

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 09 of 2019

In the matter of:

Petition under Section 86(1)(e) and 86(1)(f) in respect of 10.5 MW Sarju-III Small Hydro Power Project of Uttar Bharat Hydro Power Private Ltd.

In the matter of:

M/s Uttar Bharat Hydro Power Pvt. Ltd.

..... Petitioner

AND

In the matter of:

Uttarakhand Power Corporation Ltd. (UPCL)

..... Respondent No. 1

Power Transmission Corporation of Uttarakhand Ltd. (PTCUL)

..... Respondent No. 2

Coram

Shri D.P. Gairola, Member (Law)

Shri M.K. Jain, Member (Technical)

Date of Hearing December 13, 2019

Date of Order: March 11, 2020

ORDER

This Order relates to the Petition dated 26.11.2018 filed by M/s Uttar Bharat Hydro Power (P) Ltd. (hereinafter referred as 'Petitioner') for adjudication of dispute between Uttar Bharat Hydro Power (P) Ltd, a generating company and Uttarakhand Power Corporation Ltd. (hereinafter referred as 'Respondent No. 1'), a distribution licensee with regard to 10.5 MW Small Hydro Power Project of the Petitioner under Section 86(1)(e) of the Electricity Act, 2003 (hereinafter referred to as "the Act").

1. Background

- 1.1. The Petitioner is a Company incorporated under the Companies Act, 1956. The Petitioner has submitted that it is a generating company within the meaning of Section 2(28) of the Act and it has set up two small hydro power projects, i.e. 10.5 MW Sarju III (project commissioned on 10.07.2014) and 12.6 MW Sarju II (project commissioned on 28.05.2016).
- 1.2. The Petitioner had entered into a Power Purchase Agreement dated 16.12.2002 with the Respondent No. 1 i.e. UPCL, where under the Petitioner had agreed to set up a small hydro power project (Sarju III Project) and generate and supply electricity to the Respondent No. 1 on the terms and conditions contained in the PPA. The Agreement was superseded by Power Purchase Agreement (PPA) dated 13.10.2011. The Hon'ble Commission vide Order dated 14.10.2015 approved the PPA with certain amendments, including inclusion of provision of deemed generation. A Supplementary Agreement to the PPA dated 13.10.2011 was signed between the Petitioner and the Responded on 24.02.2016.
- 1.3. The PPA inter alia provided for delivery point to be the interconnection point i.e. the generating station. As per the PPA:

"1.15 'Interconnection Point' means the interface point of renewable energy generating facility with the transmission system or the distribution system, as the case may be.

...

ii) in relation to small hydro, biomass power and non fossil fuel based cogeneration power projects and solar thermal power projects, the interconnection point shall be line isolator on outgoing evacuation line from such generating station."

The PPA also provided for inter-connection facilities as under:

"8. Interconnection facilities

8.1 Interconnection Facilities means all the facilities which shall include existing 33/11 KV Sub-Station, Kapote, District-Bageshwar, Uttarakhand owned, maintained and operated by UPCL without limitations, switching equipment, communication, protection, control, meters and metering devices etc, for the incoming bay(s) for the Project Line(s) to be installed and maintained by Generating, Company/UPCL at the

cost to be borne by the Generating company, to enable the evacuation of electrical output from the project in accordance with the Agreement.

8.2 Power from the Generating Company shall be transmitted as 33 KV voltage and to the 33/11 KV Sub-Station, Kapkote, District-Bageshwar, Uttarakhand owned, maintained and operated by UPCL.

8.3 The cost of laying the transmission line up-to the 33/11 KV Sub-Station, Kapkote, District-Bageshwar, Uttarakhand owned, maintained and operated by UPCL, the required bay, terminal equipments and associated synchronization equipments, etc. shall be borne as per clause 38 (2) of UERC regulation 2010.

...”

- 1.4. The Petitioner has set up a small hydro generating project of 10.5 MW (Sarju III) in accordance with the provisions of the PPA and constructed the transmission line from the generating station upto 33 kV Kapkote sub-station. The project was commissioned on 10.07.2014. The Petitioner had opted for Project Specific Tariff for the said project.
- 1.5. According to the Petitioner the Respondent No. 1 is unable to evacuate its full power from 33 kV Kapkote S/s and therefore, is entitled for deemed generation claims.
- 1.6. The Petitioner had earlier filed a Petition before the Commission on 16.03.2015 with regard to deemed generation claims related to the year 2014-15 and 2015-16. The Commission vide its Order dated 08.06.2016 directed the parties to jointly sit together for monthly reconciliation of the deemed generation bills claimed by the Petitioner and settle the amount so arrived at within two months' time in accordance with the provisions of the Regulations.
- 1.7. Since the matter could not be reconciled, the Petitioner filed an Application before the Commission on 27.09.2016 seeking redressal. The Commission vide Order dated 28.10.2016 referred the matter for Arbitration regarding claim of deemed generation by the Petitioner for its 10.5 MW Sarju-III Hydro Power Project for the period FY 2014-15 and FY 2015-16. Further, the Petitioner had filed a Misc. Application No. 40 of 2017 in respect of deemed generation claim for 2016-17; however the same was disposed off by the Commission vide Order dated 09.08.2017 with a direction for amicable solution and with liberty to approach the Hon'ble Commission in case of unresolved issues.

- 1.8. Besides above, the Petitioner informed the Commission that the award of the Arbitrator passed on 29.09.2017 relating to its claim of deemed generation for the period for FY 2014-15 & FY 2015-16 has been challenged before the District Judge, Dehradun under Section 34 of the Arbitration and Conciliation Act, 1996.
- 1.9. The Petitioner has now filed the instant Petition requesting the Commission to direct the Respondent No. 1 to pay to the Petitioner the deemed generation charges for Sarju III project for the year 2016-17 and 2017-18 as per the provisions of the Renewable Energy Regulations along with delayed payment surcharge/interest at 15% pa.

2. Petitioner's Submissions

- 2.1. The Petitioner submitted that according to the above PPA, the Petitioner was to construct the transmission line from the generating station upto 33 kV Kapkote sub-station of the Respondent No. 1 and the Respondent No. 1 was to grant approval as well as technical assistance in addition to facilitation of interconnection at the sub-station. The responsibility of evacuation of power beyond 33 kV Kapkote station was of the Respondent No. 1 as per the PPA as well as the Renewable Energy Regulations. The Respondent No. 1 was required to plan and execute necessary augmentation work for ensuring evacuation of the upcoming generators, including evacuation from the Petitioner's small hydro power projects.
- 2.2. According to the Petitioner it has been able to deliver the entire electricity generated from the project with regard to the installed capacity of 10.5 MW at all times from the date of commissioning. However, on account of downstream constraints in the Respondent No. 1 system, the Respondent No. 1 in the meeting held on 22.05.2014 restricted the evacuation of power from the project to 7 MW. This restriction has not been due to any default or inability of the Petitioner but solely due to the inability of the Respondent No. 1 to evacuate the power beyond 33 kV Kapkote Sub-station. Even against the above 7 MW, the Respondent No. 1 had not taken the delivery of full quantum of power and restricted the same to 3.5 MW while allowing evacuation of 4.2 MW for Sarju-II another project of the Petitioner.
- 2.3. The Petitioner contended that there was no fault on its part and the only reason for non-evacuation of power was the inability of the Respondent No. 1 to evacuate power from 33 kV Kapkote sub-station. In view of the above, the Petitioner is

entitled to deemed generation on the quantum of electricity that could have been generated from the power plant as per the water availability. The Petitioner has been ready with the machine availability to generate entire quantum of installed capacity but has not been given the schedule by the Respondent No. 1 on account of downstream constraints in the Respondent No. 1 system.

- 2.4. The Petitioner averred that in compliance of Commission's Order dated 08.06.2016, joint meeting was held however, the Respondent No. 1 denied the claim of deemed generation in the meeting held on 10.08.2016. The Respondent No. 1 denied the claim of the Petitioner on erroneous and fallacious grounds, only with the intent to deny its liability to pay the deemed generation benefit to the Petitioner in circumvention of the Order dated 08.06.2016 passed by this Hon'ble Commission. The Petitioner further stated that aggrieved by the actions of the Respondent No. 1 and in pursuance to the leave granted by the Commission in Order dated 08.06.2016, the Petitioner filed an Application before the Commission on 27.09.2016 seeking redressal.
- 2.5. The Respondent No. 1 submitted that the Commission vide Order dated 28.10.2016 referred the matter to Arbitrator for adjudication of dispute regarding claim of deemed generation by the Petitioner for loss of generation of its 10.5 MW Sarju-III Hydro Power Project for the period FY 2014-15 and FY 2015-16.
- 2.6. The Petitioner informed the Commission that the award of the Arbitrator passed on 29.09.2017 relating to its claim of deemed generation for the period for FY 2014-15 & FY 2015-16 has been challenged by UPCL before the District Judge, Dehradun under Section 34 of the Arbitration and Conciliation Act, 1996.
- 2.7. The Petitioner further submitted that Arbitration award is neither binding nor serves as a precedent for this Commission, hence, as the Respondent No. 1 has again denied the monthly invoices raised for claim of deemed generation by the Petitioner for FY 2016-17 & FY 2017-18, nor sought to undertake any reconciliation, the Petitioner has filed the instant Petition before the Commission. The Petitioner has claimed deemed generation for FY 2016-17 & 2017-18 as given in the table below:

Table 1: Deemed generation claimed by the Petitioner

Months	Capacity Restriction		Voltage fluctuation		Grid fail		Total Amount claimed (in Rs.)
	Unit	Amount in Rs.	Unit	Amount in Rs.	Unit	Amount in Rs.	
FY 2016-17							
June-2016	1440000	7948800	-	-	103400	570768	8519568
July-16	2976000	16427520	513179	2832748	84400	465888	19726156
August 16	2976000	16427520	612581	3381447	718000	3963360	23772327
September 16	2880000	15897600	448339	2474831	349400	1928688	20301119
October-16	1488000	8213760	165726	914808	25000	138000	9266568
FY 2016-17	11760000	64915200	1739825	9603834	1280200	7066704	81585738
FY 2017-18							
July-17	2377103	13121609	1001813	5530008	357900	1975608	20627225
August-17	2508338	13846026	1125800	6214416	287100	1584792	21645234
September-17	2438494	13618390	1278687	7169456	338034	1884441	22672287
October-17	2813955	16236520	1927671	11122662	0	0	27359182
FY 2017-18	10137890	56822545	5333971	30036541	983034	5444841	92303927

- 2.8. The Petitioner submitted that it had written various letters to the Respondent No. 1 on the outages and grid failure issues as well as voltage issues. However, the Respondent No. 1 did not deny the said outages or voltage issues at the relevant time nor did the Respondent No. 1 sought to undertake any reconciliation. Further the Petitioner sought for reconciliation as per the Renewable Energy Regulations to which the Respondent No. 1 did not take any action.
- 2.9. The Petitioner further submitted that the Respondent No. 1 has not completed the work of additional line on Panther Conductor between Kapkote and Bageshwar till date and as claimed by the Respondent No. 1, this work is utmost essential for evacuation of the entire generation capacity of Sarju-II as well as Sarju-III. Therefore, the evacuation capacity apparently is not sufficient and the Respondent No. 1 contention that the Petitioner's claims are erroneous is incorrect.
- 2.10. The Petitioner further submitted that the Respondent No. 1 did not raise at the relevant time any claim of force majeure which had resulted in outages or grid interruptions or otherwise during the year 2016-17 & 2017-18. The Petitioner claimed that it is the responsibility of the Respondent No. 1 to justify the reasons for outages being force majeure event which was clearly not done.
- 2.11. The Petitioner further submitted that, the Respondent No. 1 vide letter dated 15.12.2017 stated that the deemed generation calculation against voltage fluctuation are been not in accordance with the Renewable Energy Regulations. However, Respondent No. 1 did not submit details as to why, they were not as per

the Renewable Energy Regulations. The Petitioner further stated that at the relevant time when it had raised invoices, the Respondent No. 1 had not raised any issue on voltage fluctuations.

2.12. In view of the facts and grounds mentioned above, the Petitioner seeks following relief:

- i. Direct the Respondent No. 1 to pay to the Petitioner the deemed generation charges for Sarju III project for the year 2016-17 and 2017-18 as per the provisions of the Renewable Energy Regulations along with delayed payment surcharge/interest at 15% pa;
- ii. Reject the claim of the Respondent No. 1 that there is no capacity restriction and set aside the direction of the Respondent No. 1 to the Petitioner to generate at full load;
- iii. Pass an order directing the Respondent No. 1 to complete the augmentation works for the evacuation system urgently in an emergent basis;
- iv. Award cost of the proceedings;
- v. Pass any further order as the Commission may deem just and proper.

3. Submissions of the Respondent No. 1

3.1. The Respondent No. 1 with regard to the definition of interconnection point submitted that the Petitioner has although reproduced the definition of interconnection point yet has not mentioned the fact that beyond the Interconnection Point the evacuation line upto Kapkote sub-station of the Respondent No. 1 is a dedicated line within ownership of the Petitioner and which is looked after and maintained by the Petitioner only. The Respondent No. 1 has stated that the Petitioner only is responsible regarding the dedicated evacuation line as per the Regulations including any tripping outages etc. occurring prior to Kapkote sub-station.

3.2. The Respondent No. 1 submitted that the power purchase agreement with the Petitioner was initially executed on 16-12-2002 for capacity of 2 MW and thereafter vide implementation agreement dated 03-06-2011 the capacity of SHP Sarju-III was enhanced to 10.5 MW and consequently a revised PPA dated 13-10-2011 for 10.5 MW was executed. Similarly, the capacity of other upcoming unit namely Sarju-II was also enhanced from 3 MW to 12.6 MW for which the Supplementary PPA was

executed as late as on 26-02-2015. That from the aforesaid facts it is evidently clear that Respondent No. 1 was initially not aware of any enhancement of capacity of the Petitioner's generating stations, therefore, the question of upgrading and planning the evacuation system from Kapkote to Bageshwar did not arise, moreover all along Petitioner was aware about the constraints of existing evacuation network. It is pertinent to mention here that the Respondent No. 1 as early as June, 2014 had approved for the conversion of 33 kV line from Kapkote to Bageshwar from Raccoon conductor to Dog conductor. The Petitioner was aware about the local problems regarding the existing lines and also problem faced in replacement of the said conductor. It is also pertinent to mention that through this line the evacuation from the Petitioner's generating plant was being done and no work on the said line could be done unless the Petitioner agreed to provide shut down as per its convenience because of which it took far more time to complete the work of replacement of conductor than it would have normally taken as the generator had allowed the shutdown only when its generation was not affected.

- 3.3. The Respondent No. 1 contested the claim of the Petitioner and stated that till date the Petitioner is not in a position to generate and deliver the entire contracted capacity. According to the Respondent No. 1, the Petitioner has misrepresented the minutes of meeting dated 22.05.2014 as an order restricting Petitioner to generate certain quantum of power, whereas, in fact from the bare reading of the said MoM, it is clear that the same was an agreement between both the parties and the basis of the agreement was the actual existing position of the distribution network and generation capacity of the petitioner.
- 3.4. According to the Respondent No. 1 the Petitioner had run its plant to the possible capacity within its own limitations and whenever it was possible to generate more power they have done so without any restriction. From the record it can be seen that they have even reached the generating capacity of more than 9 MW in certain months, which only shows that the quantum of power generated was only dependent upon their own constraints and they were in no way affected by the available evacuation system which was sufficient to cater for their requirement and if it was possible for them to generate to the full capacity of the plant even then it would have been possible to evacuate the full generation.

- 3.5. The Petitioner further stated that any breach of restriction would have entailed penalty so as to deter the petitioner, however there was no such provision in the said MoM/agreement which was flagrantly violated at its will by the petitioner. Moreover, the Petitioner has never opposed or represented against the said agreement or challenged the agreement reached in the meeting dated 22.05.2014 before any authority and on the contrary Petitioner himself has been stating to have complied with the same hence also the petition is barred by principle of waiver and estoppel & acquiescence.
- 3.6. The Respondent No. 1 further stated that in the earlier dispute relating to the claim of deemed generation for FY 2014-15 and FY 2015-16, the matter was referred by the Commission to the Arbitration, wherein all these facts were considered and a final award was passed, wherein the learned arbitrator has negated all such allegations of the Petitioner and given a finding against him. The Respondent No. 1 submitted that all questions which have been decided by the Arbitrator cannot be reopened and heard as the same are barred by principle of resjudicata.
- 3.7. According to the Respondent No. 1 the Petitioner is not entitled for deemed generation as even today the Petitioner is not in position to generate to the fullest capacity of the plant.
- 3.8. The Petitioner submitted that from the description of the invoices it is apparent that the said invoices were totally against the provisions of the regulations. The copies of invoices had no calculation sheets attached with them as has been stated by the Petitioner.
- 3.9. The Respondent No. 1 further claimed that the Petitioner has not complied with regulation 47(3) of UERC RE Regulations, 2013 which requires both the parties to mandatorily reconcile on monthly basis the loss of generation towards deemed generation.
- 3.10. The Respondent No. 1 further submitted that there was no question of denial of the outages or voltage claims sent with the invoices, in fact the Petitioner should have raised the invoices only after reconciliation, the responsibility of reconciliation equally lies upon the Petitioner as well. The contentions of the Petitioner are misrepresentation of the facts. The Respondent No. 1 submitted that it had already apprised the Petitioner regarding there being no capacity restriction hence the

question of raising invoices for power restriction is not only against the Regulations but also not maintainable in light of the facts.

- 3.11. The Respondent No. 1 claimed that the Petitioner was called upon to demonstrate its capacity and upon inspection of the plant it became evident that Sarju-III SHP cannot generate to its full capacity, the detailed report of the same was prepared by the senior official of the Respondent No. 1.
- 3.12. The Respondent No. 1 contented that possibility of gaming in curtailing Sarju-III and running Sarju-II at its possible capacity in order to doubly claim the benefits of obtaining deemed generation on one hand and hiding the incapacity of its plant of its fullest capacity cannot be ruled out.
- 3.13. To the claim of the Petitioner that the Respondent No. 1 system was unable to carry the increased load of the generating station and there was grid failure causing the machine to trip, the Respondent No. 1 stated that if the Petitioner was honest and the efforts were not malafide then the demonstration would have been done after the prior notice to the Respondent No. 1, this itself shows the falsity of the claim of the petitioner. Moreover, the MRI records also do not support the contention of the petitioner.
- 3.14. The Respondent No. 1 further stated that the concerned Executive Engineer vide letter no. 3026 dated 9.8.2016 categorically informed the petitioner that there is no capacity restriction as is being claimed by the petitioner. This fact was again reiterated vide letter no. 1960 dated 24.10.2017 and letter no. 2061 dated 6.11.2017 and letter no. 2088 dated 13.11.2017. Executive Engineer further vide his letter no 3027 dated 9.8.2016 had informed the petitioner that the issue of voltage fluctuation arises upon synchronizing of the plant with the grid and requested the Petitioner to rectify the technical glitches in their system.
- 3.15. The Respondent No. 1 further stated that the issue of voltage fluctuation is attributable to the Petitioner. This fact was pointed out by the Executive Engineer, Almora, that when operated in isolation, 33 kV Kapkote sub-station shows proper voltage but the voltage increases upon synchronizing Sarju-III SHP. According to the Respondent No. 1, Executive Engineer, Almora raised the possibility of defects in the equipment's of the Petitioner specially AVR, associated equipment's and Governor etc. installed in the Plant. The Respondent No. 1 submitted that even

after lapse of more than 2 years the Petitioner has not made any effort at its end to regulate the voltage.

3.16. Respondent No. 1 further clarified that whenever some major cause of outage takes place it is noted in the relevant log books of the substation which are official documents prepared during the usual course of business of the Respondent No. 1 and are admissible evidence as per the provision of Evidence Act, 1872. It is pertinent to mention here that the Regulations of the UERC do not mandate preparing of any particular or specific document for this purpose however the Respondent No. 1 is following the practice of maintaining documents as per the provisions laid down by erstwhile UPSEB of whom UPCL is the successor and the rules earlier prevailing which are not inconsistent with the prevailing regulation are still applicable and followed by the Respondent No. 1 licensee. The Respondent No. 1 stated that the Petitioner cannot deny the truthfulness of these documents and they are binding upon the Petitioner even otherwise if Petitioner wants to contradict these documents it has to be by way of very strong evidence. To prove the veracity of the documents the burden of same is upon the Petitioner.

3.17. The Respondent No. 1 further claimed that there is also another generator connected at Kapkote substation, the said generator has never claimed any deemed generation which also shows that the contention of the Respondent No. 1 regarding outages, force majeure situations are correct and the claim of petitioner is not only false but it is an outcome of an afterthought.

3.18. The Respondent No. 1 submitted that the Petitioner was fully aware about the efforts made by the Respondent No. 1 regarding replacement of conductor from Racoon to Dog and laying down of new Panther line and also the difficulties faced by the Respondent No. 1. Since, the mentioned circuit is the only available connectivity between the two stations it is amply clear that any replacement work can only be done by switching off the circuit and consequently by withholding the generation from the plants connected at Kapkote sub-station. The Respondent No. 1 further submitted that it always tried to speed up the work but many a times the petitioner themselves had requested to postpone the requisite shutdown so that their generation might not get affected and the Respondent No. 1 being cooperative in the matter adhered to the requirement of the Petitioner. Moreover, the replacement work in last two spans of the circuit was obstructed by the local

residents of the area and it was only after 3-4 months and with the help of district administration the same could be completed. According to the Respondent No. 1, the Petitioner was well aware of the reasons and genuineness of efforts of the Respondent No. 1, have not only contributed in delay in replacement work but malafidely have raised the deemed generation bills for the period of shut down taken for replacement work as well, for which the Petitioner were themselves agreed upon. According to the Respondent No. 1 it kept the Commission informed about the progress of the work of change of conductor and new Panther line being made from Kapkote to Bageshwar on regular basis and requested the Commission to ignore the outages for the purpose of conductor replacement treating them as force majeure situation for which no deemed generation claims can be made.

3.19. According to the Respondent No. 1 the Petitioner has claimed deemed generation on three accounts namely; (1) against restricted capacity (2) against the outages and (3) against the voltage fluctuations. The Respondent No. 1 submitted that the claim/calculations submitted by the Petitioner clearly show that the same are not as per the RE, Regulations, 2013.

3.20. The Respondent No. 1 submitted that the RE, Regulation, 2013 do not have provision for any deemed generation against the restrained capacity and the calculations provided by the petitioner have no basis and are arbitrary.

3.21. Further the Respondent No. 1 submitted that the deemed generation claim based on the outages are incorrectly calculated, as the outages considered are much more than the actual outages as evident from the meter MRI data which is the most authentic and reliable source of data. According to the Respondent No. 1 the Petitioner has not furnished any calculations regarding the units derived for the purpose of calculations of deemed generation on account of outages. Further the Respondent No. 1 contended that any outage of generation due to fault in 33 kV line between Petitioner's Plant and Kapkote cannot be considered for deemed generation as this particular section is maintained by the petitioner itself and the Respondent No. 1 is not liable for any outage occurring out of it however, it appears that the Petitioner has considered those outages also in the duration for the calculation of deemed generation. The Respondent No. 1 further submitted that it has itself prepared the outage data sheet which shows the total hours of outage and the reason for such outage. The said sheets clearly show that the outage hours

assumed by the Petitioner are totally incorrect moreover for most of the months the outages remained within 48 hours and in months where they are more than the prescribed outages it is attributable to either Petitioner or are due to force majeure events.

3.22. Further the Respondent No. 1 stated that the claim of deemed generation on ground of voltage fluctuation is also totally wrong and against the provisions of the RE, Regulations, 2013. According to the Respondent No. 1 the calculations of deemed generation on ground of voltage fluctuation are not only hypothetical but based totally upon assumptions and the Regulations do not permit any such assumptions. The Respondent No. 1 submitted that the Petitioner is bound to maintain voltage at his generating end by installing suitable reactors and it is the admission of the Petitioner that the voltage is increasing when it tries to push the generation. The Respondent No. 1 averred that it cannot control the voltage at the generating end for which the responsibility is of the generator only, indicating that the voltage fluctuations are due to cause attributable to the Petitioner itself. The Respondent No. 1 further stated that it can only maintain voltage at sub-station end so that any generator connected to such substation gets appropriate voltage level, however, if any cause, arriving from the generator causes fluctuation in the voltage then it cannot be maintained by the Respondent No. 1 in real time.

3.23. The Respondent No. 1 submitted that at the Kapkote sub-station, which is a connection point for both Sarju-III and PPL, and the same level of voltage is to be maintained for both the generators, that other generator i.e. PPL has never made any complaint regarding voltage and has neither raised any claim which itself shows that the deemed generation claim made by the Petitioner on the grounds of voltage fluctuations is totally false.

4. Commission's Views & Decisions

4.1. The Commission heard both the Petitioner and the Respondents at length. Based on the submissions made by the Petitioner and the Respondents the following issues need to be addressed:

Issue No. 1: Whether the issue of Res judicata as contested by the Respondent No. 1 is applicable in the present matter.

Issue No. 2: Whether the responsibility of maintenance of the dedicated line between Sarju-III and Respondent No. 1 33/11 kV Sub-Station Kapkote lies with the Respondent No. 1 or the Petitioner.

Issue No. 3: Whether the Regulation 47(1) of UERC RE, Regulation, 2013 means non-availability of the existing distribution system on account of outage/tripping/interruptions of line etc. or Whether it implies insufficient capacity of the existing distribution system resulting in the despatch restrictions (on the generation capacity) imposed by the Respondent No. 1.

Issue No. 4: Whether the Petitioner complied with the RE regulations, 2013 with respect to monthly reconciliation of bills raised on account of factors as specified in sub-regulation (1) and (2) of Regulations (47) of RE regulations, 2013.

Issue No. 5: Whether the Petitioner is entitled to receive any relief as claimed.

Issue No. 1: Whether the issue of Res judicata as contested by the Respondent No. 1 is applicable in the present matter.

On the issue of applicability of res judicata, as contested by UPCL, it is imperative to understand the said doctrine provided under section 11 of CPC, in light of the rulings of the Hon'ble Supreme Court.

To constitute a matter as res judicata under Section 11, certain conditions need to be fulfilled, which were laid down in Sheodan Singh v. Daryao Kunwar (AIR 1966 SC 1332 at p. 1334):

“A plain reading of s. 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely-

(i)The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(ii)The former suit must have been a suit between the same parties or between, parties under whom they or any of them claim;

(iii)The parties must have litigated under the same title in the former suit;

(iv) *The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and*
(v) ***The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.***

[Emphasis added]

To support the plea of res-judicata, it is not enough that the same matter is in issue, it is also important that the matter has been heard and finally decided. This expression, 'heard and finally decided' refers to a matter on which the court, having exercised its judicial mind, has recorded a finding and arrived at a decision on a contested manner. In *Satyadhyan v. Deorajin Debi* (AIR 1960 SC 941), it was held that:

*“The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter, whether on a question of fact or a question of law, has been decided between two parties in one suit or proceeding and the decision is final, **either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies**, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again”.*

[Emphasis added]

In the present matter before the Commission, the same matter was a subject matter of determination before the arbitrator. However, since the arbitral award in the matter has now been contested before the District Court, the Commission is of the view that such arbitral award cannot be considered to have attained finality and therefore, does not qualify to be considered under res-judicata. Accordingly, the Commission is not barred from entertaining the present petition filed by the Petitioner on the grounds of res judicata.

Issue No. 2: Whether the responsibility of maintenance of the dedicated line between Sarju-III and Respondent No. 1 33/11 kV Sub-Station Kapkote lies with the Respondent No. 1 or the Petitioner.

The Petitioner filed a Petition before the Commission for determination of project specific tariff. The dedicated evacuation line from the interconnection point upto Respondent No. 1 33/11 kV Sub-Station was constructed by the Petitioner.

While determining the capital cost of the project i.e. Sarju-III, the expenditure incurred towards construction of the said dedicated was included in the capital cost of the project and thereafter the project specific tariff was determined by the Commission meaning thereby that the Petitioner shall be able to recover the cost of the line till the useful life of the generating station. Hence, the Petitioner is the owner of the aforesaid dedicated line and full responsibility of its maintenance lies on him.

The similar views were expressed by the Commission in its Order dated 08.06.2016 in the matter of adjudication of dispute under Section 86 (1)(f) between the Petitioner and the Respondent No. 1 in respect of 10.5 MW Sarju-III SHP. The relevant para of the said Order is being reproduced below:

“4.1 The Commission observed that the first PPA with the generator was executed by UPCL in December, 2002 for the capacity of 2 MW of Sarju-III SHP. The same had been revised to 10.5 MW vide the PPA dated 13.10.2011 and the project was commissioned on 10.07.2014. In accordance with the Clause 7.1 & 8.3 of the PPA read with regulation 38(2) of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010, the Petitioner had taken up construction of the transmission line from interconnection point to the Respondent’s 33 kV Kapkote Sub-Station.

4.2 Regulation 38(1) of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010 specifies as under:

“Transmission Licensees and Distribution Licensees shall endeavor to provide connectivity to the RE Based Generating Stations and Co-generating Stations at nearest possible sub-station preferably within a range of 10 kilometers from the location of such generating station. They may further mutually agree to provide connectivity at appropriate voltage level subject to technical feasibility and technical standards for construction of electrical lines and connectivity with the grid as may be specified by CEA.”

Similar provisions have also been provided in the UERC RE Regulations, 2013. Accordingly, the Respondent, being a distribution licensee, is responsible for evacuation of power beyond Kapkote sub-station.”

From the above it is apparent that the Respondent No. 1 is responsible for the system beyond Kapkote Sub-station and any loss in generation due to breakdown in dedicated line from the interconnection point up to Kapkote Sub-Station shall be on the account of the Petitioner and the Respondent No. 1 shall in no way be responsible for any such loss.

Issue No. 3: Whether the Regulation 47(1) of UERC RE, Regulation, 2013 means non-availability of the existing distribution system on account of outage/tripping/interruptions of line etc. or whether it implies insufficient capacity of the existing distribution system resulting in the despatch restrictions (on the generation capacity) imposed by the Respondent No. 1.

Regulation 47 of UERC RE, Regulations, 2013 stipulates that:

“47. Deemed Generation

(Applicable only in case of Small Hydro Generating Plants & Solar PV & Solar Thermal Projects)

(1) 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, shall count towards Deemed Generation:

*– Non availability of evacuation **system** beyond the Interconnection Point; and*

– Receipt of backing down instructions from the SLDC.

...”

From the reading of the Regulation 47(1) above it is amply clear that the Regulations imply non-availability of the existing distribution system on account of tripping/outage/interruptions of line etc. It does not imply insufficient capacity of the existing distribution system resulting in despatch restrictions (on the generation capacity) imposed by the Respondent No. 1. This is also substantiated from the intent of the Regulations as has been cited in the Statement of Objects and Reasons by the Commission dated 14.08.2012, while amending UERC RE, Regulations, 2012 Regulations to incorporate deemed generation. According to the Commission it is the responsibility of the Respondent No. 1 to maintain the existing distribution system to ensure availability of maximum generation.

Issue No. 4: Whether the Petitioner complied with the RE regulations, 2013 with respect to monthly reconciliation of bills raised on account of factors as specified in sub-regulation (1) and (2) of Regulations (47) of RE regulations, 2013.

The Regulation 47 (3) of the RE Regulations, 2013 stipulates:

“The period of outage/interruption on account of such factor(s) specified in sub-Regulation 1 and 2 above, shall be reconciled on monthly basis and the loss of generation at the Station towards Deemed Generation after accounting for the events specified under sub-Regulation 1 (i) & (ii) above, shall be computed on following consideration : ...”

[Emphasis added]

The aforesaid Regulation is clear in its intent that bills of deemed generation should be reconciled on monthly basis. However, on perusal of the records submitted by the Petitioner it was found that the deemed generation bills were not being reconciled regularly on monthly basis. In one instance the deemed generation bills for the month of August 2016 were sent to Chief Engineer (Commercial), UPCL in the month of October 2016. The Commission also went through the logbooks of both the Petitioner and the Respondent No. 1 maintained at the respective generating stations and found that in the logbooks maintained by the Petitioner the reason given for each outage of machine was simply stated as “Tripping from Bageshwar” instead comprehensive reasons for outage of the machine should have been recorded in the logbook. On the other hand the logbook maintained by the Respondent No. 1 was more comprehensive stating reasons for each tripping of line in detail. The Commission notes that due to laxity in proper upkeep of records by the Petitioner lead to bills not been reconciled on monthly basis as envisaged in the Regulations.

The Commission directs the Respondent No. 1 to frame a detailed procedure for monthly reconciliation of deemed generation bills together with the Petitioner and submit the same to the Commission within one month of issue of this order.

Issue No. 5: Whether the Petitioner is entitled to receive any relief as claimed.

The Commission in its Order dated 08.06.2016 very categorically stated that the Petitioner is entitled to receive claim of deemed generation in accordance with the provisions of RE Regulations. The para 4.12 of the said Order states that:

4.12 Having discussed as above, the Commission is of the view that the claim of deemed generation is admissible to the Petitioner in accordance with the provisions of the RE Regulations. The Commission directs:

- a) Both the Petitioner and the Respondent to jointly sit together for monthly reconciliation of the deemed generation claimed by the Petitioner and settle the amount so arrived at within two months time in accordance with the provisions of the Regulations.
- b) UPCL to submit fortnightly progress report of the same before the Commission jointly signed by both the parties failing which the Respondent will render himself liable for action under Section 142 of the Electricity Act, 2003. ...”

In order to adjudicate the matter, the Commission held a meeting with the official(s) of the Petitioner and the Respondent No. 1 on 02.05.2019 in the Commission’s office. The logbooks detailing daily sequence of events maintained by the Petitioner and the Respondent No. 1 were matched and it was found that the logbook maintained by the Respondent No. 1 were more comprehensive and gave detailed reasons for the trippings of the generating station/line whereas the reason cited by the Petitioner for each tripping was just “ Tripping from Bageshwar.” On perusal of the deemed generation bills for the period June 2016 to October 2016 and July 2017 to October 2017 it was observed that the Petitioner raised the deemed generations bills under three heads (i) Deemed generation due to Grid failure (ii) Deemed generation due to fluctuations in voltage (iii) Deemed generation due to restriction imposed by the Respondent No. 1.

In order to determine the deemed generation payable by the Respondent No. 1 the Commission decided to frame a methodology for calculating the same.

(i) Deemed generation on account of interruption/tripping /outage of lines etc. or grid failure

The Regulation 47 of UERC RE Regulations, 2013 states:

“47. Deemed Generation

(Applicable only in case of Small Hydro Generating Plants & Solar PV & Solar Thermal Projects)

- (1) *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, shall count towards Deemed Generation:*

- *Non availability of evacuation system beyond the Interconnection Point; and*
- *Receipt of backing down instructions from the SLDC.*

Provided that the following shall not count towards Deemed Generation:

- (i) *the loss of generation at the Station on account of aforesaid factor(s) but attributed to the Force Majeure event(s);*
- (ii) *the loss of generation at the Station due to the interruptions/outages attributed to the aforesaid factor(s) during the period in which the total duration of such outages/ interruptions, other than that excluded under above, is within the limit of:*
 - *48 hours in a month in case of small hydro project, and*
 - *60 hours in a month in case of solar PV and Solar Thermal Project.*
 - *Provided further that for working out the ceiling of 60 Hrs. in a month, the interruptions/outages occurring during 18.00 hours in the evening to 6.00 hours in the morning shall not be counted.*

...

- (3) *The period of outage/interruption on account of such factor(s) specified in sub-Regulation 1 and 2 above, shall be reconciled on monthly basis and the loss of generation at the Station towards Deemed Generation after accounting for the events specified under sub-Regulation 1 (i) & (ii) above, shall be computed on following considerations:*

- (i) *The recovery on the above account shall be admissible if the actual energy generated during the year is less than the normative CUF specified in the Regulation for small hydro projects and Solar PV and solar thermal projects (in case of project opting for generic tariff) or the CUF considered for recovery of fixed charges (in case of project specific tariff is applicable) for small hydro projects and solar PV and solar thermal projects. In case the sum of actual energy generated and the deemed generation during the year exceeds the CUF at which the recovery of fixed charges has been envisaged, then the deemed generation alongwith the actual energy generated will be allowed only upto the CUF considered.*

(ii) The generation loss towards the Deemed Generation in accordance with sub-Regulation (1) above, if any, during the month shall be considered on the pro-rata basis on the number of hours lost based on the actual average generation achieved during that month divided by the total number of hours available during the month reduced by the number of hours outage/interruption occurred in the system."

The Commission examined the logbooks submitted by the Petitioner and the Respondent No. 1 for the period for which the deemed generation is being claimed. The Commission discarded the deemed generation claim of the Petitioner due to Grid failure on account of force majeure events like falling of trees on 33 kV Kapkote-Bageshwar line, lightning, storm etc. Deemed generation claimed by the Petitioner on account of Grid failure, due to fault occurring in the dedicated line from inter connection point upto 33/11 kV Sub-Station Kapkote, has not been considered by the Commission since the said line as discussed above is to be maintained by the Petitioner. Considering the synchronization time of 15 minute as considered by the Petitioner, the Commission determined the total grid failure time per slot. The total duration of such outages/interruptions/trippings of the lines etc. in a month were reduced by the limit of 48 hrs as per the RE, Regulations.

In compliance of the aforesaid Regulations, deemed generation on account of outages/interruptions/trippings of lines etc./grid failure for the period in consideration is as follows:

Table 2: Deemed generation on account of outages/interruption/tripping of lines etc/grid failure

Months	Total Hours of grid fail in Hrs.	Total grid fail in Hrs excluding 48 Hrs as per Regulation	Actual Generation (MWh)	Deemed generation due to grid fail* (in kWh)
	A	B	C	D
Jun-16	35:09:00	-	1581	-
Jul-16	20:15:00	-	3127	-
Aug-16	29:37:00	-	3416	-
Sep-16	37:59:00	-	3402	-
Oct-16	20:57:00	-	2560	-
Jul-17	60:42:00	12:42:00	2534	47098
Aug-17	56:59:00	08:59:00	2471	32297
Sep-17	53:07:00	05:07:00	2284	16923
Oct-17	-	-	2204	-

$$D = B * [C * 1000 / (\text{total numbers of hours in the month} - A)]$$

(ii) Deemed generation on account of fluctuation in Voltage

The Regulation 47 of the UERC, RE, Regulations, 2013 states that:

“(2) The distribution licensee shall be required to maintain the voltages at the point of interconnection with the project within the limits stipulated hereunder, with reference to declared voltage:

– In the case of High Voltage, +6% and -9%; and,

– In the case of Extra High Voltage, +10% and -12.5%.

With effect from 01.04.2013, any loss in generation due to variations in the voltage beyond the limits specified above shall be reckoned as deemed generation provided such loss of generation results in reduction of more than 25% of capacity output.

...

(iii) The generation loss towards the Deemed Generation (in MWh) in accordance with sub Regulation (2) above, if any, during the month shall be considered as the summation of the product of number of hours the variations in voltage beyond the specified limit existed and the Generation lost (in MW) due to the variation in the voltage beyond the specified limit. The Generation lost (in MW) would be the difference between the following:

a) Minimum of the actual generation (in MW) before the variation in voltage occurred and the generation (in MW) achieved after 90 minutes immediately after variation in voltage was restored within the specified limit would be treated as the actual generation during the period when voltage variations occurred; and

b) The generation achieved during the period when variation in voltages took place

The Commission called for the MRI data of the main meter installed at the generating end (Sarju-III) for the months of June 2016 to October 2016 and July 2017 to October 2017. In the MRI data, the Commission examined slot-wise voltage to see if it was within the prescribed limit of -6% and 9%. Thereafter, in accordance with Regulations, as above, the Commission calculated the loss of generation for counting towards deemed generation (in kWh) as shown in the table given below:

Table 3: Deemed generation due to Voltage fluctuation	
Months	Units in kWh
Jul-16	0
Aug-16	86629
Sep-16	56064
Oct-16	160211
Total FY 2016-17	302904
Jul-17	3700
Aug-17	32488
Sep-17	10728
Oct-17	32,731
Total FY 2017-18	79647
Grand Total	382551

- (iii) **Deemed generation on account of 4 MW capacity restriction imposed by Respondent No. 1 due to incapability of its distribution system to evacuate full 10.5 MW capacity of the generating plant i.e. Sarju-III.**

From the reading of the Regulation 47(1) reiterated above, it is amply clear that the Regulations consider loss of generation on account of non-availability of the existing distribution system due to interruption/tripping/outage of line etc. as deemed generation. However, it does not count loss of generation as deemed generation due to non-availability of the capacity in the existing distribution system resulting in despatch restrictions imposed by the Respondent No. 1 on the generator. This is also substantiated from the intent of the Regulations as has been cited in the Statement of Objects and Reasons by the Commission dated 14.08.2012, while amending UERC RE, Regulations, 2012 to incorporate deemed generation provisions. Accordingly the claim of the Petitioner on this account is rejected.

- 4.2. Based on the above, the Respondent No. 1 has to pay to deemed generation charges on the units determined by the Commission as per Table 2 & Table 3 above, on two counts on the prevailing tariffs i.e. (i) deemed generation due to interruption, tripping, outage of lines/grid fail (ii) deemed generation due to voltage fluctuation. The Commission is of the view that since deemed generation bills were not reconciled monthly as per the Regulation, the Petitioner is not entitled for any delayed payment surcharge/interest.
- 4.3. The Respondent No. 1 is directed to make payment of deemed generation bills, as above, within one month of bills being served by the Petitioner.

4.4. Since 33/11 kV Kapkote sub-station besides being a distribution sub-station of the Respondent No. 1 (UPCL) it is also an inter-connecting sub-station wherein small hydro generators in the Kapkote area are connected for their further evacuation of power. Considering the reliable connectivity and evacuation of hydro generators, UPCL is advised to take suitable measures to ensure that voltage profile at the sub-station is maintained within the limits prescribed in the Regulations.

Ordered accordingly.

(M. K. Jain)
Member (Technical)

(D.P. Gairola)
Member (Law)