

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 23 of 2019 (Suo-moto)

In the matter of:

APTEL's Judgement dated 23.04.2019 in Appeal No. 287 of 2015.

In the matter of:

M/s Swasti Power Ltd.

... Petitioner

AND

In the matter of:

Uttarakhand Power Corporation Ltd.

... Respondent

CORAM

Shri D.P. Gairola Member (Law)

Shri M.K.Jain Member (Technical)

Date of Hearing : July 10, 2019

Date of Order : October 18, 2019

The Order relates to the Judgement of Hon'ble APTEL dated 23.04.2019 in Appeal No. 287 of 2015 in the matter of appeal filed by M/s Swasti Power Ltd. (hereinafter referred to as "the Petitioner" or "M/s SPL") against the Commission's Order dated 22.09.2015 in the matter of adjudication of disputes between M/s SPL and Uttarakhand Power Corporation Ltd. (hereinafter referred to as "the Respondent" or "UPCL") arising out of the power purchase agreement dated 03.07.2009.

1. Background

1.1. M/s Swasti Power Limited filed an Appeal (Appeal No. 287 of 2015) before the Hon'ble APTEL, against the Order dated 22.09.2015 passed by the Commission, to allow the claims of M/s SPL which have been rejected or declined by the Commission through aforesaid Order.

1.2. The Commission in its Order dated 22.09.2015 dealt with 4 claims raised by the Petitioner

as discussed below:

1. Claim No. 1: Deduction of prompt payment rebate by the Respondent @ 2% in place of eligible rate of 1% from the payment from the monthly energy bills. Period of claim from August, 2009 to July, 2014.
 2. Claim No. 2: Deduction of 2% rebate from payment of transmission charges and corresponding delayed payment surcharge. Period of claim from July, 2010 to December, 2012.
 3. Claim No. 3: Deduction of 2% rebate from payment of monthly energy bills. Period of claim from September, 2012 to November, 2012.
 4. Claim No. 4: Deduction of excess rebate deducted by Respondent from supplementary energy bills. Period of claim from April, 2014 to August, 2014.
- 1.3. The Commission, while dealing with the 4 claims raised by the Petitioner, in its Order dated 22.09.2015 principally held that both M/s SPL and UPCL executed Supplementary PPA on 10.01.2013 enabling the main PPA dated 03.07.2009 to be termed as long term PPA in accordance with the Regulations, and therefore, all the claims after 10.01.2013 shall be dealt in accordance with the prevailing Regulations. Accordingly, the Commission allowed/disallowed the claims of the Petitioner in view of the above principle and other findings as discussed therein.
- 1.4. Hon'ble APTEL passed an Order dated 23.04.2019 in the matter of appeal filed by M/s SPL, and held that once it is established and held by the State Commission that the Appellant gets covered under the prevailing Regulations then all claims after 10.01.2013 shall be dealt in accordance with the governing Regulations only. Hon'ble APTEL, accordingly, ordered that the Commission's Order dated 22.09.2015 is set aside in part so far it relates to the extent of disallowing the claims made by the Appellant for the refund of excess rebate deducted by UPCL and also refund of late payment surcharge, and directed the Commission to pass the Order in light of the observations made by Hon'ble APTEL in its Order dated 23.04.2019.

2. Petitioner's submissions

- 2.1. The Petitioner, in compliance to the directions issued by Hon'ble APTEL and based on the findings rendered by the Hon'ble APTEL, recasted its claims and submitted the same

before the Commission for approval.

- 2.2. The Petitioner with respect to Claim No. 1, i.e. claim for recovery of the amount wrongfully deducted by the Respondent in the form of extra 1% prompt payment rebate (PPR) deducted from 10.01.2013 and Late Payment Surcharge (LPS) thereupon, submitted that the Respondent had been deducting an amount equivalent to 2% of the invoice amount as against the eligible 1% in the form of Prompt Payment Rebate, which was against the Regulations notified by the Commission. The Petitioner submitted that Hon'ble APTEL in its Order dated 23.04.2019, has held that once the Petitioner gets the coverage of the Regulation, then the Regulations as notified by the State Commission has to be followed for the purposes of calculating the claims raised by the Petitioner. Thus, the amount against Claim No.1 has been revised by the Petitioner to the tune of Rs. 88,35,922/- wherein the ineligible (excess) Prompt Payment Rebate is summed up for the period from 10.01.2013 to November 2014 (date of initial appeal filed with APTEL) and Late Payment Surcharge calculated from the 61st day of bill date till 11.06.2019.
- 2.3. The Petitioner with respect to Claim No.2, i.e. Late Payment Surcharge towards delayed payments of Rs. 0.05 per unit against the Transmission line constructed by the Petitioner and wrongful deduction of 2% Prompt Payment Rebate from the invoice raised by the Petitioner, submitted that the amount is receivable from UPCL towards ineligible PPR deducted on delayed payment of transmission charges and, accordingly, the Late Payment Surcharge for delay in payment. The Petitioner revised the Claims to Rs. 34,11,831/- towards the Late Payment Surcharge payable by the Respondent calculated upto 11.06.2019, and against wrongful deduction of Prompt Payment Rebate while making payment of 0.05 paise per unit for transmission charges.
- 2.4. The Petitioner with respect to Claim No. 3, i.e. ineligible Prompt Payment Rebate deducted on delayed payment of Monthly Energy Bills from September, 2012 to November, 2012 & Late payment Surcharge applicable thereupon, submitted the revised calculation upto 11.06.2019, and thus revised the claim to an amount of Rs. 49,36,437/-.
- 2.5. The Petitioner with respect to Claim No. 4, i.e. Late Payment Surcharge (LPS) on the delayed payment of an amount of Rs. 0.40 per unit towards the supplementary monthly energy bills raised by the Petitioner for the period from April, 2014 till August, 2014 and refund of the amount of the wrongful deduction of 2% Prompt Payment Rebate made by

the Respondent while releasing the said Supplementary energy bills, submitted that the said claim has been revised by the Petitioner in line with the directions of the Hon'ble APTEL to the tune of Rs. 9,71,749/-.

3. Respondent's replies and Petitioner's rejoinders

- 3.1. The Respondent, i.e. UPCL submitted that the submissions made by the Petitioner are not correct, and the Petitioner cannot file any revised claims. UPCL submitted that the matter has been remanded by Hon'ble APTEL, and the Petition No. 2 of 2015 has to be decided in light of findings given by Hon'ble APTEL. UPCL submitted that Hon'ble APTEL has not set aside any findings of the Commission or the interpretation of the Commission as given in the Commission's Order dated 22.09.2015. UPCL submitted that the Commission has in its order held that before 10.01.2013 the provisions of the PPA would apply and the Regulations shall become applicable only after this date when the Supplementary PPA was signed, and the same view has also been taken by Hon'ble APTEL in its Order dated 23.04.2019 wherein it has been directed to apply the provisions of the Regulations only after 10.01.2013.

The Petitioner in its rejoinder submitted that Hon'ble APTEL has specifically held that, once it is established and held by the State Commission that the Appellant gets covered under the prevailing Regulations, then all the claims shall be dealt with in accordance with the Regulations only. The Petitioner submitted that the Order dated 22.09.2015 passed by the Commission, directed the Petitioner to recast its claims in terms of the decision arrived at by the Commission in its Order dated 22.09.2015, and since the Order issued by the Commission has merged into the judgment issued by Hon'ble APTEL, thus, the submission of the revised claims by the Petitioner is in compliance to the directions issued by the Commission except to the extent of the part of the order dated 22.09.2015, as partly set aside by the Hon'ble APTEL. The Petitioner submitted that the submission of the revised claims is only for just and proper adjudication of the disputes between the parties, and the claims have to be revised in terms of the directions and findings rendered by Hon'ble APTEL, in as much as, earlier the claims had been raised by the Petitioner only till 10.11.2014, whereas the Petitioner is entitled to the refund of the excess Prompt Payment Rebate and Late Payment Surcharge in terms of the Regulations calculated till 11.06.2019, since, no amount against the said claims, either allowed by the

Commission or by the Hon'ble APTEL, has been received till date. The Petitioner submitted that they are, therefore, entitled to claim Late Payment Surcharge/interest on the delayed payments till the date of actual payments thereof by the Respondent, and legally entitled to calculate its claims as on the date of submission of the revised claims.

- 3.2. UPCL submitted that the Commission in its Order dated 22.09.2015 while deciding Claim No. 1, has held that no claim of the Petitioner can be considered for the period prior to signing of the Supplementary PPA as it wasn't covered under RE Regulations, 2010. UPCL submitted that the Commission rejected the claim for refund of rebate for the period prior to signing of long term PPA on 10.01.2013, and this finding of the Commission has not been interfered by the Hon'ble Tribunal. UPCL submitted that the Commission in its Order dated 22.09.2015 observed that majority of the payment of energy bills were received by the Petitioner within 2 to 7 days of the submission of the bills, and the decision was given considering the particular circumstances of the case. UPCL submitted that the Commission while explaining the purport and the reasons for LC mechanism clarified that the same was to ensure prompt payment and that LC was a payment security mechanism, the Commission balanced the equities between the parties when it held that the Petitioner cannot be allowed both a lower rebate and a prompt payment. The Petitioner submitted that these findings and the interpretation has not been set aside by Hon'ble APTEL. UPCL submitted that the Petitioner in light of the above facts is not entitled for Claim No. 1.

The Petitioner in its rejoinder submitted that the Order dated 22.09.2015 passed by the Commission has been partly set-aside by Hon'ble APTEL, wherein, Hon'ble APTEL has held that claims raised by the Petitioner in respect of the energy supplied from the Project to the Respondent, shall be dealt with in accordance with the Regulations notified by the Commission, and thus, the deduction of additional 1% Prompt Payment Rebate by the Respondent would be in violation of the Regulations notified by the Commission. The Petitioner submitted that the contentions of the Respondent that the Order dated 22.09.2015 has not been set-aside by Hon'ble APTEL is inadmissible in law and in facts, and the Respondent is not legally entitled to find faults in the findings rendered by the Hon'ble APTEL in its order dated 23.04.2019, especially when the said Order dated 23.04.2019 has not been under challenge or is neither sought to be reviewed by the Respondent. The Petitioner submitted that the revised claim do not cover the amount deducted towards Prompt Payment Rebate prior to the date of execution of the Supplementary agreement, i.e.

10.01.2013, and also, no claim has been raised against deduction of 2% Prompt Payment Rebate, where the payments had been made by UPCL within three working days from the date of the invoice raised by the Petitioner. The Petitioner further submitted that the revised claim has been calculated while considering the wrongful (excess) deduction of 1% Prompt Payment Rebate while making the payment of energy bills by the Respondent, and since, the excess amount deducted by the Respondent towards Prompt Payment Rebate has not yet been released, the Petitioner is entitled to the Late Payment Surcharge @ 1.25% per month on said excess deduction of Prompt Payment Rebate calculated up to 11.06.2019. The Petitioner submitted that the Respondent is legally liable to pay the Late Payment Surcharge/interest on the delayed payments till the date of actual receipt of the same by the Petitioner, and the revised calculations submitted by the Petitioner is in complete compliance of the Hon'ble APTEL's Order dated 23.04.2019 and also in compliance with UERC (Tariff and other Terms for Supply of Electricity from Renewable Energy Sources and Non-Fossil Fuel based Co-Generating Stations) Regulations, 2010.

- 3.3. The Respondent, i.e. UPCL submitted that Claim No. 2 as revised by the Petitioner cannot be allowed as this claim pertains to a period from July 2010 to December 2012, i.e. before 10.01.2013, moreover, the Commission has also allowed the said claim. The Respondent submitted that the Hon'ble ATE has remanded the matter only so far the claim has been rejected and the provisions of the RE Regulations, 2010 has to apply after 10.01.2013, therefore, the petitioner has wrongly revised Claim No. 2 and the same cannot be permitted. UPCL further submitted that the Petitioner was to give option for purchase of evacuation line to UPCL as per the Regulations and since Regulations only applied after 10.01.2013 after signing of valid long term PPA, the question of giving the option and taking over the line by the Respondent did not arise. The Respondent submitted that they could decide the proposal to take over the evacuation line or not only on 21.01.2013, and therefore, no payment before the said date was possible, and the payment was eventually made on 11.02.2013 which was within 30 days. The Respondent submitted that the Petitioner became entitled to be governed by RE Regulations, 2010 only after 10.01.2013, hence, the Petitioner had no right to claim the amount of 5 paise over and above the tariff and consequently could not raise any invoice for the said amount, so the past invoice for which the payment has been sought were totally invalid and could not be acted upon, moreover the whole order passed by the Commission was based on equity and justice

balancing the rights of the parties, and the Respondent did not even prefer an appeal against the said finding. However, now when the Hon'ble Tribunal has clarified that the RE Regulations would apply after 10.01.2013 then it becomes necessary that the findings on the said issue be revisited in light of the judgment of the Hon'ble APTEL, otherwise huge injustice would occur to the Respondent and the Respondent will be deprived of the fair and reasonable opportunity and justice.

The Petitioner in its rejoinder submitted that the parties under the PPA had specifically agreed to the timeline within which the invoices raised by the Petitioner would be released by the Respondent, however, the Respondent had delayed the release of the invoices by 1 month to 13 months (Approx). The Petitioner submitted that the Respondent cannot be allowed to inordinately delay or withhold the legible dues of the Petitioner, and therefore, is contractually, legally and in terms of the Regulations, liable to pay the Late Payment Surcharge/Interest on such delayed payments till the date of actual receipt thereof by the Petitioner. The Petitioner submitted that the Claim No. 2 is admissible in as much as, the payment against the claim raised by the Petitioner towards delay in payment of Rs. 0.05 per unit towards transmission charges had only been released on 11.02.2013, i.e. after 10.01.2013, when the provisions of the Regulations notified by the Commission had come into effect and the same were held to be applicable upon the PPA executed between the parties. Since, the payment of transmission charges had been made only after 10.01.2013, therefore, the provisions of the Regulation with regard to Prompt Payment Rebate and Late Payment Surcharge would automatically be applicable in terms of the decision of Hon'ble APTEL. The ineligible Prompt Payment Rebate had been deducted from the invoice raised against the transmission charges, and the payment has been released by the Respondent only on 11.02.2013. Thus, the provisions of the RE Regulations, 2010, would be applicable on the Claim No. 2 raised by the Petitioner. The Petitioner further submitted that it had only claimed the ineligible deduction of Prompt Payment Rebate and the Late Payment Surcharge @ 1.25% per month, in accordance with the relevant provisions of the RE Regulations, 2010, and the Respondent cannot under the law request the Commission to revisit its order except to the extent of the order of remand and directions issued by the Hon'ble APTEL.

- 3.4. The Respondent submitted that the Claim No. 3 pertains to a period from September, 2012 to November, 2012, i.e. prior to 10.01.2013 which was rightly rejected by the Commission.

The Respondent further submitted that the Hon'ble APTEL has remanded the matter but at the same time has mentioned that the provisions of the Regulations would apply only after 10.01.2013. The Respondent submitted that the Hon'ble APTEL has not interfered with the finding of the Commission and has not remanded the matter back with regard to Claim No. 3 because it pertains to a period before 10.01.2013 where the provisions of PPA would apply as has been held by the Commission, therefore, the Petitioner cannot be permitted to file revised Claim No. 3 as has been done.

The Petitioner in its rejoinder submitted that Claim No. 3 has been rightly revised by the Petitioner in terms of the direction issued by the Hon'ble APTEL. The demands in respect of Claim No.3 against the monthly energy bills from September, 2012 to November, 2012 had been released by the Respondent only on 10.01.2013, when the Regulations, 2010 as notified by the Commission was held to be applicable on the claims raised by the Petitioner. The Petitioner submitted that the payments for monthly energy bills for the aforesaid months was released after a delay of 98 days, 66 days and 37 days respectively, and therefore, the Respondent was not entitled to 2% Prompt Payment Rebate while releasing the said invoices/bills. Thus, the Provisions of Late Payment Surcharge and Prompt Payment Rebate under the RE Regulations, 2010, would be applicable upon the Claim No. 3. The Petitioner submitted that it is entitled to the excess deduction of Prompt Payment Rebate by the Respondent, and Late Payment Surcharge @ 1.25% per month for the delayed period till the date of actual payment by the Respondent. The Petitioner submitted that the RE Regulations, 2010, once held applicable on the PPA from 10.01.2013 would govern, and be applicable upon the payments received on or after 10.01.2013 even when the claims/invoices against the same were raised prior thereto.

- 3.5. The Respondent submitted that the Claim No. 4 was allowed by the Commission, and the Hon'ble ATE has not remanded back matter so far the claim have been allowed by the Commission, hence, Petitioner cannot revise Claim No. 4 as has been done so as to seek fresh adjudication on the said claim.

The Petitioner in its rejoinder submitted that although, Claim No. 4 had been allowed by the Commission in its order dated 22.09.2015, however, the payments against the same had not been received by the Petitioner from the Respondent till date. Thus, the Petitioner is entitled to the Late Payment Surcharge on the delayed payments in terms of

the RE Regulations, 2010, apart from the amount deducted by the Respondent towards ineligible Prompt Payment Rebate. The Claims having been allowed by the Commission which ought to have been released by the Respondent in the absence of any challenge to the Order dated 22.09.2015, and the Respondent cannot be allowed to withhold the admitted dues of the Petitioner as held entitled to in Order dated 22.09.2015. The Petitioner submitted that it may be noted that the bill submission date and the payment date are both after 10.01.2013, and thus, the claim under reference is admissible. The Respondent, having failed to release the amount against ineligible Prompt Payment Rebate even in terms of the direction issued by the Commission, is liable to pay Late Payment Surcharge in terms of the RE Regulations, 2010, till the date of actual payments thereof to the Petitioner.

- 3.6. The Respondent submitted that the Petitioner cannot be permitted to file the revised claims as has been done, the matter has to be considered with regard to the original Petition and same has to be dealt with in light of the order of the Hon'ble Tribunal. UPCL submitted that the order passed by the Commission was under the peculiar facts and circumstances of the case, and the Commission balanced the equities on one hand considering the consent and the conduct of the Petitioner and did not confer any benefit for the prompt payment made considering that Petitioner cannot be allowed both a lower rebate and also prompt payment, the Commission although consciously noted that the Petitioner accepted the deduction of rebate and did not agitate the issue for 18 months, however while considering that Respondent has incorrectly made payment to the Petitioner as per tariff provided in RE Regulations, 2010 even before the Petitioner become eligible, the Commission taking a holistic view directed to consider the payments made within three working days to be eligible for 2 % rebate. Similarly permitted the Petitioner the benefit of 5 paisa/unit over and above the tariff even when the Commission categorically held that Regulations would apply to the Petitioner only after 10.01.2013, which clearly shows that the Commission balanced the right of the parties and passed the just and equitable order because of which the Respondent did not challenge the finding of the Commission with regard to Claim No. 2, however, now when the Hon'ble Tribunal has clarified that once Regulation became applicable after 10.01.2013 the provisions of the Regulation would apply which would also imply that the provisions of the Regulation cannot be applied to a period before 10.01.2013, therefore, if the Commission gives a different finding with regard to Claim No. 1 in the original petition it is only just that finding on Claim No. 2 should also be given afresh as it

will be very unjust to the Respondent to apply the Regulations only to confer benefits to the Petitioner. UPCL further submitted that, if the order of the Hon'ble ATE is applied strictly in a water tight compartment manner, that is apply the Regulation without accepting any circumstances or facts of the case then it would clearly mean that for the period prior to 10.01.2013 the provisions of PPA would apply meaning thereby that the Petitioner from July, 2010 till 10.01.2013 would only be entitled to a tariff of Rs. 2.65/unit as per PPA and cannot be permitted the benefit of increased tariff as per RE Regulations, 2010, the benefit of which has been conferred upon the Petitioner by the Commission as a special case when the Commission itself has held that conferring of special benefit cannot be construed to vest any right in the Petitioner. Therefore the respondent is entitled to claim the difference in tariff amount of Rs. 0.60/unit for the period from July, 2010 till 10.01.2013 together with interest against the same.

The Petitioner in its rejoinder submitted that the order dated 22.09.2015 passed by the Commission has finally been partly set aside, and thus, has legally merged with the Judgment dated 23.04.2019 passed by the Hon'ble APTEL. The Petitioner further submitted that the Respondent cannot under the law be allowed to go behind the substance of the Order dated 23.04.2019 passed by the Hon'ble APTEL. The Respondent has no legal right or entitlement to claim the difference in the tariff amount of Rs.0.60 per unit for the period from the July, 2010 till 10.01.2013, as alleged, as the same is neither the subject matter of the dispute between the parties nor the matter has been remanded back by the Hon'ble APTEL to consider the said submission of the Respondent. The Petitioner submitted that the matter has been remanded by the Hon'ble APTEL to pass a consequential order in terms of the directions issued in the order dated 23.04.2019, and thus, Respondent cannot be allowed to agitate or raise any fresh claim or issues or pray for passing of any order in contravention to the orders passed by the Hon'ble APTEL.

4. Commission's Analysis and view

- 4.1. The Commission conducted a hearing in the matter on 10.07.2019. The Commission heard both the parties and carefully considered their written submissions. After examining the relevant material available on records, issues raised by the Petitioner and Respondents have been dealt in the subsequent paragraphs of this Order.
- 4.2. The Petitioner has approached the Commission in view of the Judgment dated 23.04.2019

of the Hon'ble ATE, wherein the Commission's Order dated 22.09.2015 was set aside in part so far as it relates to the extent of disallowing the claims made by the Petitioner for the refund of excess rebate deducted by UPCL and also refund of payment of late payment surcharge. The relevant extract of the Judgment is reproduced hereunder:

"The Impugned Order dated 22.09.2015 passed in Petition No. 02 of 2015 by the Uttarakhand Electricity Regulatory Commission is hereby set aside in part so far as it relates to the extent of disallowing the claims made by the Appellant for the refund of excess rebate deducted by UPCL and also refund of the payments of late payment surcharge."

- 4.3. Before going into the merits, it is to be noted that the instant Order has to be dealt categorically in line with the Judgment dated 23.04.2019 of Hon'ble APTEL, and shall be limited to the directions given in the aforesaid Order of the Hon'ble APTEL. This implies that this Order does not cover adjudication of any fresh issue or re-opening/re-hearing of already concluded issues, except to the extent of the Order passed by the Hon'ble APTEL. The relevant portion of the Judgment dated 23.04.2019 of the Hon'ble APTEL is reproduced hereunder:

"...

We are of the considered view that once it is established and held by the State Commission that the Appellant gets covered under the prevailing Regulations then all claims after 10.01.2013 shall be dealt with in accordance with the governing Regulations only.

ORDER

For the foregoing reasons as stated above, the instant Appeal being Appeal No.287 of 2015 filed by the Appellant is allowed...

The Respondent No.1/the State Commission is directed to pass the order in the light of the observations made in the preceding paragraphs..."

- 4.4. From a plain reading of the above mentioned Order of the Hon'ble APTEL, it can be seen that the Hon'ble APTEL through its Judgment has made it very clear that once it is established and held by the State Commission that the Petitioner gets covered under the prevailing Regulations then all claims after 10.01.2013 shall be dealt with in accordance with the governing Regulations only. Accordingly, the Commission, in line with the findings of the Hon'ble APTEL in its Order dated 23.04.2019, principles, and applicable Regulations, has considered the claims raised by the Petitioner which is discussed in the

subsequent paragraphs of this Order.

- 4.5. The Commission in its Order dated 22.09.2015 principally held that as both the Parties, i.e. M/s SPL and UPCL, executed the Supplementary PPA on 10.01.2013 enabling the main PPA dated 03.07.2009 to be termed as long term PPA in accordance with the Regulations, therefore, all the claims after 10.01.2013 shall be dealt with in accordance with the governing Regulations. The Commission, accordingly, in its Order dated 22.09.2015 decided upon the claims raised by the Petitioner in line with the aforesaid principle.
- 4.6. Claim no.1 in respect of deduction of prompt payment rebate by the Respondent @ 2% in place of eligible rate of 1% from the payments for the monthly energy bills amount:

The period for which claim was earlier submitted by the Petitioner was from August, 2009 to July, 2014. In this regard, the Commission in its Order dated 22.09.2015 observed that post signing of the Supplementary PPA majority of the payments of energy bills have been received by the Petitioner within 2 to 7 days of submissions of the bills. The Petitioner also continued offering the Respondent 2% rebate without any protest till July, 2014, wherein, for the first time it raised the dispute regarding payment of rebate and late payment surcharge in accordance with the Regulation after a period of almost 18 months. The Commission was of the view that the Petitioner cannot be allowed both a lower rebate and benefit of prompt payment at the same time, and ordered that whenever payment have been made within 3 working days, the respondent would be entitled for 2% rebate in this period.

The Petitioner during the current proceedings revised its claim on this account stating that Claim No.1 is being revised to the tune of Rs. 88,35,922/- wherein the ineligible (excess) Prompt Payment Rebate is summed up for the period from 10.01.2013 to November, 2014 (date of initial appeal filed with APTEL) and Late Payment Surcharge calculated from the 61st day of bill date till 11.06.2019. The Petitioner also submitted that they have not raised any claim against deduction of 2% Prompt Payment Rebate, where the payments had been made by UPCL within three working days from the date of the invoice raised by the Petitioner.

In this regard, it is to be seen in the light of the Judgment passed by Hon'ble APTEL, whether, the Claim No. 1 as revised by the Petitioner relates to period prior to 10.01.2013 or post that date. The Petitioner has, as discussed above, revised the Claim No.1

to cover the period from 10.01.2013 to November, 2014, and calculated Late Payment Surcharge thereon till 11.06.2019. In this regard, it is to note that the period covered through this Order cannot exceed the claim for the period as has been decided by the Commission in its Order dated 22.09.2015, i.e. upto July 2014. Further, in light of the Judgment of Hon'ble ATE all claims post 10.01.2013 shall be governed by the provisions of the applicable Regulations, and accordingly, 2% prompt payment rebate deducted by the Respondent will only be applicable in cases where payment has been made within three working days (as agreed by the Petitioner) from the date of the invoice raised by the Petitioner only for the energy bills raised from 10.01.2013 to July 2014 as the claims raised by the Petitioner for August 2014 to November 2014 were not raised by the Petitioner during the previous proceedings. Hence, any new issue is not being dealt with by the Commission in this proceeding as already discussed above. Moreover, if the payment has been made by UPCL within one month from the date of the invoice raised by the Petitioner for the energy bills raised from 10.01.2013 to July 2014, only 1% rebate would be admissible to UPCL and in all other cases if payment is made beyond one month from the date of invoice no rebate will be admissible to UPCL.

- 4.7. Further, the Petitioner has also claimed Late Payment Surcharge on the aforesaid amount and has made the calculation for the same for the period upto June, 2019. In this regard, it is to note that question of Late Payment Surcharge, which is basically an interest of penal nature, arise only where there is an ascertained liability that one party was required to honour but it eventually failed to do so. In the instant case, Commission in its Order dated 22.09.2015 had directed the Petitioner to recast their claims based on decisions in the order and UPCL was ordered to pay the same within 15 days of receipt of claims after due verification and failure to do so would entitle the Petitioner to claim DPS on payment not made. Hence, DPS, if any, will be applicable if the payment of amount due in respect of this claim of the Petitioner's was not done by 07.10.2015.
- 4.8. Claim no. 2 on account of deduction of 2% rebate from payments of transmission charges and corresponding delay payment surcharge.

The Petitioner earlier submitted computation of Claim No. 2 on account of deduction of 2% rebate from payments of transmission charges and corresponding delayed payment surcharge, for the period from July, 2010 to December, 2012. In this regard, the

Commission in its Order in its Order dated 22.09.2015 was of the view that the period of claim was prior to signing of the Supplementary PPA, i.e. 10.01.2013, and accordingly, this transaction would be governed by the agreed provisions of the PPA between the parties and not of the Regulations. The Commission, accordingly, opined that as the Delayed Payment Surcharge was not provided for in PPA, the claim for the same was not sustainable, however, as the payments were delayed beyond 30 days, rebate is not attracted and its deduction is unjustified, and the claim of Petitioner for refund of rebate deducted was upheld.

4.9. The Petitioner during the current proceedings revised its Claim No. 2 to the tune of Rs. 34,11,831/- towards the Late Payment Surcharge payable by the Respondent calculated upto 11.06.2019, and against wrongful deduction of Prompt Payment Rebate while making payment of Rs. 0.05 per unit towards transmission charge. The Petitioner submitted that the parties under the PPA had specifically agreed to the timeline within which the invoices raised by the Petitioner would be released by the Respondent, however, the Respondent had delayed the release of the invoices for the period of 1 month to 13 months (Apprx.). The Petitioner submitted that the Respondent cannot be allowed to inordinately delay or withhold the legible dues of the Petitioner and therefore, contractually, legally and in terms of the Regulations, is liable to pay the Late Payment Surcharge/interest on such delayed payments till the date of actual receipt of thereof by the Petitioner. The Petitioner submitted that Claim No. 2 is admissible in as much as, the payment against the claim raised by the Petitioner towards delay in payment of Rs.0.05 per unit towards transmission charges had only been released on 11.02.2013, i.e. after 10.01.2013, when the provisions of the Regulations notified by the Commission had come into effect and the same were held to be applicable upon the PPA executed between the parties. Further, since the payment of Transmission Charges had been made only after 10.01.2013, therefore, the provisions of the Regulations with regard to Prompt Payment Rebate and Late Payment Surcharge would automatically be applicable in terms of the decision of Hon'ble APTEL.

4.10. In this regard, it is to be seen in the light of the Judgment passed by Hon'ble ATE, whether the Claim No. 2 as revised by the Petitioner relates to period prior to 10.01.2013 or post that date. The claim raised by the Petitioner relates to bills raised for the period July, 2010 to December, 2012, i.e. prior to 10.01.2013. The Hon'ble APTEL has also categorically held that all the claims after 10.01.2013 shall be dealt with in accordance with the prevailing

Regulations, and accordingly for the claims prior to 10.01.2013, the findings of Commission's Order dated 22.09.2015 shall prevail. Thus, the Petitioner contention and revision of Claim No. 2 cannot be upheld in the light of the Order of Hon'ble APTEL as the same relates to period prior to 10.01.2013, and the views taken by the Commission in its Order dated 22.09.2015 as discussed above shall prevail for this claim including the claim for DPS. The option of paying Rs. 0.05 per unit for the evacuation infrastructure was provided for the first time in RE Regulations, 2010 and as held by the Commission in its Order dated 22.09.2015 and also upheld by Hon'ble APTEL, the Petitioner is governed by the same w.e.f. 10.01.2013, hence, any claim prior to 10.01.2013 will not be admissible under the Regulations.

4.11. The Petitioner's contention that since the payment towards transmission charges was released by the Respondent on 11.02.2013, i.e. after 10.01.2013, therefore, the transaction shall be covered by the provisions of the RE Regulations, 2010 is not tenable. In a normal parlance, unless specifically specified under the statute, the applicability of Regulations is ascertained based on the period in which an event has occurred, which in the present case is the period for which billing was done. The date of raising the bill or the date of making the payment against the said bill cannot be taken as a yardstick to determine the applicability or otherwise of an act or statute, in the present case the Regulations. Thus, the contention of the petitioner that, since the payment was released after 10.01.2013 even though the billing period was prior to that date, therefore transaction shall be governed by the provisions of the Regulations and not the PPA, is not tenable in law. In this regard, as held by the Commission in its Order dated 22.09.2015, as the payments were delayed beyond 30 days, rebate will not be attracted and its deduction is unjustified and UPCL will have to refund the rebate so deducted.

4.12. Claim no. 3 on account of deduction of 2% rebate from payments of monthly energy bills for the months of September, 2012 to November, 2012.

The Petitioner earlier submitted computation of Claim No. 3 on account of deduction of 2% rebate from payments of monthly energy bills for the months of September–November, 2012. In this regard, the Commission in the Order dated 22.09.2015 opined that the period of dispute pertains prior to the signing of the Supplementary PPA, i.e. 10.01.2013, hence, shall be governed by the terms of PPA and not the Regulations, and

as the PPA did not provide for any Delayed Payment Surcharge, the claim is not sustainable and was rejected.

4.13. The Petitioner during the current proceedings revised Claim No. 3 to the tune of Rs. 49,36,437/- towards ineligible Prompt Payment Rebate deducted by UPCL on delayed payment of MEBs of September, 2012 to November, 2012 & Late payment Surcharge applicable thereupon calculated upto 11.06.2019. The Petitioner also submitted that the demands in respect of Claim No. 3 against the monthly energy bills from September, 2012 to November, 2012 had been released by the Respondent only on 10.01.2013, when the RE Regulations, 2010 as notified by the Commission was held to be applicable on the claims raised by the Petitioner. The Petitioner submitted that the payments for monthly energy bills for the aforesaid months was released after a delay of 98 days, 66 days and 37 days respectively, and therefore, the Respondent was not entitled to 2% Prompt Payment Rebate while releasing the said invoices/bills. The Petitioner submitted that it is entitled to the refund of excess deduction of Prompt Payment Rebate by the Respondent and Late Payment Surcharge @ 1.25% per month for the delayed period till the date of actual payment by the Respondent. The Petitioner also submitted that Regulations, 2010, once held applicable on the PPA from 10.01.2013 would govern and be applicable upon the payments received on or after 10.01.2013 even when the claims/invoices against the same were raised prior thereto.

4.14. In this regard, it is to be seen in the light of the Judgment passed by Hon'ble ATE, whether the Claim No. 3 as revised by the Petitioner relates to period prior to 10.01.2013 or post that date. The claim raised by the Petitioner relates to bills raised for the period September, 2012 to November, 2012, i.e prior to 10.01.2013. The Hon'ble APTEL has also categorically held that all the claims after 10.01.2013 shall be dealt with in accordance with the prevailing Regulations, and accordingly, with respect to the claims prior to 10.01.2013, the findings of Commission's Order dated 22.09.2015 shall prevail. Thus, the Petitioner contention and revision of Claim No. 3 cannot be upheld in the light of the Order of Hon'ble APTEL as the same relates to period prior to 10.01.2013, and the views taken by the Commission in its Order dated 22.09.2015 as discussed above shall prevail for this claim including the claim for LPS.

4.15. Further, the contention of the Petitioner that the Regulations, 2010, once held applicable on

the PPA from 10.01.2013 would govern and be applicable upon the payments received on or after 10.01.2013 even when the Claims/Invoices against the same were raised prior thereto, is not tenable in law. As discussed above, the applicability of Regulations is ascertained based on the period in which an event has occurred, which in the present case is the period for which billing was done, and the date of payment cannot be taken for deciding upon the effective date of applicability of Regulations. Further, in this regard, the Commission in its Order dated 22.09.2015 has held as under:

“Infact, UPCL had incorrectly made payment to it at tariffs specified under RE Regulations, 2010 even before the Petitioner became eligible to be governed by RE Regulations, 2010. However, taking a holistic view in the matter, the Commission had decided to give the Petitioner an option to either enter into a fresh long term PPA or execute a supplementary agreement to the existing PPA with the Respondent consistent with the provisions of the RE Regulations, 2010, for sale of power for the entire useful life of the plant. The Commission also decided that if a valid long term PPA was executed between the Petitioner and the Respondent, the tariff provided in RE Regulation, 2010 would be applicable on the Petitioner’s plant from the date of effectiveness of the regulations.

However, mere allowance of tariff as a special case does not afford coverage of PPA by the regulations and cannot be construed to vest right to Petitioner to dispute the amount of rebate deducted by the Respondent or DPS not paid to it for the period prior to signing of the Supplementary PPA.

Accordingly, the provisions as existed in the earlier PPA would prevail for the period prior to signing of a valid long term PPA as the PPA entered into by the Petitioner was not in compliance of the RE Regulations, 2010. The Petitioner cannot claim any rebate or late payment surcharge in accordance with the RE Regulations, 2010. Hence, no claim of the Petitioner can be considered for the period prior to signing of the Supplementary PPA as it wasn’t covered under RE Regulations, 2010 under which it was billing for power sold to UPCL.

2.9 It is furthermore necessary to point out that the Petitioner was fully aware of the provisions of Regulations with respect to Rebate and Delayed Payment Surcharge and infact it had been allowing UPCL higher rebates than that allowed in the Regulations without any protest. If it did not have any issue in offering a higher rebate to UPCL earlier, then there is no explanation for agitating the issue after a period of 5 years from CoD. The claims for refund of rebate for the period prior to signing of long term PPA on 10.01.2013 are not valid and hence are rejected.”

Thus, in view of the above, the Petitioner’s claim on this account is rejected as the

same relates to period prior to 10.01.2013, and accordingly the views taken by the Commission in its Order dated 22.09.2015 shall prevail.

- 4.16. Claim no. 4 on account of deduction of excess rebate by the Respondent from supplementary energy bills for the months of April, 2014 to August 2014.

The Petitioner earlier submitted that the Commission on 20.06.2014 issued the Second amendment to the RE Regulations, 2010 and consequent to the same, the Petitioner was entitled to an enhancement in tariff for sale of energy generated from the Project to an extent of Rs. 0.40 per unit over and above the tariff of Rs. 3.30 per unit, which was being paid to the Petitioner in terms of the RE Regulations, 2010. The Petitioner submitted that in compliance of the provisions of the aforesaid (Second Amendment) Regulations, 2014, it raised the supplementary bills for the energy supplied during the months of April and May 2014 on 03.07.2014. Similarly, supplementary bills for the energy supplied during the months of June, 2014 and July, 2014 was submitted on 07.08.2014 and energy bill for August, 2014 was raised on 11.09.2014. However, the payment of the above mentioned bills was made on 15.10.2014. In this regard, the Commission in its Order dated 22.09.2015 observed that period of billing is after signing of Supplementary PPA, i.e. 10.01.2013, and held that claim for both refund of rebate and levy of DPS are upheld with the proviso that such claim shall be recognized from the date of operationalisation of the second amendment to the RE Regulations, 2010, i.e. 05.07.2014.

- 4.17. The Petitioner in the current proceedings has revised the said claim stating that the payments against the amount upheld by the Commission in its Order dated 22.09.2015 in respect of Claim No. 4 has not been received by the Petitioner from the Respondent, till date. The Petitioner submitted that they are entitled to the Late Payment Surcharge on the delayed payments in terms of the RE Regulations, 2010, apart from the amount deducted by the Respondent towards ineligible Prompt Payment Rebate. The Petitioner submitted that the Respondent, having failed to release the amount against ineligible Prompt Payment Rebate even in terms of the direction issued by the Commission, is liable to pay Late Payment Surcharge in terms of the RE Regulations, 2010, till the date of actual payments thereof to the Petitioner.

- 4.18. In this regard, it is to be noted that the Commission had earlier allowed the Claim No.4 to the Petitioner as the period of billing was after 10.01.2013. The Hon'ble APTEL in its Order

dated 23.04.2019 has directed the Commission to re-consider the claims that have been disallowed by the Commission in light of the findings of the Hon'ble ATE in the said Order. As discussed above, the Claim No. 4 was duly allowed by the Commission to the Petitioner, and from the submissions of the Petitioner the issue raised by them relates to non-payment by the Respondent of the amount allowed by the Commission in the Order dated 22.09.2015 with respect to Claim No. 4. Infact as discussed above, the Commission had in its Order dated 22.09.2015 had directed UPCL to pay the claims within 15 days of receipt of the same after due verification failing which the Petitioner would be entitled to claim DPS on payment not made. Therefore, in view of the above discussion, no revision is being carried on by the Commission with respect to Claim No. 4 as the same was already allowed earlier by the Commission, and UPCL is directed to pay the amount due to the Petitioner with DPS w.e.f. 07.10.2015 till the date of payment in accordance with RE Regulations, 2010.

- 4.19. The Commission, accordingly, directs the Petitioner to revise its Claim No. 1 and Claim no. 4 in view of the findings of this Order, and raise a claim before the Respondent for the same. The Respondent is hereby directed to make the payment against the revised Claims No. 1 and 4 of the Petitioner within a period of 7 working days from the date of submission of the revised claim by the Petitioner.
- 4.20. Further, with respect to revision of other claims of the Petitioner, i.e. Claim No. 2 and Claim No. 3, the Commission disallows the said revision claimed by the Petitioner as the same is not warranted in the light of the Order passed by the Hon'ble APTEL, and the Order dated 22.09.2015 of the Commission with respect to the same shall prevail.
- 4.21. Ordered accordingly.

(M.K. Jain)
Member (Technical)

(D.P. Gairola)
Member (Law)