

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 02 of 2013

In the matter of:

Review Petition against the Commission's Order dated 21.12.2012 on the Petition filed by M/s Him Urja (P) Ltd. seeking determination of tariff of its Vanala SHP.

AND

In the matter of:

Uttarakhand Power Corporation Limited

...Petitioner

Versus

M/s Him Urja Pvt. Ltd.

...Respondent

CORAM

Shri Jag Mohan Lal, Chairman

Shri C.S. Sharma, Member

Shri K.P. Singh, Member

Date of Hearing: January 03, 2013

Date of Order: January 08, 2013

This Order relates to the review Petition filed by Uttarakhand Power Corporation Limited (hereinafter referred to as "UPCL" or "Petitioner" or "licensee") under Section 94(1)(f) of the Electricity Act, 2003 and Regulation 68(1) of UERC (Conduct of Business) Regulations, 2004 for review of the Commission's Order dated 21.12.2012 passed on the Petition filed by M/s. Him Urja (P) Ltd. (hereinafter referred to as "generator" or "Respondent") seeking determination of tariff of its Vanala SHP.

1. Background and UPCL's submission

- (a) The PPA was entered with the generator for sale/purchase of power from the Vanala SHP on 15.05.2010 for a period of 1 year, however, the generator is continuously supplying power to UPCL from the date of synchronization of the plant.
- (b) The Commission vide its letter dated 04.12.2012 had directed UPCL that after execution of the PPA between the generator and UPCL, the provisional tariff of Rs.

3.50 per unit shall be applicable for Vanala SHP in accordance with Regulation 14(2) of UERC (Tariff and Other Terms for Supply of Electricity from non- conventional and Renewable Energy Sources) Regulations, 2010 (hereinafter referred to as "RE Regulations, 2010").

- (c) On the Petition filed by the generator seeking determination of the project specific tariff of its Vanala SHP, the Commission vide its Order dated 21.12.2012 directed UPCL to execute the PPA with the generator to buy power from Vanala SHP on 21.12.2012 and also to release the outstanding payment due to the generator within 3 days of the order, i.e. by 24.12.2012.
- (d) In compliance of the Order issued by the Commission, UPCL entered into a long term PPA on 21.12.2012 with the generator to buy power from Vanala SHP.
- (e) The Commission vide its letter dated 26.12.2012, mentioned that the Director (Operation), UPCL had, during the hearing held on 21.12.2012 misrepresented before the Commission and is liable to be proceeded against. UPCL submitted that it has entered into a PPA with the generator in compliance of the directions of the Commission. However, UPCL further submitted that it does not agree with the decision of the Commission regarding applicability of the tariff prior to the execution of the PPA and has therefore filed the review Petition before the Commission.
- (f) UPCL also submitted that the Commission in its Order dated 21.12.2012 read with letter dated 04.12.2012 held that the provisional tariff of Rs. 3.50 per unit is applicable to the generator as per the provisions of RE Regulations, 2010. UPCL was also directed to ensure that all the outstanding payment due to the generator shall be settled at the provisional tariffs within 3 days of the signing of the PPA. UPCL in its review petition submitted that the Commission had erred in holding that the tariff as per Regulation, 2010 should be applicable even prior to the date of execution of the PPA and not from the date of execution of the PPA.
- (g) Accordingly, UPCL requested the Commission to stay the Order of the Commission and also to order that the tariff provided in RE Regulations, 2010 shall be applicable from the date of execution of the PPA till the final determination of tariff for Vanala SHP.

The Commission decided to hold a hearing in the matter to seek views of the Petitioner as well as the Respondent with regard to maintainability of the review Petition and fixed the hearing on 03.01.2013.

2. Submission of UPCL and the generator during the hearing

The Commission heard the Petitioner and the Respondent on 03.01.2013 on the issue of maintainability of the Petition filed by UPCL. The response of UPCL and the generator are discussed hereunder:

- (a) UPCL submitted that RE Regulations, 2010 provides that the rates specified in the Regulations will be applicable only in case the generator signs a long term PPA with UPCL. However, RE Regulations, 2008 does not provide for entering into a long term PPA, hence, payment can be made to the generator as per the rate specified in RE Regulation, 2008. Further, UPCL also submitted that the PPA entered into with the generator on 15.05.2010 was terminated by UPCL on August, 18 2010 and as such no PPA exist with the generator and hence the rate of Rs. 3.50/unit should not be made applicable to the respondent's plant.
- (b) The generator referred to Regulation 8(5) and Regulation 30(1) of RE Regulation, 2008 which provides the agreement period. Further, the levelised rates specified in RE Regulation, 2008 were not for short term but for long term as the life of SHPs have been considered as 35 years and PPA period as 30 years has been specified in the said Regulations. Further, as per the PPA dated May, 2010 the tariffs payable by UPCL were in accordance with the rates specified by the Commission in RE Regulation, 2008 as amended by the Commission from time to time. The RE Regulation, 2008 were repealed by the Commission through its RE Regulation, 2010. Hence, the rates given in the PPA should have been modified to that extent.

The generator also submitted that UPCL has issued a letter ordering recovery of Rs. 0.75/unit for the electricity supplied from its plant during July, 2010 to August, 2012 and has stopped the payment from September, 2012 onwards which has affected the generator seriously. UPCL did not provide any opportunity to the generator to plead its case and assumed the power of the Commission by fixing a rate applicable to the generator's plant.

The generator also submitted that UPCL has not specified any error in the order of the Commission, and hence the review Petition filed by UPCL is not maintainable.

- (c) The Commission during the course of the hearing asked UPCL that whether the review Petition filed by it was maintainable and how they intend to sustain their contention of mistake or error apparent in the order issued by the Commission. The Commission also

asked UPCL as to why it complied with one direction of the Commission of signing the PPA and not with other direction of settling payment. UPCL was also enquired upon its understanding of the provisions of Regulation 14(2) of RE Regulations, 2010 as UPCL has itself relied upon the same. The Commission ordered that the relevant Regulation 14(2) be read during the hearing, and UPCL was asked to explain as to where was the requirement of PPA while granting interim/provisional tariff to generator. UPCL did not furnish any satisfactory reply on the queries raised by the Commission and only mentioned that the Commission had erred in holding that the tariff as per RE Regulations, 2010 should be applicable even for the period prior to signing of the PPA. The Commission also enquired the intent and purpose of seeking 15 days time vide their letter dated 24.12.2012. UPCL mentioned that it was for settling the dues of the generator.

The Commission also asked the generator that while signing the PPA did UPCL inform it that it will not be able to consider the tariff for it based on the RE Regulations, 2010 from retrospective date, i.e. July, 2010 and, accordingly, it will not be able to release the outstanding dues by 24.12.2012 to it. The generator informed that no such intent was communicated to it by UPCL.

3. Commission's View

Section 94(1)(f) of the Act empowers the Commission to undertake review, which can be exercised in the same manner as a Civil Court would exercise such powers under section 114 and Order XLVII of the Code of Civil Procedure, 1908 (CPC). Under the said provisions, review of the Order is permitted on the following specific grounds only, namely:

- (i) Discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time of passing of the Order.
- (ii) Mistake or error apparent on the face of the record;
- (iii) If there exist other sufficient reasons.

Given this unambiguous position of law as spelt out above, the Commission is of the opinion that the contention of UPCL that the Commission had erred in its Order is totally frivolous and misconceived as the Commission was fully aware that no PPA existed between the generator and UPCL and had, therefore, directed UPCL in its letter dated 04.12.2012 and then again in its Order dated 21.12.2012 to enter into a PPA with the generator and release all the outstanding dues of the generator at the provisional tariff approved by the Commission within 3

days. Thus, the Petition filed by UPCL does not pass the tests of review as underlined in CPC and hence, the Petition is not maintainable.

It is, however, observed that UPCL has been taking stands and actions which contradict the earlier ones. They continued to pay the generator at the generic rate of Rs. 3.50 per unit for almost 2 years and then recovered the assessed extra payment in 2 months. They first sought 15 days time to release the payment after the order of the Commission and then came up with a review petition contending "error apparent". A chaotic environment is being created by this inconsistent behaviour of UPCL. At the cost of being repetitive, the Commission once again undertakes examination of whole gamut as under:

- (a) UPCL had executed a PPA with Vanala SHP on 15.05.2010 for a period of one year. UPCL subsequently, terminated the PPA w.e.f. 18.08.2010. However, UPCL continued receiving power from the plant till August, 2012 at Rs. 3.50/unit. As per the PPA signed the tariffs agreed upon both the parties was at the levelised rate specified for such plant in schedule I of UERC (Tariff and other terms for supply of electricity from non-conventional and renewable energy sources) Regulations, 2008 as amended from time to time.

In this regard, the contention of UPCL that the RE Regulation, 2008 does not necessarily require long term PPA and, therefore, the rates as per the Schedule annexed to RE Regulations, 2008 can be applied to generators selling power under short term PPA is unfounded. Further, the contention of UPCL that it had erroneously made payment to the generator at the rates specified under RE Regulation, 2010 is misconceived. The tariffs specified under RE Regulation, 2008 were also for long term as the Commission has specified levelised tariffs under these Regulations considering the life of SHPs to be 35 years. Further, Regulation 8(5) of RE Regulation, 2008 specifies as under:

"The generating plant shall enter into a power purchase agreement with the distribution licensee of the area in which the plant is located for a period of at least 20 years from the date of its commissioning, in line with the Model Power Purchase Agreement. The parties to the agreement may make plant/site specific changes in the Model PPA not inconsistent with the Act, these Regulations and other relevant Regulation. Such changes shall however be subject to approval of the Commission."

Further, Regulation 30(1) of RE Regulation, 2008 specifies as under:

"The life and PPA period of wind/biomass/bagasse projects shall be 20 years. For SHPs, however, the life shall be 35 years and PPA period as 30 years. After the expiry of PPA period, first right of purchase shall be that of distribution licensee."

Thus, from the reading of the above provisions of RE Regulation, 2008 it is clear that those Regulations were also applicable on plants having long term PPA with UPCL.

- (b) Vanala SHP had filed an application for determination of tariff before the Commission on 26.03.2010 which was pending since the generator had preferred an appeal before the Hon'ble Supreme Court on the issue of open access. Regulation 14(2) of RE Regulation, 2010 specifies as under:

"Till fixation of final tariffs a RE Based Generating Stations or Co-generating Stations may either accept the generic tariff as provisional tariff or make an application for determination of provisional tariff in advance of the anticipated date of completion of project based on the capital expenditure actually incurred up to the date of making the application or a date prior to making of the application, duly audited and certified by the statutory auditors. The provisional tariff as may be determined by the Commission may be charged from the Commercial Operation Date (CoD) of the respective unit of the generating station."

In accordance with the above referred provisions of the Regulations, the Commission had allowed a provisional tariff of Rs. 3.50/unit for Vanala SHP only after execution of long term PPA with UPCL which shall continue to apply till the final determination of tariff for Vanala SHP by the Commission vide letter dated 04.12.2012.

- (c) Despite the directions of the Commission, UPCL failed to sign the PPA with the developer within 3 days of the receipt of consent by the developer. The Commission heard both UPCL as well as the generator on 21.12.2012. The hearing was attended by Director (Operation), UPCL and he agreed to execute the PPA on that day itself and also to make payment to the generator within 3 days of the order, i.e. by 24.12.2012. This was also recorded by the Commission in its order dated 21.12.2012 and has not been refuted by UPCL. Infact UPCL vide its letter dated 24.12.2012 had informed the Commission that a long term PPA was executed with the generator on 21.12.2012 and UPCL had also requested for 15 days time to make payment of outstanding amount to the generator and that too without forwarding any reason whatsoever. Finding the Petitioner's action of seeking modification/review of Commission's decision absolutely inconsistent with the provisions of the Act or UERC (Conduct of Business) Regulations, 2004 and thereby legally untenable, the Commission issued notice to the Petitioner on dated 26.12.2012 informing it about its misdemeanour and warned it that for such act of the Petitioner, it

may be liable for appropriate action under the Act. It would be relevant to reiterate the contents of the said notice and the same is reproduced below:

"Notwithstanding what is stated above, the Commission has directed me to inform you that, prima-facie, you have repeatedly contravened directions/orders of the Commission, thus, rendering yourself liable to be proceeded against as per Section 142 of the Act. Further, prima-facie, your representative during the hearing held on 21.12.2012, has misrepresented before the Commission and is liable to be proceeded against."

Thereafter, the Petitioner on 28.12.2012 filed a petition for review of the Commission's Order dated 21.12.2012, which the Commission has found to be without any valid grounds or basis necessary for any review petition under the Act/regulations. The Commission has already given its views while dealing with the said review Petition earlier in this Order. This action of UPCL is totally uncalled for and unacceptable. Further, it is not understood as to why UPCL in the first instance sought 15 days time from the Commission for releasing the outstanding dues of the generator. A clear case of misrepresentation by Director (O) of the Petitioner Company is also made out as only after his assurance during the hearing held on 21.12.2012 that the payment would be released to the generator within 3 days of the Order, i.e. by 24.12.2012, the Commission recorded the same in its Order and directed UPCL, accordingly. Director (O), UPCL is liable to be proceeded for the same in accordance with the provisions of the Act. The Commission in the current proceeding is refraining itself from taking any decision in the matter but would separately decide whether any action need be initiated against the Director (O), UPCL or not.

During the course of the hearing, the Commission enquired from the Petitioner about the significance and legal sanctity of its letter dated 24.12.2012, to which the Petitioner submitted that it had requested the Commission for giving 15 days time for making the outstanding payment to the respondent. Further, the Petitioner also submitted before the Commission that they should be given sufficient time for compliance of the orders/decisions considering the fact that if the Petitioner is aggrieved by such order/decision of the Commission it gets sufficient time to file a review Petition before the Commission. The Commission would like the Petitioner to take note that under the Act, after issuance of the Commission's Order, both the Petitioner(s) as well as Respondent(s) have only the legal recourse either to comply with such Orders/decisions within the stipulated time provided in the said Orders/decisions and submit a compliance report, if directed to do so in such orders/decisions, or the

Petitioner(s)/Respondent(s) may file a review application before the Commission in accordance with the relevant provisions of the Act/Regulations. However, the Petitioner(s)/Respondent(s) cannot inordinately delay the compliance of the Orders/decisions of the Commission on the pretext of filing a review petition.

It should not be forgotten that the generator was not ready to sign long term PPA with UPCL but was interested in signing a PPA for short term at APPC rate so as to get itself accredited under REC mechanism. But when UPCL stopped making payment to the generator it expressed its willingness to enter into a long term PPA with UPCL.

UPCL was expected to act in a prudent and reasonable manner when the generator was ready to sign the long term PPA with it and it should have released the amount due to it considering that it has obligations under RE Regulation, 2010 and UERC (Compliance of renewable purchase obligation) Regulations, 2010 which it has to meet by purchase of power from RE sources or through purchase of REC's from the exchange. Recently, the Commission had issued an order dated 19.12.2012 in the matter of non-compliance by UPCL of RE Regulations, 2010 and RPO Regulations, 2010 wherein the Commission had directed UPCL to carry forward the unmet RPO for FY 2011-12 for both solar as well non-solar sources to 2012-13 which shall be met alongwith the RPO for FY 2012-13. Further, the Commission had also referred to dilly-dallying on the part of UPCL in executing PPAs with RE generators on flimsy pretexts and had cautioned UPCL that if such improvement is not seen in the immediate future, the Commission would be constrained to proceed against UPCL appropriately. However, it appears that UPCL has again ignored the directions of the Commission.

- (d) It appears that UPCL seems to have developed a tendency to give a blind eye to the directions issued to it. In the current proceedings also there have been two instances of non-compliance by UPCL of the directions issued by the Commission. The first non-compliance by UPCL was of direction issued by the Commission vide its letter dated 04.12.2012 to execute the PPA within 3 days of receiving consent from the generator and releasing payment within 3 days of signing of the PPA. The second non-compliance was of Commission's Order dated 21.12.2012 wherein UPCL was directed to release the outstanding payment due to the generator within 3 days of the Order. As already discussed above, this direction was based on the assurance given by Director (O), UPCL. The Commission currently is not taking any decision in the matter but would separately decide whether action needs to be initiated against UPCL under the Electricity Act, 2003.

En-passant, the Commission would like to record its displeasure on the happenings in this case. The licensee was making payments at a rate, which according to them was higher than permissible, as per Hon'ble Supreme Court order, for almost 2 years and then chose to recover the excess amount paid in two months. Apparently, for these two months nothing was paid to the generator, thereby, rendering even O&M activities difficult. After specific orders were issued by the Commission, the licensee still did not release any money and chose to prefer this review which is neither maintainable nor sustainable on merit. The intent appears to be to continue availing power from this renewable source, avail attached benefits by counting it towards its RPO and continue to dither on making due payments. The actions, as aforesaid of the licensee, raise serious doubts on their commitment to meet their RPO. It also suggests misuse of their dominant position. Their actions are also obstructing Commission's efforts to promote renewable generation as also promotion of investment in State in electricity sector. The Commission would like to caution the licensee that their working on cross-purpose with the objective of Commission as also to the mandate of the Electricity Act, 2003 will not be conducive to their growth. The Secretary is directed to bring up this matter as and when UPCL's renewable purchase obligation is reviewed by the Commission. UPCL is also given one last opportunity to mend its ways failing which action will be taken against it under the Act.

- (e) Further, going by the submission of UPCL that Commission's order dated 21.12.2012 will adversely affect its financial health, it appears that either UPCL is ignorant of the Commission's orders issued from time to time or are unable to comprehend them logically. The Commission while approving the power purchase cost for UPCL in the Tariff Order for FY 2012-13 had already allowed purchases from Vanala SHP at the rates specified under RE Regulations, 2010. Hence, there is no question of the Commission's order impacting the financial health of UPCL adversely.
- (f) Hence, in light of the facts brought out above, the Petition filed by UPCL does not pass the tests of review and is thus, not maintainable. The review Petition is, therefore, dismissed. UPCL is directed to release the outstanding payment to the Respondent without any further delay, i.e. within 03 days of this Order.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Jag Mohan Lal)
Chairman