioner should also review the Power Purchase agreements with Central Generating Stations. **The Petitioner should also submit the power purchase agreements already signed with IPPs, if any, to the Commission.**”*

b. The Commission in its Order dated November 07, 2014 directed UPCL as follows:

*“2.3.3 UPCL is directed to take note of the above modifications and carry out the same in the PPA and submit the amended/supplementary PPA to the Commission within 45 days of the*

*date of the Order. UPCL is also directed to submit the remaining PPAs which have not yet been approved by the Commission within 15 days of the date of the Order including the PPA of M/s. Himalaya Hydro (P) Ltd. in accordance with the prevailing Regulations."*

c. The Commission in its Order dated February 10, 2015 directed UPCL as follows:

*"2.3.3 UPCL is directed to take note of the above modifications and carry out the same in the PPA and submit the amended/supplementary PPA to the Commission within 15 days of the date of the Order. UPCL is also directed to submit the remaining PPAs which have not yet been approved by the Commission within 15 days of the date of the Order."*

326. As can be seen from above stated Regulations and the directives issued by the Commission from time to time, the distribution licensee is legally obligated to seek approval of the Commission for every PPA it has entered or proposes to enter with the generating companies.
327. As submitted by the Petitioner, the PPA for sale of power to UPCL from Tanga SHP was signed between the Petitioner and UPCL on 05.02.2003. Subsequently, a supplementary PPA dated 07.12.2009 in this regard was also signed between the Petitioner and UPCL.
328. The Petitioner had filed an application seeking provisional Tariff of its Tanga SHP on 14.09.2016 and the Commission vide its order dated 06.02.2017 granted a provisional tariff of Rs. 5.43/Kwh for the Petitioner's Tanga SHP. Subsequently, the Petitioner filed an application for determination of final project specific tariff for its Tanga SHP on 05.06.2017.
329. UPCL vide its letter dated 12.10.2017 informed the Petitioner that before seeking approval of the PPA from the Commission, tariff of the Tanga SHP needs to be finalized first and only after that UPCL will take decision with regard to continuity of the PPA. A copy of the said letter was also marked to the Commission.
3210. The Petitioner aggrieved by the aforesaid response of the Respondent filed the instant Petition before the Commission for approval of the PPA of its Tanga SHP stating that such an action on the part of the Respondent is against the intent of the law and the Regulations laid down by the Commission and further would discourage the new

investors from setting up RE projects in the State. The Petitioner also stated that it had got the funding from the lender based on the executed PPA with UPCL and any ambiguity regarding the approval of PPA would adversely affect its financial position.

3211. The Commission analysed the submissions made by both the Petitioner and the Respondent and observed that UPCL on the first hand contended that only the distribution licensee is permitted to file the PPA for approval under the regulations. In response to the UPCL contention, the Petitioner has submitted that UPCL vide its aforesaid reply has itself agreed that it is the licensee who is legally obligated to seek approval of the PPA entered into by it with the generators. The Petitioner has further stated that the Respondent is discriminating against the Petitioner by withholding only the PPA for Tanga SHP while it has already submitted all other PPAs it has entered into with other generating companies either already commissioned or likely to be commissioned in the future years for approval by the Commission. The Petitioner also stated that the Respondent is not entrusted with any rights under the terms of the PPA or provisions of the Regulations so as to decide which PPA it wishes to get approved by the Commission and which are the ones it can hold. In this regard, the Commission is of the view that UPCL is required to seek approval of the Commission on all the PPAs entered into by it with the generators which is also in line with the Regulations and the directives issued by the Commission from time to time in the matter. Further, the Commission is of the view that UPCL cannot discriminate by holding back the PPA of one generator while getting the PPA entered into with other generators, during the same period, approved by the Commission. Moreover, the contention of the UPCL that it would take decision regarding approval of PPA only after the determination of final tariff by the Commission has no legal sanctity and cannot be sustained. Section 62(1) of the Electricity Act, 2003 stipulates as under:

*“The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

*(a) supply of electricity by a generating company to a distribution licensee...”*

Hence, from the above reading it is amply clear that the Commission shall determine the generation tariff for sale to a distribution licensee. Sale of electricity to the distribution licensee is established by a PPA. Hence, the Commission determines

the generation tariff based on a PPA with the State Discom. The contrary view of UPCL taken in the matter that once the Commission decides the tariff of the Tanga SHP, only then it will decide on the continuity of the PPA is not only contravening the provisions of the Act but also will be detrimental to the development of power sector in the State as then no PPA will have any sanctity which will create uncertainty and in such a scenario no financial institution would finance any project. It is to be understood that a PPA is a legal document binding on the concerned parties and any ambiguity with respect to the same at a later stage will not only adversely affect the concerned parties but will also discourage other developers from investing in the State fearing the sanctity of the PPA.

3212. The Respondent further stated that the Petition filed by M/s HHPL is not in accordance with the provisions of the UERC (Conduct of Business) Regulations, 2014. In response to the contention of the UPCL, the Petitioner has submitted that UPCL has violated Regulation 39 (1) of UERC Conduct of Business Regulations, 2014 and Regulation 7(3) of UERC RE Regulations, 2013 by refusing to seek approval of Tanga SHP's PPA by the Commission and in order to seek remedy of the unlawful action by the Respondent they have rightfully approached the Commission under the law. The Commission in this regard is of the view that Regulation 7(3) of RE Regulations, 2013 clearly states that the distribution licensee is required to make an application for approval of power purchase agreement entered into with the generating station in such form and manner as specified in the regulations. In the instant case, UPCL has clearly contravened the provisions of the Regulations by not getting the PPA of Tanga SHP approved by the Commission well in advance of the determination of final generation tariff as required under the Act/Regulations. M/s HHPL being the aggrieved party has full rights to represent before the Commission for the non-compliance on the part of UPCL.

3213. The Respondent further stated that the Petitioner has filed the current Petition upon the contention that UPCL has refused to submit the Power Purchase Agreement dated 05.02.2003 and Supplementary Power Purchase Agreement dated 07.12.2009 for approval before the Commission which is not correct and the Respondent has further stated that as it had not made any refusal as suggested by the Petitioner rather has only

deemed it proper to wait for determination of final tariff so that it would be in a position to satisfy the Commission regarding economic viability of the project as required by the regulations. In response to the Respondents contention, the Petitioner submitted that the Respondent vide its letter dated 15.07.2017 asked the Petitioner to submit the requisite fees for approval of the PPA which was duly submitted by the Petitioner, however, subsequently the Respondent vide its letter dated 12.10.2017 informed the Petitioner that it would submit the PPA for approval only after the Tariff of the Tanga SHP is determined which is in clear violation of the Regulation 39 (1) of UERC Conduct of Business Regulations, 2014 and Regulation 7(3) of UERC RE Regulations, 2013. The Petitioner, further, submitted that it has obtained financial closure on the basis of the PPA from Indian Renewable Development Agency (IREDA) an authority under MNRE, Govt. of India and availed loans to commission its Tanga SHP. The PPA is a legally binding agreement between the Petitioner and the Respondent and there is no provision either in the PPA or in UERC RE Regulations, 2013 or Conduct of Business Regulations, 2014 for the Respondent to question the PPA or to discontinue it. The Petitioner also submitted that in the case of generating companies such as M/s Uttar Bharat Power Pvt Ltd's Sarju-II SHP (which has claimed a tariff that is higher than the one claimed by the Petitioner for its Tanga SHP), M/s Uttarakhand Jal Vidyut Nigam Ltd's Dunao SHP (whose capital cost is more than Rs. 20 Crore/MW and estimated tariff would be about Rs. 9/kWh) and for Melkhet SHP, Khutani Power Company, M/s Ramachandra Rao Transmission & Projects Pvt. Ltd (Bernigad SHP) etc. where the project cost and tariffs are unknown, the Respondent has nevertheless applied for and obtained the approval of their PPAs from the Commission, however, in case of the Petitioner's Tanga SHP, the Respondent wants to alter this provision to its convenience such that the Commission may fix the tariff first and then the Respondent will decide if they wish to continue with the PPA, which is not permitted under the Electricity Act, 2003 or UERC RE Regulations, 2013 and is also ultra vires to the Contract Act, 1972. The Petitioner also submitted that if such a situation is permitted then the Respondent would be free to reject any tariff fixed by the Commission not only for the Petitioner's Tanga SHP, but also for any other project in the future such as Dunao SHP, Sarju-II SHP, Melket SHP, Khutani Power, Bernigad SHP etc., based on its whims and fancies, which in turn means that none of the Power

Purchase Agreements signed by the Respondent will have any sanctity whatsoever and in such a situation, it follows that no generating company or lending agency will invest and establish power projects in Uttarakhand State on the basis of Power Purchase Agreements signed by the Respondent.

The Commission in this regard is of the view that the Petitioner has rightfully submitted that such an action on the part of the Respondent to deliberately hold back the PPA of a particular generating company till the determination of final Tariff is not permitted under the Electricity Act, 2003 and also under the Regulations issued by the Commission. Besides the Respondent did not submit under which legal provisions of the Act or the Regulations they chose to defer the approval of the PPAs. Further, if such an act on the part of the Respondent is affirmed by the Commission then it would defy the very sanctity of the PPA which is a legally binding agreement between the parties. Moreover, such an act of the distribution licensee might also discourage the new investors to establish projects in the State of Uttarakhand fearing the sanctity & reliability of the terms of PPA entered into by them. Regarding, UPCL's contention on the economic viability of the project, the Commission observes that UPCL is still deficient in meeting its RPO based on the projections in its Tariff Petition for FY 2018-19 filed before the Commission. Moreover UPCL has projected an average rate of Rs. 8.76/kWh, Rs. 7.35/kWh and Rs. 9.07/kWh from NTPC owned stations of Jhajjar, Anta and Auraiya gas respectively from where it proposes to procure power at rates more than what the Petitioner's project would deliver to it. Hence, the question of economic viability has also to be seen with reference to other sources from where UPCL is purchasing power. Besides, it should not be ignored that the Petitioner's plant would deliver green/renewable power which would enable UPCL to meet its RPO shortfall. Further, since the financial closure of the project took place based on the legally valid PPA and the commissioning of the project has subsequently taken place, the issue of economic viability is of no consequence as the generator has made investments in the project from its own sources and also from loans availed from IREDA, the recovery of which will be in jeopardy by this misdemeanor of UPCL. Besides, it would also set a wrong precedence and then there would be no sanctity of the PPA and in fact it would deter the financial institutions from providing funding to

the new projects in the State.

3214. UPCL also submitted that no irreparable harm would be caused to the Petitioner if approval on the PPA is obtained after determination of tariff of the Petitioner's Tanga SHP. In response to the Respondent's contention, the Petitioner submitted that the Respondent's actions of not submitting the PPA for approval before the Commission is aimed at seeking to question the validity of the PPA itself at a later stage, which in turn has served to create uncertainty about the very survival of the Petitioner company and its Tanga SHP for which financial closure was done by IREDA based on the PPA entered into by the Petitioner with the Respondent. The Petitioner further submitted that that the present action of the Respondent may cause IREDA to recall the entire loan advanced for the project forthwith which will cause irreparable loss to the Petitioner as its project is already commissioned and there would be no firm buyer of power from the project. In this regard, the Commission is of the view that PPA being a legal agreement serves as a yardstick for the developers to get the funding for the projects from the lenders. A legally valid PPA as a prerequisite ensures certainty of sale of power to the firm buyer that eventually results in revenue from operations to meet the cost of financing & operations of the project. The Commission agrees with the contention of the Petitioner and is of the view that the UPCL's action may lead to creating uncertainty about the survival of the Tanga SHP of M/s HHPL and in the absence of firm buyer available for purchase of the power from the Petitioner's plant the lenders may not feel safe regarding the certainty of payment of the debt advanced for the project. Moreover, UPCL is legally obligated to get the PPA's entered into by it with the developers be got approved by the Commission and any inaction in this regard cannot be permitted under the provisions of the Regulations and the Law.

3215. UPCL as per the Regulations laid down by the Commission and also the directives issued by the Commission from time to time was required to submit all the executed PPA before the Commission for approval, however, UPCL failed to comply with the Regulations and the directives issued by the Commission in so far as the PPA of Tanga SHP (5 MW) for purchase of power is concerned which appears to be a deliberate non-compliance on its part keeping in view the fact that UPCL even sought approval of the 03 nos. PPAs with the generating stations which were under

predevelopment/development stage and yet to be commissioned. This non-uniform approach of the Respondent has been taken seriously by the Commission as irrational. Besides there is no reason as to why UPCL did not submit the PPA of the Petitioner's projects even after categorical directions of the Commission issued vide Order dated November 07, 2014 and February 10, 2015. **Accordingly, MD, UPCL is directed to submit the list of officers who were required to ensure regulatory compliances of the directions issued by the Commission since October, 2014 in the matter of submission of PPA petition before the Commission within 15 days of the date of this Order and also show cause as to why action should not be initiated against them under Section 142 of the Act for non-compliance of the provisions of the Act and Commission's directives (issued vide different Orders for submissions of all the PPAs signed by UPCL) within 30 days of the date of this Order.**

3216. The Commission in view of the above discussion allows the Petition filed by M/s HHPL for approval of the PPA for its Tanga SHP.

3217. The Commission observed that certain clauses in the PPA (including supplementary PPA) submitted by M/s HHPL 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 Supplementary PPA with the project developer.

a) Clause 2.2.7 of the original PPA be replaced as follows:

*"Corporation" means Uttarakhand Power Corporation Limited, a Company registered under the Company's Act, 1956, having its Registered Office at V.C.V. Gabar Singh Bhawan, Kanwali Road, Dehradun, hereinafter called "UPCL" and shall also include, unless repugnant to the context or meaning thereof, its successors, permitted assigns and legal representatives.*

b) 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.”*

c) 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.”*

d) 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 Rishikesh, 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.”*

e) 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.”*

f) Clause 2.2.40 of the original PPA defines Implementation Agreement as follows:

*“Implementation Agreement means this Agreement dated 7th May 1997 entered into between the company and the Government for Implementation of Tanga Small Hydroelectric Project read with the subsequent amendments, if any, thereto.”*

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

*“Implementation Agreement means the Agreement dated 28.04.2004 and 23.11.2007 entered into between the company and the Government of Uttarakhand for Implementation of Tanga Small Hydroelectric Project read with the subsequent amendments, if any, thereto.”*

- g) 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).”*

- h) Clause 2.2.43 of the original PPA provides definition of Interconnection Point as follows:

*““Interconnection Point” means the physical touch point where the Project Lines (s) and the allied equipment forming a part of the Interconnection Facilities are connected to the 33 KV Bus Bars on the 33 KV sub-station of the Corporation at Madkote, District Pithoragarh, Uttaranchal.”*

The same needs to be corrected and should be replaced as follows in accordance with the applicable regulations:

*“Interconnection Point shall mean interface point of renewable energy generating facility with the transmission system or the distribution system which shall be line isolator on outgoing feeder on HV side of generator transformer.”*

- i) 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”*

- j) 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.”*

- k) Article 3 of the PPA, i.e. Construction Stage and Time limit for executing the project is not relevant as the same shall be governed in accordance with the Implementation Agreement dated April 28, 2004 signed by the generator with the Government of Uttarakhand as the project was allotted to the generator by the State Government and not UPCL and any cancellation of allotment or levy of penalty or liquidated damages will accordingly be done by the State Government. Besides the PPA specifies the commissioning schedule as 48 months, however, the IA allows the Company to achieve COD within 54 months from the effective date. Moreover, as per the IA, UJVNL was responsible for monitoring and supervision of the construction works, etc. and UPCL had no role in the same. Accordingly, the same may either be modified in accordance with the IA or since the project has already achieved the COD, the same may be done away with.

- l) Para 2 of Clause 6.1 of the original PPA states as follows:

*“During such periods, as may occur from time to time, as the Project is partly or totally unable to operate, the Company may draw energy required for startup and maintenance of the Project for the Corporation’s System, which shall be metered at the Interconnection Point and adjusted against the Net Saleable Energy in corresponding month’s bill. In case the quantum of such*

*drawals by the Company during a month exceeds the Net Saleable Energy for that month, the excess draws shall be paid for by the Company at the same rate as applicable for Net Saleable Energy as per section 6.2."*

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

*"Energy accounting for supply of electricity by UPCL to the Generating Company shall be as per Regulation 45 of the Uttarakhand Electricity Regulatory Commission as provided in 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, 2013."*

m) Clause 6.2 of the original PPA was amended vide Supplementary PPA dated 05.02.2003 which reads as follows:

*"Tariff for Net Saleable Energy*

*UPCL shall accept and purchase 5 MW (Plus 10% overloading) of power made available to UPCL system from the Generating Company based on Small hydro with capacity up to 25 MW at the levelised rate specified for such plant in Schedule I of Uttarakhand Electricity Regulatory Commission (Tariff and other terms for supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 as amended from time to time.*

*The rate applicable for supply of electricity by UPCL to the Generating Company shall be as per the tariff determined by the Commission under appropriate 'Rate Schedule of Tariff for the consumer category-determined on the basis of the total load requirement of the plant and billing done in the manner as specified by the Commission in the Regulations.*

*The Generating Company and UPCL shall comply with all the regulations issued by UERC from time to time including but not limited to Uttarakhand Electricity Grid Code, Open Access Regulations, SLDC Regulations to the extent they are applicable to them."*

Since the Petitioner has opted for the project specific tariff in accordance with the RE Regulations, 2013, accordingly, Clause 6.2 needs to be corrected and should be replaced as follows:

*"The tariff for Net Saleable energy shall be the project specific tariff determined by the Commission in accordance with UERC (Tariff and other terms for supply of Electricity from Renewable Energy Sources and non-fossil fuel based co-generating stations) Regulations, 2013 as amended from time to time."*

n) Clause 6.4 of the original PPA provides definition of Deemed Generation as follows:

*“After the COD of the project, loss of generation at the station on account of reasons attributed to the following or any one of the following, which result in Water Spillage, shall count towards Deemed Generation:-*

- a) Corporation Grid System failure;*
- b) Non Availability of evacuation system beyond the Interconnection Point; and*
- c) Receipt of backing down instructions from the Control Centre.*

*Provided that the following shall not count towards Deemed Generation:-*

- i) The loss of generation at the station due to the interruption/outages attributed to the aforesaid factor(s) lasting for a period of less than 20 minutes at a time;*
- ii) The loss of generation at the Station on account of aforesaid factor(s) but attributed to the Force Majeure event(s);*
- iii) The loss of generation at the Station due to the interruption/outages attributed to the aforesaid factor(s) during the period in which the total duration of such outages/interruptions, other than those excluded under (i) & (ii) above, is within the annual limit of 400 hours in a year/and*
- iv) The loss of generation at the Station that would have taken place otherwise also even in the absence of the aforesaid factor(s).*

*The period of outage/interruption on account of such factor (s) shall be reconciled on monthly basis and the loss of generation at the Station counting towards Deemed Generation after accounting for the events(i) to (iv) above, shall be computed on following considerations:*

- i) If such period falls within the first twelve months after the COD of the Project, the generation, envisaged for the month in which such period falls, based on inflows relating to 75 % dependable year, as per the hydrological data contained in the Approved DPR; and*
- ii) If such period falls subsequent to the first twelve months after the COD of the project, the generating actually achieved including the deemed generation, if any in the corresponding month of the previous year for the one envisaged in that month based on inflows relating to 75% dependable year as per the hydrological data contained in the Approved DPR, whichever is less.*

*The Corporation shall pay for the saleable deemed Generation, worked out on the basis of the deemed generation on above lines, at a fixed rate of Rs. 2.50 (Rupees two paise fifty only) per unit on monthly basis.*

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

*“Deemed Generation:*

*After the CoD of the project, deemed generation shall be admissible to the Company in accordance with 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, 2013 as amended from time to time."*

o) Clause 7.18 is required to be added to the original PPA as follows:

*"The complete metering system consisting of Meters, Current Transformers & Potential Transformers shall conform to the 0.2S accuracy class, individually and collectively, and shall comply with the technical standards, accuracy and calibration requirements of the CEA (Installation and Operation of Meters) Regulations, 2010 and amendment thereof."*

p) Clause 8.2 of the original PPA talks about rebate and states as follows:

*"If the payment of bill is made on or before the due date of payment, the corporation shall be entitled for a rebate @ 1.5% of the gross amount of the bill. However, in case of part payment (s) made by the Corporation within the due date of payment, the rebate @ 1.5% of the amount (s) paid by the corporation shall be allowed by the company."*

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."*

q) Clause 8.3 of the original PPA talks about late payments and states as follows:

*"In the case the un-disputed amount of bill is not paid within the Due date of Payment, the unpaid and undisputed amount shall bear penalty at a rate of 1.5% per month. For this purpose the month shall be considered to be comprising of thirty days. The penalty shall be payable for each day of delay in making such payment beyond the Due date of Payment.*

*In case the corporation does not make payment of un-disputed bill, within three months from the receipt of the bill, the Company shall be at liberty to invoke the provisions of Government Guarantee after giving a notice of at least 15 days to the corporation."*

The above mentioned clause needs to be corrected and be replaced as follows:

*“For default in payment beyond 60 days from the billing, a surcharge at the rate of 1.25(%) percent per month or part thereof shall be levied on the billed amount.”*

r) Clause 10.1 of the original PPA talks about Terms of Agreement and states as follows:

*“The Agreement shall become effective upon execution and delivery by the Parties hereto and unless earlier terminated pursuant to provisions of the Agreement shall have a term from the date hereof until thirty (30) years after the Synchronisation Date of the first unit of the project.”*

The above mentioned clause needs to be corrected and be replaced as follows:

*“This agreement shall be valid till the expiry of 35 years from the date of commercial operation of the project.*

*The agreement may be renewed or extended for such period as may be mutually agreed between the Generating Company and UPCL on expiry of initial term described at above.*

*UPCL reserves the first right of purchase after the expiry of initial term of PPA.”*

s) 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;”

t) 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 Uttarakhand at Nainital.”*

The above clauses need 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.”*

u) 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."*

v) 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."*

4. The above mentioned observations/corrections in the PPA submitted by the Petitioner alongwith this Petition are required to be incorporated by both the parties. Thereafter a final PPA duly signed by both the Parties be submitted by the Respondent within 15 days of the date of this Order.
5. The Commission once again directs UPCL to submit the remaining PPAs which it has entered into and have not yet been approved by the Commission within 15 days of the date of this Order failing which appropriate action will be initiated against the respondent.
6. Ordered Accordingly.

**(Subhash Kumar)  
Chairman**