

**Before**

**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

**In the matter of:**

Application of Vanala Small Hydro Project of 15 MW in District Chamoli for grant of permission of Open Access for carrying electricity from Vanala SHP to outside the State of Uttarakhand.

Uttarakhand Power Corporation Ltd., Dehradun ..... Petitioner

**And**

Him Urja Pvt. Ltd. .... Respondent

**Coram**

<b>Shri V.J. Talwar</b>	<b>Chairman</b>
<b>Shri Anand Kumar</b>	<b>Member</b>

**ORDER**

**Date of Order: 30.12.2009**

**1.0 Background**

1.1 Uttarakhand Power Corporation Ltd. (hereinafter referred to as "UPCL" or "Petitioner") filed a Petition on 14.05.2009 before the Commission seeking:

- (i) inclusion of 66 kV voltage level to evacuate power upto 20 MW and
- (ii) allow it to the grant open access for carrying electricity outside the State of Uttarakhand from Vanala Small Hydro Electric Project of 15 MW capacity

located in District Chamoli of Him Urja Pvt. Ltd (hereinafter referred to as "HUPL" or "Respondent"), through 66 kV Srinagar-Mangrauli-Joshimath line.

- 1.2 The Commission heard the Parties during the hearing held on 10.06.2009 and issued an Interim Order in the matter in which the Commission observed that in terms of clause 4.1 of the Implementation Agreement, the sale outside the State was permissible only to a consumer. Accordingly, before proceeding further in the matter, the Commission sought the status of the proposed buyer with whom the PPA has been/or is proposed to be signed alongwith copies of PPA and other relevant documents and also to confirm that the proposed sale is permissible under clause 4.1 from HUPL.
- 1.3 On 29.06.2009, UPCL filed another application before the Commission submitting that since the developer had not produced any document substantiating that the sale of power outside the State would be made to the consumer and also there was no order from Government of Uttarakhand to the effect that the developer could sell its power outside the State of Uttarakhand to any person other than the consumer, hence, no issue remained left in the application filed by UPCL and, hence, UPCL was therefore willing to withdraw its application dated 14.05.2009. A copy of the said application was forwarded to HUPL for its comments on 07.08.2009, when the next date of hearing was fixed as 18.08.2009. Simultaneously, the Commission, vide its letter no. 652/UERC/Vanala SHP/09-10 dated 10.08.2009 (**Annexure-1**), informed the Government of Uttarakhand (hereinafter referred to as "GoU" or "Government") about the Petition filed before it in the matter and sought the Government's view on the issue of permissibility of sale outside the State of Uttarakhand from such Small Hydro projects as per the terms of Implementation Agreement entered into by these developers with the Government. The Commission also sought clarification from Central Electricity Regulatory Commission (CERC) on the clause of PPA with PTC regarding sharing of trading margin vide its letter no. 727/UERC/Vanala SHP/09-10 dated 21.08.2009.
- 1.4 Meanwhile, HUPL, vide its letter dated 02.07.2009, submitted the reply to Commission's directions contained in the Commission's Interim order dated 10.06.2009. In its reply, along with certain submissions HUPL prayed for vacating the

directions contained in the interim order dated 10.06.2009, wherein it has been said to be stated that the sale outside the State of Uttarakhand under the Implementation Agreement dated 11.06.2004 was permitted only to a consumer situated outside the State. HUPL also submitted that the project was established by HUPL with the clear intention to sell power to PTC India limited and at no point of time there was any demand that the power generated from the project should not be sold to PTC or other persons except an end user outside the State of Uttarakhand. It, therefore, requested for the permission to sell electricity to Power Trading Corporation Limited (hereinafter referred to as "PTC") consistent with the Power Purchase Agreement dated 03.03.2009 entered into by it with PTC. HUPL also sought Commission's directions to UPCL and PTCUL to give immediate connectivity to their system for evacuation of the power upto the CTU grid for synchronization of the generating station, testing and commissioning and power supply to PTC.

1.5 UPCL again filed an application dated 11/12.08.2009 before the Commission wherein it submitted that under the Electricity Act, 2003 the duty of the distribution licensee is to provide open access only to a consumer in the State and not to a generating company for carrying electricity outside the State. Further, from the provisions of the Act, a generating company intending to carry electricity outside the State should approach the Transmission licensee or the STU for providing open access. Further, the Regulations specify that the distribution licensee is required to provide open access to the generating company for carrying electricity. Hence, UPCL sought clarification in light of the above provisions of the Act and Regulations that the Distribution Licensee has no obligation to provide open access to the generating companies for carrying electricity outside the State. Further, UPCL again requested the Commission to allow it to withdraw its application filed before the Commission on 14.05.2009.

1.6 HUPL again filed its submission before the Commission on 17.08.2009 submitting that it undertakes to fulfill all the requirements as a generator under the reporting obligations to enable the Commission to decide the case conclusively and at the earliest. HUPL also submitted a copy of Appeal No. 115 of 2009 filed by it before Hon'ble Appellate Tribunal for Electricity alongwith a copy of Hon'ble Supreme Court's judgment in the matter of Tata Power Co. and others.

1.7 The Commission again heard HUPL, UPCL and SLDC, Rishikesh in the matter during the hearing on 18.08.2009 at the Commission's office. During the course of hearing, the Commission asked HUPL to tell the provisions of law under which it was entitled to open access in the distribution system and Commission's jurisdiction for permitting sale outside the State. HUPL was also informed of the various pre-requisites for getting open access in intra-State and inter-State transmission system. HUPL referred to Regulation 11(1) of Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulation, 2008 (hereinafter referred to as "Regulations") for getting open access in the distribution system but was not able to establish Commission's jurisdiction for permitting sale outside the State.

## **2.0 Commission's Finding, Analysis and Order**

2.1 The present Petition has two prayers (i) to allow connectivity at 66 kV to Vanala SHP and (ii) to allow open access for sale outside the State to PTC. The Commission has first dealt with the issue of open access and then with the issue of connectivity in the following paragraphs of this Order. The Commission has refrained from going into the issues and contentions of the parties on facts regarding allotment of site, intentions/conditions for such allotment for open access and responsibilities/obligations attached thereto.

2.2 While UPCL has submitted that it is not obliged under the Electricity Act, 2003 to grant open access to a generator, HUPL has cited Commission's Regulation 11 (1) of UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008, which is reproduced below, to claim open access for sale to PTC:

### *"11. Open Access*

*(1) A person, who has constructed the Plant, shall have right to 'open access' for carrying electricity from his plant by using transmission lines or distribution system or associated facilities with such lines or system and for that matter, rules or regulations notified by the Commission in this regard shall apply on the plant....."*

2.3 The Commission has examined the above contentions of both the parties and notes

that open access in distribution system is permissible only under section 42 of the Electricity Act, 2003, which deals with “Duties of distribution licensees and open access” and its relevant portion is reproduced below:

*“(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such **cross subsidies**, and other operational constraints: .....*

*(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) **requires a supply of electricity** from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be a common carrier providing non-discriminatory open access.*

*(4) Where the State Commission **permits a consumer or class of consumers to receive supply**, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

*.....”*

2.4 A plain reading of the above provisions with specific reference to emphasized phrases above, makes it amply clear that these provisions are applicable only for providing open access to persons/consumers for their own use within the area of supply of distribution licensee and not to a generator for supplying electricity outside the area of supply of the distribution licensee. The Electricity Act, 2003 nowhere else mandates a distribution licensee to provide non-discriminatory open access to a generator. Accordingly, the distribution licensee is obliged to give open access to consumers only as per the Regulations framed by Commission in this regard. The Commission has already notified UERC (Open Access in Distribution) Regulations, 2004 for permitting

open access to consumers presently getting supply from the distribution licensee viz. UPCL. The above quoted Regulation 11(1) by HUPL has, therefore, to be read with these Open Access Regulations. Regulation 11(1) clearly stipulates that the open access shall be provided as per Regulations framed by the Commission in this regard, which in this case are the said Open Access Regulations for Distribution permitting open access only to consumers within the area of supply of distribution licensee i.e. the State of Uttarakhand for UPCL. While, under section 40, the generators and licensees are entitled to open access in transmission system right from 10<sup>th</sup> June 2003, the date of coming into force of the Electricity Act, 2003, it is permissible in distribution system only to a consumer of the licensee as per the Open Access Regulations. Thus, HUPL or for that matter any other generator is not entitled to get open access in distribution system as a matter of right.

- 2.5 The issue of seeking open access whether in transmission or distribution system would arise only if proposed sale for seeking open access is in the first place permissible under the applicable provisions of agreements or contracts entered into by the developers under the prevailing policies/rules/regulations. The Commission now examines this aspect.
- 2.6 In its reply dated 02.07.09, HUPL has submitted that any restriction placed on it on the sale of electricity generated from the project to PTC or any other person outside the State would be unconstitutional, ultra vires, without any basis and being a completely misconceived interpretation of the provisions of the Implementation Agreement and has made further submissions to justify its agreement to sell power to PTC.
- 2.7 The Commission is well aware of the powers vested with it under the statute and would always act within the ambit of such powers. The issue of allocation of States resources in the form of hydro sites and conditions for such allocation is within the powers and jurisdiction of GoU. The Government, in its wisdom and in exercise of its powers, may impose conditions or restrictions as it deems appropriate while allocating a particular site, which in this case includes restrictions on sale of power in Clause 4 of the Implementation Agreement. The appropriate authority to give clarification on issues related to Implementation Agreement, for which either there is no provision or that are not clearly specified, would obviously be the Government of

Uttarakhand. Accordingly, the Commission asked for its jurisdiction to decide the issue of permissibility of sale outside the State, which clearly is the prerogative of the Government while specifying the terms of allocation of the site and, hence, HUPL was not able to establish the same. However, if the Government has imposed a restriction or given permission on sale, whether inside or outside the State, the Commission would not be overstepping its jurisdiction to modify the same but would rather facilitate implementation of these provisions by either party. In this case, the Commission's view on Clause 4 of the Implementation Agreement given in its Order dated 10.06.2009 was agreed to by UPCL, who wished to withdraw the Petition dated 14.05.2009, but was contradicted by HUPL. Hence, there was a dispute between the licensee and the generating company, which can be adjudicated by the Commission under section 86(1)(a) of the Electricity Act, 2003. For correct interpretation and intention of the Government behind Clause 4 of the Implementation Agreement, the matter was referred to GoU on 10.08.2009, who was requested to send its view on the issue of sale of power outside the State of Uttarakhand by HUPL and other such small hydro projects as per the terms of Implementation Agreement. It is only when the entitlement to sell outside is established, the terms of open access have to be settled between HUPL and the Licensees under the ambit of the Electricity Act, 2003, Implementation Agreement, Regulations notified by the Commission/Central Electricity Regulatory Commission and other applicable provisions of law.

- 2.8 The Commission heard the parties on 18.08.2009 and pending receipt of Government's view on this issue reserved its Order on the same. HUPL relied on Commission's above stated regulation, which as brought out above, do not permit open access in distribution system to generators for supplying electricity outside the State. In any case, these Regulations cannot be said to have removed the restrictions applicable to a person/generator on sale outside the State who otherwise is not entitled for the same.
- 2.9 The GoU in its letter dated 10.11.2009 (enclosed as **Annexure 2**) has informed the Commission that the State is having power shortages and HUPL has proposed to sell the electricity generated to PTC, which is a trading company and does not fall within the category of consumer and, hence the Government is of the view that it would not be appropriate to consider the open-access proposal of the developer.

- 2.10 The dispute between UPCL and HUPL regarding allowing open access for sale outside the State can now be decided on the basis of clarification given by the Government, which makes it amply clear that HUPL is not entitled to open access for sale of electricity outside the State to PTC. The Commission, having regard to this clarification by the Government, is of the view that the proposed sale to PTC is not permissible under the Implementation Agreement and, therefore, permits UPCL to withdraw its application dated 14.05.2009 for allowing open access to HUPL.
- 2.11 HUPL in its reply and written submission made before the Commission had submitted that its project was ready for synchronization but it has not been provided connectivity by UPCL due to which it has been subjected to loss. HUPL also submitted that though the Regulations provided that in case of plants which get commissioned after the Regulations come into effect and where the scheme for connectivity had already been approved, the connectivity would be allowed as per the approved scheme. The connectivity scheme for the project has been approved in the year 2000. Hence, in light of the above, UPCL should be directed to provide immediate connectivity to its SHP.
- 2.12 The Commission understands that connectivity has been provided to HUPL by UPCL under a short term PPA and the issue of allowing connectivity at the earliest is no more required to be addressed. UPCL is, therefore, permitted to withdraw its application dated 14.05.2009 in this regard as well.
- 2.13 As stated earlier, the Commission is not going into other issues/contentions of the parties and would deal with them separately, if required, at an appropriate time.
- 2.14 As this Order has implications for other similarly placed SHP developers, a copy of this Order may be sent to all SHP developers whose details are available in Commission's database and a copy may also be sent to the Government and UJVNL for necessary action at their end.

**(Anand Kumar)**  
**Member**

**(V.J. Talwar)**  
**Chairman**



**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

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No. 652 /UERC/Vanala SHP/09-10

Date: 10 August 2009

To,

The Secretary (Energy),  
Government of Uttarakhand,  
Dehradun.

**Sub: Application of Vanala Small Hydro Project of 15 MW in District Chamoli for grant of permission of Open Access for carrying electricity from Vanala SHP to outside the State of Uttarakhand filed by UPCL**

Sir,

Uttarakhand Electricity Regulatory Commission (Commission) has received an application dated 14.05.2009 (Copy enclosed as Annexure-I) from Uttarakhand Power Corporation Ltd. (UPCL) for grant of permission of Open Access for carrying electricity from Vanala SHP being commissioned by M/s. Him Urja Pvt. Ltd. (HUPL) to outside the State of Uttarakhand. The Commission has issued an Interim Order dated 10.06.2009 (Copy enclosed as Annexure-II), which is self explanatory, wherein it has pointed out that disposal of power from the project outside the State is permissible only to a consumer as per clause - 4.1 of Implementation Agreement, which is reproduced below:

**"ARTICLE IV**

**SALE OF POWER AND ROYALTY ENERGY**

*4.1 Disposal of Power*

*4.1.1 The Company may utilize the option to dispose off power from the project, after allowing for Royalty Energy, in any one or more of the following modes:*

- i) Sell power to the UPCL, and such sales shall be mutually negotiated between the UPCL and the Company; and/or*
- ii) Sell power to any High Tension (HT) consumer within the State of Uttaranchal; and/or*
- iii) Sell power to local rural grids within the State of Uttaranchal, which are not connected to the UPCL's main grid; and/or*
- iv) Sell power to rural power distribution entities (i.e. those which sell power to predominantly rural areas); and/or*

v) Sell power to any consumer outside the State of Uttaranchal

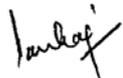
It is clear from the above clause that the first four modes are for sale within the State and only fifth one is for sale outside the State. However, such sale is permitted only to a consumer situated outside the State. ....”

Accordingly, the Commission sought the status and details of the proposed purchaser and also the confirmation from the developer that the proposed sale is permissible under clause 4.1 of the implementation agreement. In response M/s. HUPL has filed its reply dated 02.07.2009, copy of which is enclosed herewith as Annexure-III, wherein it has stated that it has entered into agreements for sale of power to PTC. The same issue is also to other SHPs of the State namely Bhilangana-I and Bhilangana-III being developed by M/s. Swasti Power Engineering Ltd. & M/s. Polyplex Corporation Ltd. respectively. The Commission has fixed a hearing in this matter on 18.08.2009 (copy of letter dated 07.08.2009 stating the facts of the case is enclosed as Annexure IV).

In this regard, I have been directed to seek Government's views on the issue of permissibility of sale outside the State of Uttarakhand from such projects as per the terms of implementation agreement.

Yours sincerely,

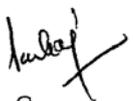
Encl: As above

  
(Pankaj Prakash)  
Secretary

Copy to:

1. Managing Director, UJVNL, GMS Road, Maharani Bagh, Dehradun for appearing before the Commission in the hearing on 18.08.2009 at 3.00 PM for clarifying the position with respect to activities related to UJVNL in the implementation agreement of this project. Copy of implementation agreement is enclosed for ready reference.
2. Managing Director, PTCUL, 7-B, Lane No. 1, Vasant Vihar Enclave, Dehradun for appearing before the Commission in the hearing on 18.08.2009 at 3.00 PM for clarifying the position with respect to activities related to STU/Transmission licensee in the implementation agreement of this project. Copy of implementation agreement is enclosed for ready reference.

o/c

  
Secretary

Annexure 2

संख्या: 2299 /1(2)/2009-04(8)/55/2004

प्रेषक,

सौरभ जैन,  
अपर सचिव,  
उत्तराखण्ड शासन।

सेवा में,

सचिव,  
उत्तराखण्ड विद्युत नियामक आयोग,  
देहरादून।

ऊर्जा अनुभाग-2,

देहरादून: दिनांक: 10 नवम्बर, 2009

विषय:- बनाला जल विद्युत परियोजना से उत्पादित विद्युत के सम्बन्ध में।

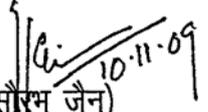
महोदय,

उपरोक्त विषय पर कृपया अपने पत्र संख्या 652/UERC/VanalaSHP/09-10, दिनांक 10.08.2009 का सन्दर्भ ग्रहण करने का कष्ट करें।

इस सम्बन्ध में अवगत कराना है कि राज्य में विद्युत की अत्यधिक कमी है तथा कम्पनी के द्वारा मै0 पी0टी0सी0 को उत्पादित विद्युत विक्रय करने का प्रस्ताव किया गया है, जोकि एक ट्रेडिंग कम्पनी है तथा उपभोक्ता की श्रेणी में नहीं आता है।

उक्त के दृष्टिगत राज्य सरकार के अभिमत "विकासकर्ता के Open access के अनुरोध पर विचार किया जाना उचित नहीं है" से मुझे आपको अवगत कराने का निदेश हुआ है।

भवदीय,

  
(सौरभ जैन)  
अपर सचिव