

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 14 of 2019

In the Matter of:

Dispute between M/s Bhilangana Hydro Power Limited and Uttarakhand Power Corporation Ltd., regarding non-payment of Open Access Charges by UPCL for supply of non-solar renewable power by M/s Bhilangana Hydro Power Ltd. through Tata Power Trading Company Ltd. in FY 2016-17 and FY 2017-18.

AND

In the matter of:

M/s Bhilangana Hydro Power Limited. (BHPL)Petitioner No. 1

In the matter of:

Tata Power Trading Company Ltd. (TPTCL).Petitioner No. 2

AND

In the matter of:

Uttarakhand Power Corporation Ltd. (UPCL)Respondent

Coram

Shri Subhash Kumar Chairman

Date of Hearing 12 March, 2019

Date of Order: 10 April, 2019

The present Petition is filed by M/s Bhilangana Hydro Power Ltd (hereinafter referred to as 'the Petitioner No. 1' or 'M/s BHPL') and M/s Tata Power Trading Company Ltd. (hereinafter referred to as 'the Petitioner No. 2' or 'TPTCL') under Section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred to as the 'Act') against Uttarakhand Power Corporation Ltd. (hereinafter referred to as 'Respondent' or 'UPCL').

1. Facts of the Case

- 1.1 Bhilangana Hydro Power Limited is a company incorporated under the Indian Companies Act, 1956 and has set up a 24 MW hydro electric power project (Bhilangana-III) on River Bhilangana near Village-Ghuttu, Tehsil Ghansali, District Tehri Garhwal, Uttarakhand. The project was allocated under the competitive bidding process by Government of Uttarakhand in 2003.
- 1.2 The Petitioners are inter-alia challenging the non-payment of Open Access charges by UPCL of Rs. 3.84 Cr. approximately for FY 2016-17 and FY 2017-18.

2. Submission of the Petitioner

- 2.1 The Petitioner stated that it had supplied non-solar renewable energy to UPCL through TPTCL inter-alia for FY 2016-17 and FY 2017-18 through short term tenders. However, UPCL contrary to clear provisions of the tender documents, letter of intent, power purchase agreement, the guidelines issued by the Ministry of Power and the provisions of UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 has been denying the payment of open access charges payable in relation to the said supply.
- 2.2 According to the BHPL UPCL invited offers for purchase of non-solar renewable energy on short term basis for FY 2016-17 & FY 2017-18 vide tender No. 01/CE (Comm)/UPCL-01/2015-16, 05/CE (Comm) /UPCL-05/2015-16 and 08/CE (Comm) /UPCL-08/2017-18.
- 2.3 BHPL stated that TPTCL participated in the aforesaid tenders intending to source power from the plant of Petitioner No. 1. The participation by TPTCL, thus has been back to back w.r.t. power sale agreement entered into with Petitioner No. 1 i.e. BHPL.
- 2.4 According to the Petitioner No. 1 the provisions of Cause 3 (Tariff Structure) and Clause no. 9 (Open Access) of tender numbers 01/CE (Comm) /UPCL-01/2015-16 and 05/CE (Comm) /UPCL-05/2015-16 are similar. Clause 3 inter-alia states that for intra-state transmission of power, inter connection point of seller with STU

- shall be taken as delivery point and Clause 9 inter-alia states that UPCL shall reimburse the open charges beyond delivery point in full to Supplier as per the amount paid to nodal RLDC within 7 Days of submission of bill by Supplier.
- 2.5 According to BHPL a bare perusal of the aforesaid clauses establishes beyond doubt that the intra-State delivery point is the inter-connection point of the seller with the STU i.e. the BHPL switchyard.
 - 2.6 Petitioner No. 1 stated that PPAs against tender numbers 01/CE (Comm) /UPCL-01/2015-16 and 05/CE (Comm)/UPCL-05/2015-16 dated 01.10.2015 and 16.10.2016 respectively have a common Clause 3 which very clearly states that the HT bus of BHPL shall be designated as the inter-connection point of BHPL with STU and the tender price was quoted at the inter-connection point with STU. Accordingly, as per the provisions of PPAs the transmission cost of single circuit of Ghuttu-Ghansali line is payable by UPCL.
 - 2.7 The Petitioner No. 1 further informed that UPCL has failed to pay open access charges including the cost of single circuit of Ghuttu-Ghansali line.
 - 2.8 Petitioner No. 1 further averred that UPCL invited offer for purchase of non-solar renewable energy on short term basis for FY 2017-18 vide Tender No. 08/CE (Comm)/UPCL-08/2017-18. A bare perusal of the said tender document establishes beyond doubt that the intra-State delivery point is the inter-connection point of the seller with the STU i.e. the BHPL switchyard in the present case. However, while issuing the Letter of Intent dated 31.03.2017, UPCL unilaterally, arbitrarily and in complete abuse of its dominant position changed the delivery point to Uttarakhand State periphery, which is clearly the delivery point for inter-State transmission of electricity in terms of the tender No. 08/CE (COMM)/UPCL-08/2017-18 (non Solar). This is illegal and impermissible.
 - 2.9 The Petitioner No. 1 further stated that a Power Purchase Agreement was executed in between UPCL and TPTCL on 19.08.2017 for FY 2017-18. On the perusal of Clause 2 (Tariff Structure and Delivery Point) and Clause 5 (Open Access) of the PPA it is clear that UPCL arbitrarily treated the supply of power from the Petitioner No. 1 through TPTCL, as Inter-State transmission of electricity instead of Intra-State transmission. Supply of renewable power from Bhilangana-

III Hydro Power Project (Bhilangana-III Project) of the Petitioner situated in the State of Uttarakhand to UPCL, a distribution licensee in Uttarakhand, can in no manner be treated as Inter-State transmission of electricity. UPCL has arbitrarily and illegally treated the delivery point as the Uttarakhand State periphery instead of the switchyard of Bhilangana-III Project of the Petitioner.

- 2.10 M/s BHPL further stated that TPTCL vide letter dated 09.10.2017 objected to the aforesaid unilateral change in delivery point by UPCL. TPTCL pointed out that the bid placed by it clearly mentioned the delivery point as the HT Bus of Bhilangana-III Project that is, the interconnection-point of B-III switchyard with PTCUL, in line with the terms of the bid. TPTCL further pointed out that in the past 3 power purchase agreements executed with UPCL, the delivery point was clearly mentioned as the HT Bus of Bhilangana-III Project that is, the interconnection-point of Bhilangana-III Project switchyard with PTCUL.
- 2.11 According to the Petitioner No. 1 the perusal of clauses 5.3, 5.4, 8.1 and 8.2 Notification dated 30.03.2016 of Ministry of Power Government of India namely; the "Guidelines for short-term Procurement of Power by Distribution Licensees through Tariff based bidding process" it is clear that in case of intra state transmission of electricity, the inter-connection point of the seller with the STU is to be taken as the delivery point. UPCL, contrary to the aforesaid guidelines and the tender documents has made the State periphery as the delivery point for sale of power from the BHPL Project, which is not permissible.
- 2.12 Petitioner No. 1 stated that vide letter dated 09.08.2018 it requested TPTCL to reimburse the transmission charges for single circuit of 220 kV Ghuttu-Ghansali line for FY 2016-17 and FY 2017-18 amounting to Rs. 1.95 Cr. and 1.89 Cr. respectively alongwith the late payment surcharge. Accordingly, TPTCL vide its letter dated 10.08.2018 requested UPCL to pay the said open access charges. However, UPCL has failed to pay the said amount.
- 2.13 The Petitioner No. 1 requested the Commission to direct UPCL to pay open access charges including transmission charges for Ghuttu-Ghansali line amounting to Rs. 1,94,99,999/- for FY 2016-17 and Rs. 1,88,99,998 for FY 2017-18 alongwith interest @18% per annum.

3. Submission of the Respondent

3.1 Preliminary objections/comments were filed by UPCL vide its letter dated 11.03.2019. According to the Respondent the Petition is not legally maintainable as Petitioner's have no dispute that requires to be adjudicated between the parties. M/s BHPL has raised invoices to M/s TPTCL and M/s TPTCL has forwarded them to UPCL. According to the Respondent, TPTCL has no authority to forward the invoices to UPCL, hence, the very basis of the Petition does not exist. According to UPCL it does not have any PPA with Petitioner No. 1, hence M/s BHPL cannot file any Petition against UPCL. Moreover, M/s TPTCL is an inter-State trader therefore, not subject to jurisdiction of the Commission.

3.2 A hearing in the matter was held on 12.03.2019 for admissibility of the Petition, where in the Commission Ordered that:

"1) The reply submitted by UPCL during the hearing be forwarded to M/s BHPL for submitting their comments before the Commission by 22.03.2019 with a copy to UPCL who is at liberty to submit its comments by 29.03.2019.

2) Further, M/s BHPL is also directed to submit a copy of PPAs entered into with Tata Power Trading Company Ltd. (TPTCL) to the Commission and also provide the same to UPCL for the year FY 2016-17 & FY 2017-18 by 22.03.2019."

3.3 In compliance to the aforesaid Order of the Commission M/s BHPL filed a rejoinder to the reply filed by UPCL on 22.03.2019. Thereafter, UPCL vide letters dated 09.04.2019 submitted its reply wherein, inter alia, UPCL requested the Commission to make available the copies of the Agreements signed between M/s BHPL and TPTCL for filing an elaborate reply, to which it is observed that the desired documents does not hold any material relevance in the matter and are inconsequential to the sanctity of the PPAs dated 01.10.2015, 16.03.2016 and 19.08.2017, which are the governing documents unleashing the rights and obligations of the parties involved. Moreover, the Commission is of the view that the documents desired by UPCL for verification are the pre-requisite of due diligence required before entering into an Agreement and is not of any relevance at this juncture.

4. Commission's view

4.1 The Commission examined tender No. 01/CE (Comm)/UPCL-01/2015-16, 05/CE (Comm)/UPCL-05/2015-16 and tender no. 08/CE (Comm)/UPCL-08/2017-18 invited by UPCL for purchase of non-solar renewable energy on short term basis for the period 01 October 2015 to 20 September 2016, 21 September 2016 to 31 March 2017 and 01 April 2017 to 31.03.2018 respectively alongwith related Letter of Intent and PPAs. On the perusal of the aforesaid documents it was observed that the provisions of relevant Clauses relating to Tariff Structure and Open Access of tender number no. 01/CE (Comm)/UPCL-01/2015-16 and 05/CE (Comm)/UPCL-05/2015-16 for FY 2016-17 were similar and at variance with the similar provisions of tender no. 08/CE (Comm)/UPCL-08/2017-18 for FY 2017-18. The Commission, therefore, examined the tender documents, Letters of Intent and the PPAs for purchase of non-solar renewable energy on short term basis for FY 2016-17 and FY 2017-18 separately.

(A) For the period 1st April 2016 to 31 March 2017 i.e. FY 2016-17

4.2 The Respondent invited tender no. 01/CE (Comm)/UPCL-01/2015-16 and 05/CE (Comm)/UPCL-05/2015-16 for purchase of non-solar renewable energy on short term basis and PPAs dated 01.10.2015 and 16.03.2016 were signed with M/s TPTCL for supply of power for the period 01 October 2015 to 20 September 2016 and 21 September 2016 to 31 March 2017 respectively. The Clause 3 and Clause 9 of the aforesaid tenders are similar and extracted below:

“3. Tariff Structure

The bidder shall quote the single tariff at the Delivery Point up to three (3) decimals which shall include capacity charge, energy charge, trading margin (in case of trader being a Bidder) and all taxes, duties, cess etc. imposed by Central Govt./ State Govt./ Local bodies. Tariffs shall be designated in Indian Rupees only. For inter-State transmission of power, State/ Regional periphery of the seller to be taken as Delivery Point. For intra-state transmission of power, inter connection point of seller with STU to be taken as delivery point. However, the bids will be evaluated at the State periphery after taking into account the applicable PoC charges. For avoidance of doubt, Intra-state

open access charges, transmission charges and with CTU injection charges and loss up to the CTU interface are Seller's account and CTU drawl charges and losses along with intra-state open access, transmission charges and losses are on UPCL's account. The tariff should be constant and there shall be no escalation during the contractual period. If the power is being supplied through alternate source, any additional charges and losses if any, due to cancellation of existing corridor and booking of new corridor etc., shall be to the account of Bidders. Power from alternate source should be same nature of renewable energy.

...

9. Open Access

*The energy shall be scheduled and dispatched as per the relevant provisions of CERC Regulations currently applicable (inclusive of all the amendments till date) and current Procedures for reservation of Transmission Corridor for short term open access customers. The supplier shall book the transmission Corridor well in advance as per IEGC after making advance payment to the nodal RLDC in case of Inter State transmission of power towards open access charges in full. **UPCL shall reimburse the open charges beyond delivery point in full to Supplier** as per the amount paid to nodal RLDC within 7 Days of submission of bill by Supplier. In case of cancellation of corridor by RLDC due to system constraint, the refund received from RLDC if any against open access charges shall be refunded to UPCL by the Supplier."*

[Emphasis added]

- 4.3 The Clause 3 (Tariff Structure and Delivery Point) of the PPAs dated 01.10.2015 and 16.03.2016 between TPTCL and UPCL against the tender No. 01/CE (Comm)/UPCL-01/2015-16, 05/CE (Comm)/UPCL-05/2015-16 state that:

"3. TARIFF STRUCTURE AND DELIVERY POINT

*The HT bus of Bhilangana-III is designated as the inter-connection point of Bhilangana-III with STU/ PTCUL (also Metering Point). The Hon'ble UERC vide its order dated 29.04.2013 (and subsequently confirmed by the Hon'ble APTEL vide its order dated 29.11.2014) has provisionally held that the transmission cost of one circuit of Ghuttu-Ghansali STU transmission line (i.e. for FY 2015- 16 is Rs. 1.59 Crore per year) shall be exclusively borne by Bhilangana-III. **Since, the price is***

quoted at the inter-connection point with STU, the cost of Guttu-Ghansali line as provisionally determined by the Hon'ble UERC vide its order dated 29.04.2013 and subsequently MYT order of UERC dated 06.05.2013 shall be borne by UPCL.

[Emphasis added]

4.4 PPA is a legal document and it is incumbent upon the signing parties to honour the provisions of the PPA in letter and spirit. From the perusal of the above provisions of the aforesaid tenders and the related PPAs it is very clear that the HT bus of Bhilangana-III Hydro Power Project of Petitioner No. 1 is the inter-connection point with STU, as well as the delivery point and that the transmission charges of Ghuttu-Ghansali line shall be borne by UPCL. The Commission feels that UPCL has grossly violated the provisions of PPAs (dated 01.10.2015 and 16.03.2016) entered into with TPTCL and without any reason withheld the amount payable to TPTCL towards transmission charges of Ghuttu-Ghansali line for the FY 2016-17.

(B) For the period 1st April 2017 to 31st March 2018 i.e. FY 2017-18

4.5 The Respondent invited tender No. 08/CE (Comm)/UPCL-08/2017-18 for purchase of non-solar renewable energy on short term basis for the period 1st April 2017 to 31st March 2018. The Clause 3 and Clause 9 of the aforesaid tender are extracted below:

“3. Tariff Structure

The bidder shall quote the single tariff at the Delivery Point up to three (3) decimals which shall include capacity charge, energy charge, trading margin (in case of trader being a Bidder) and all taxes, duties, cess etc. imposed by Central Govt./ State Govt./ Local bodies. Tariffs shall be designated in Indian Rupees only. For inter-State transmission of power, State periphery of the procurer to be taken as Delivery Point. For intra-state transmission of power, inter connection point of seller with STU to be taken as delivery point. However, the bids will be evaluated at the State periphery which is also the delivery point (Including all PoC charges). The tariff should be constant and there shall be no escalation during the contractual period. If the power is being supplied through alternate source, any

additional charges and losses if any, due to cancellation of existing corridor and booking of new corridor etc., shall be to the account of Bidders. Power from alternate source should be same nature of renewable energy."

[Emphasis added]

"9. Open Access

The energy shall be scheduled and dispatched as per the relevant provisions of CERC Regulations currently applicable (inclusive of all the amendments till date) and current Procedures for reservation of Transmission Corridor for short term open access customers. The supplier shall book the transmission Corridor well in advance as per IEGC."

- 4.6 The Clause 2 (Tariff Structure and Delivery Point) of the PPAs dated 19.08.2017 between TPTCL and UPCL against the tender No. 08/CE (Comm)/UPCL-08/2017-18 state that:

"2. Tariff Structure and Delivery Point

Upto Delivery Point: All Open Access Charges Upto Delivery Point (Uttarakhand State periphery/ STU shall be the delivery point) including PoC injection charges & Losses, Transmission charges and losses or any other charges as amended from time to time may be applicable and shall be borne by TPTCL. (If the power is being supplied through alternate source, any additional charges and losses, if any, due to cancellation of existing corridor and booking of new corridor etc. shall be to the account of M/s Tata Power Trading Company Limited. Power from alternate source should be of same nature)."

[Emphasis added]

- 4.7 From the perusal of the above provisions of the aforesaid tender invited by UPCL for purchase of non-solar renewable energy on short term basis for FY 2017-18 it is clear that State periphery has been designated as the delivery point. As per the tender document evaluation of bids shall be done at State Periphery. Clause 2 of the PPA very categorically state that all open access charges upto the delivery point i.e. Uttarakhand State Periphery shall be borne by TPTCL. Since PPA is a legal document and signed by both the parties i.e. UPCL and TPTCL, meaning thereby that all the provisions of the PPA are acceptable to both the parties, the

Commission is of the view that all the Open Access charges up to the delivery point are payable by the bidder i.e. TPTCL.

- 4.8 Petitioner No. 1 claims that HT bus of Bhilangana-III Hydro Power Project of Petitioner No. 1 is the delivery point/State Periphery whereas, UPCL claims Ghansali as the delivery point/State Periphery. Therefore, clarity with regard to location of delivery point in terms of the Bid invited by UPCL against tender No. 08/CE (Comm) /UPCL-08/2017-18 for purchase of non-solar renewable energy on short term basis for FY2017-18 is required. The Commission in its previous Order dated 29.04.2013 which was upheld by Hon'ble APTEL and Hon'ble Supreme Court has very categorically held:

"16 Based on the above, the Commission is of the view that except for 220 kV D/C Bhilangana-III-Ghansali line other projects namely 220 kV GIS substation at Ghansali, 220 kV S/C Chamba - Ghansali line and 01 No. bay at 220 kV substation Chamba need be considered as system strengthening works of the transmission licensee and cost of these works, therefore will be included in the overall ARR of Transmission Licensee (Petitioner in the matter) to be recovered from distribution licensee of the State."

*"17... It is apparent that only one circuit has been energised and put to use. Taking cognizance of the provisions of the Tariff regulations that any capital expenditure towards creation of an asset is deem fit for capitalization only if that asset is put to use, therefore, the Commission has decided to allow cost of servicing/ARR on only 50% of the capital cost incurred by the Petitioner towards the construction of the 220 kV D/C Bhilangana -III- Ghansali line which **shall be recovered from the generator namely Bhilangana-III SHP, the only beneficiary as of now**, subject to pro-rata recovery of this cost from other generators as and when they are commissioned and connected with this line.*

The Commission in its recent Order dated 28.06.2018 has held as under:

*"Further, the short term tender was floated by UPCL for supply of RE power at the State periphery and the generator from which power will be sourced by M/s TPTCL is located in the State of Uttarakhand at a **dedicated** 220 kV Bhilangana-III to Ghansali line, therefore, all the charges and losses till Ghansali will have to be borne by M/s*

*TPTCL in accordance with the Open Access Regulations as well as RE Regulations, 2013. A 220 kV sub-station was proposed at Ghansali by PTCUL, however, due to its inefficiency the commissioning of the sub-station has got delayed and work on the same has not yet been started. Had the sub-station been erected, the power from M/s TPTCL would have been received at 220 kV substation at Ghansali and input energy would have been metered therein as the same would have been the delivery point as per the PPA. However, the trader cannot be penalized by asking it to bear the losses till 220 Chamba S/s, where the 220 kV line from Bhilangana-III is interconnected. UPCL's submission in this regard is also in contradiction to the bid document. Hence, as proposed by M/s TPTCL and agreed upon by PTCUL, the Commission directs M/s TPTCL, PTCUL and UPCL to sit jointly and work out the methodology for computation of line losses considering the **deemed delivery point at Ghansali...**"*

- 4.9 From the perusal of the above Orders of the Commission it is clear that Ghuttu-Ghansali line is a dedicated line which is being solely used by Petitioner No. 1 for the evacuation of power from its Bhilangana-III hydro project as of now. The transmission system consisting of proposed 220 kV GIS substation at Ghansali, 220 kV S/C Chamba - Ghansali line and 01 No. bay at 220 kV substation Chamba are system strengthening works of the transmission licensee i.e. PTCUL and cost of these works shall be included in the overall ARR of Transmission Licensee therefore, the termination point of dedicated 220 kV Ghuttu-Ghansali Ghansali shall be the deemed to be the State periphery/delivery point.
- 4.10 Further, the Commission expresses concern over repeated occurrence of disputes and directs UPCL that in future all the provisions in the inter-related documents namely bid document, letter of intent and PPA should be consistent in every aspect, as any such inconsistency leads to avoidable litigation.

In the light of the above the Commission order's that:

(A) For the period 1st April 2016 to 31st March 2017 i.e. FY 2016-17

UPCL has grossly violated the provisions of PPAs dated 01.10.2015 and 16.03.2016, therefore it is liable to pay the transmission charges for Ghuttu-Ghansali line, provisionally determined by the Commission, to TPTCL after reconciling the same with transmission licensee i.e. PTCUL within 01(One) month

of the issue of this Order along with late Payment Surcharge in accordance with Regulation 23 of RE Regulations, 2013 as PPA does not have the provision of LPS and the Regulations being subordinate legislation will prevail over the PPA as has also been held by the superior Appellate Authorities in numerous judgements.

(B) For the period 1st April 2017 to 31st March 2018 i.e. For FY 2017-18

No transmission charges for Ghuttu-Ghansali line are payable by UPCL to TPTCL in accordance with the provisions of the PPA dated 19.08.2017.

Ordered accordingly.

(Subhash Kumar)
Chairman