

Before

## UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

**In the matter of:**

Adjudication of dispute under Section 86(1)(f) between Uttar Bharat Hydro Power (P) Ltd. and Uttarakhand Power Corporation Ltd. in respect of 10.5 MW Sarju III Small Hydro Power Project.

**In the matter of:**

M/s Uttar Bharat Hydro Power (P) Ltd.

... Petitioner

AND

**In the matter of:**

Uttarakhand Power Corporation Ltd.

... Respondent

CORAM

**Shri Subhash Kumar Chairman**

**Shri K.P. Singh Member**

**Date of Hearing: October 18, 2016**

**Date of Order: October 28, 2016**

The Order relates to the Petition dated 16.03.2016 and an application dated 27.09.2016 filed by M/s Uttar Bharat Hydro Power (P) Ltd. for adjudication of dispute between Uttar Bharat Hydro Power (P) Ltd, a generating company and Uttarakhand Power Corporation Ltd., a distribution licensee (hereinafter referred to as "the Respondent" or "UPCL") with regard to 10.5 MW Small Hydro Power Project of the Petitioner under Section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred to as "the Act") for "Deemed Generation Claim" by 10.5 MW Sarju III SHP on account of loss of generation due to non-availability of evacuation line and voltage problem. The Petitioner vide above Petition has prayed as follows:

- (a) Pass an Order setting aside the decision of Respondent in Meeting dated 10.08.2016
- (b) Pass an Order directing the Respondent to pay tariff on deemed generation basis for Sarju III project with delayed payment surcharge.
- (c) Pass any further Order as the Commission may deem just and proper.

## 1. Background

- 1.1 M/s Uttar Bharat Hydro Power (P) Ltd. (hereinafter referred to as “the Petitioner”) is a Company incorporated under the Companies Act, 1956. The Petitioner submitted that it was 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 11.07.2014) and 12.6 MW Sarju II (project completed on 01.08.2015) and the Petitioner also intends to establish 7.5 MW Sarju I Small Hydro Power Project. The Petition filed by the Petitioner is with regard to the claim of deemed generation which is being consistently rejected by the Respondent with regard to 10.5 MW Small Hydro Power Project of the Petitioner. The petition has been filed under Section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred to as “the Act”) and the petition pertains to adjudication of dispute on “Deemed Generation Claim” by 10.5 MW Sarju III SHP on account of loss of generation due to non-availability of evacuation line and voltage problem.
- 1.2 Earlier the Petitioner had filed a petition before the Commission seeking relief in the matter of dispute with UPCL that the deemed generation charges was not paid by UPCL. The Commission after due analysis of submissions made by M/s UBHP & UPCL vide its Order dated 08.06.2016 held that the claim of deemed generation is admissible to the Petitioner in accordance with the provisions of the RE Regulations. The Commission vide its Order also directed that:

*“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.*

*c) UPCL to review the requirement of capacitor banks at its substations and submit a status report on the capacitor banks within 1 month of the Order.*

*d) The Petitioner granted leave to agitate the issues remaining disputed after two months.”*

## 2. Petitioner’s Submissions

- 2.1 The Petitioner submitted that it had entered into a Power Purchase Agreement dated 16.12.2002 with UPCL wherein the Petitioner had agreed to set up a small hydro power project (Sarju III Project) and generate & supply electricity to the Respondent on the terms and conditions contained in the PPA which was superseded by the Power Purchase Agreement dated 13.10.2011 approved by the Commission vide Order dated 14.10.2015 with certain amendments

to ensure consistency with the relevant Regulations. The Petitioner further submitted that the Commission, inter-alia, specified the provision for deemed generation in its UERC (Tariff and other terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generation Stations) Regulations, 2013 (hereinafter referred to as “the RE Regulations, 2013”).

- 2.2 The Petitioner had set up the power plant of 10.5 MW (Sarju III) in accordance with the provisions of the PPA which was commissioned on 10.07.2014. As per the PPA, the Petitioner was to construct the transmission line from the generating company to the interconnection point which in the present case was 33 kV Kapkote sub-station and the Respondent was to grant approval as well as technical assistance in addition to facilitation of interconnection at the sub-station. The Petitioner further submitted that the responsibility of evacuation of power beyond the Kapkote sub-station was that of the Respondent. The Respondent 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 project. The Petitioner submitted that it was ready and 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 CoD. However, on account of downstream constraints faced by the Respondent in its system, the Respondent restricted the evacuation of power from the project to 7 MW. The Petitioner submitted that the restriction was solely due to the inability of the Respondent to evacuate the power beyond 33 kV Kapkote Sub-station.
- 2.3 The Petitioner further submitted that even against 7 MW, the Respondent has not been taking delivery of the full quantum and has been restricting the generation at a much lower capacity. Further, there has been a loss of generation due to high/low voltage, trippings and grid interruptions without any fault in the lines of the Petitioner. The Petitioner had informed the Respondent many times regarding loss of generation as well as the financial problems faced by it.
- 2.4 The Petitioner further submitted that there was no default on part of the Petitioner or any force majeure condition preventing the generation from the power plant of the Petitioner. The only reason was the inability of UPCL to evacuate power from the said sub-station. Accordingly, the Petitioner is entitled to deemed generation on the quantum of electricity that can be generated from the power plant as per the water availability in accordance with the Regulations. The Petitioner had, accordingly, raised the invoices for Deemed Generation claim for the loss of

generation. However, the Respondent refused to make any payment on the basis that the restriction in generation was due to the improvements being carried out in the evacuation system and, infact, the Respondent had vide Minutes of Meeting dated 25.02.2016, restricted the capacity for evacuation to 3.5 MW.

- 2.5 In addition to the above, the Petitioner submitted that it was entitled to claim deemed generation for the unavailed capacity from COD of the Sarju III Project. The RE Regulations clearly provide for Deemed Generation from small hydro projects for loss of generation on account of non-availability of evacuation system beyond the inter-connection point and receipt of backing down instructions from the SLDC as well as variations in voltage etc. Further, the Petitioner is facing financial problems to service the interest and finance charges and other fixed commitments including employee cost, O&M expenses etc. The Petitioner has requested the Commission to pass an order directing the Respondent to pay tariff on deemed generation for Sarju III project from the CoD alongwith the delayed payment surcharge/interest.
- 2.6 The Petitioner vide its instant petition dated 27.09.2016 submitted that the claims of deemed generation are set aside by the Respondent and also after three reconciliation meetings with the Respondent, the Petitioner's requests for proper evacuation, deemed generation are rejected and therefore the Petitioner approached the Commission to set aside the decisions taken in the reconciliation meetings. The Petitioner submitted that the monthwise details handed over by the Respondent are incorrect and the Petitioner had undertaken to file comments on the same during the meeting.
- 2.7 The Petitioner submitted that UPCL denied the claim of deemed generation on account of grid interruptions/outages by stating the specious claim of force majeure without any substance or proof thereof. Further, UPCL had stated that the conductor replacement works were being carried out at certain time slots without substantiating the same. UPCL had not planned such works nor submitted such schedule to M/s UBHP or to the Commission. The Petitioner further submitted that there was discrepancies in the data handed over by the Respondent.
- 2.8 The Petitioner submitted that the Respondent erred in claiming force majeure in respect of thunder, lightning and bad weather and heavy rains without substantiating the same. The Respondent had not provided any details either at the relevant time or in the meeting and had merely stated that the outages are due to bad weather. The Petitioner submitted that the Respondent is required to satisfy the Petitioner and the Commission as to the existence of the force majeure event, i.e. bad weather, thunder and lightning or rains at the time as claimed by

the Respondent and further that such events actually affected the transmission system or evacuation facilities and the outage could not have been prevented by the Respondent.

2.9 The hearing on the matter was held on 18.10.2016. The Ld. Advocate appearing on behalf of the Petitioner argued that based on the Commission's Order dated 08.06.2016, the developer had 3 meetings with UPCL for reconciling the "Deemed Generation" claim of the developer due to loss of generation on account of non-availability of evacuation. The Ld. Advocate also submitted that UPCL has rejected its claim of Deemed Generation based on the following 3 reasons:

- (a) Capacity Restriction in 33 KV Kapkote Bagheshwar line.
- (b) Tripping/non availability of line due to Force Majeure reasons like heavy rainfall, thunder, lightening, felling of trees etc.
- (c) Voltage fluctuation problem.

Moreover, it was submitted that these cannot be considered valid reasons for rejecting deemed generation for lack of evacuation infrastructure.

### **3. Submissions of the Respondent**

3.1 UPCL had, vide its letter dated 28.04.2016, submitted that the PPA between UPCL and the Petitioner was initially executed on 16.12.2002 for the capacity of 2 MW and thereafter vide implementation agreement dated 03.06.2011 the capacity of 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 on 26.02.2015.

3.2 The Respondent had further submitted that prior to signing of the PPA on 13.10.2011, the Respondent was not aware of any enhancement of the capacity of the Petitioner, therefore, the question of upgrading and planning the evacuation system didn't arise. Further, the Petitioner was aware about the constraints of existing evacuation network. In addition, the Respondent submitted that it had approved the conversion of Raccoon conductor to Dog conductor in June 2014 for enhancement of evacuation system.

3.3 The Respondent submitted that the Petitioner had misrepresented the Minutes of Meeting as an order for restricting the Petitioner to generate only certain quantum of power whereas, it is clear from the minute of meeting 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.

- 3.4 The Respondent submitted that the Petitioner has filed the Petition u/s 86(1)(f) of the Act, however, the said provision is not attracted as there is no dispute which requires adjudication by the Commission and the Petitioner has not complied with the provision of the RE Regulation, 2013 relating to Deemed Generation. The Petitioner has not reconciled on monthly basis the loss of generation which is mandatorily required for claiming deemed generation. The Petitioner has not filed any authentic document in support of his claim.
- 3.5 The Respondent further submitted that the Petitioner wants his non-achieving of the rated capacity be treated as deemed generation due to constraint in the evacuation system which is not legally permissible. The provision of deemed generation assumes the existence of proper evacuation system and permits deemed generation only when due to fault of the licensee, the evacuation system is not available for hours more than those which are permissible. The purpose is to maintain an efficient evacuation system and also avoid loss of useful generation. But in the present situation the system was always available but due to the enhancement in the capacity of the Petitioner the existing system became insufficient and the Respondent has all along been making efforts to strengthen its evacuation system as per the requirement.
- 3.6 The Respondent further submitted that the Petitioner was aware of the constraints in the existing evacuation system and also the difficulty being faced in conductor replacement and laying down of panther line. Moreover, the Petitioner had all along accepted this position which is also evident from the agreement reached on 22.05.2014. However, the Petitioner for the first time on 23.06.2015 mentioned that it should be permitted to evacuate 10.5 MW of power or else it should be allowed deemed generation. UPCL submitted that the Petitioner knew the existing situation and was also aware that unless the conductor replacement of the existing line is done it would not be possible to evacuate 10.5 MW of power yet writing that letter shows the ulterior motive of the Petitioner to create false and frivolous dispute.
- 3.7 UPCL vide its reply dated 17.10.2016 submitted that after the Commission's Order dated 08.06.2016, the Respondent had three reconciliation meetings with the Petitioner and rejected their claims of deemed generation. Further, the Respondent in the hearing held on 18.10.2016 submitted that the developer (Petitioner) cannot challenge the minutes of the meetings before the Commission and reiterated UPCL's stand that the deemed generation claim is not maintainable in accordance with the Regulations as recorded in the minutes since capacity restriction was known to the developer from the beginning and the evacuation line outages

were due to force majeure reasons like heavy rainfall, thunder, lightning beyond the control of UPCL.

- 3.8 Further, the Respondent submitted that if the Petitioner had disagreements it should have brought that up in the meeting itself, so that its effective reply could be given to the Petitioner and the matter could be reconciled. Further, the Respondent has stated that the reply submitted by the Respondent in its earlier Petition should be considered as its reply for the present Petition. Also, the Respondent submitted that the Petition is not liable to be admitted and that the Respondent reserves the right to file a detailed and comprehensive reply upon the merits of the case as and when required.
- 3.9 UPCL submitted that the Petitioner has just submitted a chart for amount claimed as deemed generation, however, the Petitioner has not enclosed any calculation and factual data. The Respondent again submitted that the Petitioner was aware of the constraints in its evacuation network, local problems regarding the existing lines and also problem faced in replacement of the conductor. Further, the Petitioner had never challenged the agreement reached in the meeting dated 22.05.2014. On the contrary M/s UBHP had always complied with the same hence the petition is barred by the principle of waiver and acquiescence. Further, the Petitioner had never raised any invoice after the reconciliation meeting which shows that there was no dispute which requires adjudication between the parties. UPCL submitted that M/s UBHP has not filed any authentic document in support of its claim.
- 3.10 UPCL submitted that the provision of deemed generation assumes the existence of proper evacuation system and permits deemed generation only in cases where it is the fault of the licensee. However, in the present situation the system was always available but due to the enhancement in the capacity of the Petitioner the existing system became insufficient.

#### **4 Commission's Views & Decisions**

- 4.1 Taking cognizance of the submission made by the Petitioner & Respondents during the course of hearing and as discussed above, the Commission observes that UPCL has rejected all claims of deemed generation and has also held the deemed generation claim as not maintainable. UPCL could not submit proper reply including analysis of nature of outages, period of outages and their causes consistent with requirement of Regulations with regard to deemed generation and simply stated force majeure, voltage fluctuation and no timely reconciliation by the Petitioner as grounds for disallowing deemed generation.

4.2 The Respondent contended that the provision of deemed generation assumes the existence of proper evacuation system and permits deemed generation only due to the fault of licensee, however, in the present situation the system was always available but due to the enhancement in the capacity of the Petitioner's plants, the existing system became insufficient. In this regard, Regulation 47(1) of the RE Regulations, 2013 provides that:

*“(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*

*...”*

Apparently, non-availability of the evacuation system beyond the interconnection point is one of the factors for admissibility of deemed generation claim for RE generating stations. Further, evacuation system beyond the interconnection point is responsibility of the licensee. By allowing transmission of part capacity generation due to insufficient evacuation system, as also admitted by the licensee, and denying deemed generation on account of frequent outages as claimed by the Petitioner clearly makes out a case of dispute between the parties involved. The Commission had already held that the deemed generation is admissible and both the parties were required to settle the deemed generation charges after monthly reconciliation of the deemed generation claimed by the Petitioner within two months time from the Order dated 08.06.2016 in accordance with the provisions of the Regulations. Further, the Commission has also noted that the details/information furnished by one party is not being accepted by the other party. Even after the revised PPA dated 13.10.2011 was signed by UPCL with the Petitioner, UPCL took no steps for facilitating evacuation of power from the Petitioner's plants even when it was in its knowledge that two more generating stations were scheduled to be commissioned whose evacuation also depended on the existing network. This reflects towards the callous approach and apathy of UPCL towards RE based generating stations as a result of which it not only loses energy but is also unable to meet its RPO target. The Commission expresses displeasure over lackadaisical approach and vague excuses of the licensee (Respondent) and warns it to refrain from such callousness in future.

4.3 The Commission is of the view that the dispute between a Generator & licensees can be adjudicated in accordance with Section 86(1)(f) of the Electricity Act, 2003 by the Commission and the aforesaid provision of the Act also empowers the Commission to direct that the dispute may be adjudicated upon by an arbitrator to be appointed by it. The Hon'ble Supreme Court of

India has also held in the case of Gujarat Urja Vikas Nigam Ltd Vs Essar Power (2008) 4 SCC 755 (the Mimansa judgment) that the appropriate Commission may either decide the dispute itself or appoint an arbitrator to adjudicate upon the disputes between the parties. The Hon'ble Supreme Court has, inter alia, held:

*"59. In the present case we have already noted that there is an implied conflict between S. 86(1)(f) of the Electricity Act, 2003 and S. 11 of the Arbitration and Conciliation Act, 1996 since u/s 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under S. 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with S. 11 of the Arbitration and Conciliation Act, 1996. This is also evident from S. 158 of the Electricity Act, 2003.*

*However, except for S. 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations u/s. 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)*

*60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in cls. (a) to (e) and (g) to (k) in S. 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in S. 86(1)(f) about the nature of the dispute.*

*61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over S. 11 of the Arbitration and Conciliation Act, 1996. However, as regards, the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, S. 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between*

*licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.*

- 4.4 Considering that in-depth study of records would be needed to address the rival contentions of the parties as also the complicated questions of facts and documents that would have to be gone into, the Commission is of the view that it would be appropriate that an arbitrator is appointed to adjudicate the disputes raised between the parties.
- 4.5 The Commission is also of the view that the prayers at (a) & (b) made by the Petitioner in the Petition are also prayers that an arbitrator is competent to grant in law.
- 4.6 In exercise of powers conferred to it under section 158 of the Electricity Act, 2003 and dictum of Hon'ble Supreme Court quoted in para 4.3 hereto above as well as in terms of Regulations 20 & 21 of UERC (Conduct of Business) Regulations, 2014, the Commission hereby nominate Shri Subhash Chander Negi, Ex-Chairman, HPERC, Address: House No. B-51, Lane 4, Sector 1, New Shimla, Shimla, H.P., Pincode-172009, Mobile No. +919418129215 as the sole arbitrator to decide the dispute amongst the parties on the issues raised by the Petitioner in respect of Deemed Generation charges for the period from December 2014 to till date as claimed by Petitioner.
- 4.7 The Petition filed before this Commission would be treated as the statement of claim before the arbitrator. The Petitioner would be at liberty to apply to the Arbitrator, in accordance with law, to file any further and/or amended pleadings documents etc. that may be permitted by the arbitrator in accordance with law.
- 4.8 The parties would be permitted to complete their pleadings, filing of documents, leading of evidence etc. in terms of the directions that may be passed by the arbitrator from time to time in accordance with law.
- 4.9 The Arbitration proceedings would be governed by the procedure for the arbitration in accordance with the Arbitration and Conciliation Act, 1996.
- 4.10 The arbitration fees would be Rs. 2.00 Lakh as a consolidated amount for the entire proceedings including all hearings, reading fees, etc. The said amount would be for the entire arbitration proceedings including making of the claims and counter claims by the Petitioner and the Respondents respectively in the beginning, i.e. at the time of entering of reference before the arbitrator and would also cover, if any, fresh claim(s) and counter claim(s) that are brought before the arbitrator during the course of the proceedings later on. The said fees would be paid

by the Petitioner and Respondent to the arbitrator in three installments, i.e. 25% of the fees at the time of entering of reference before the arbitrator by the parties, next 25% of the fees after the issues are framed by the arbitrator and balance 50% of the remaining fee after the final award is given by the arbitrator.

- 4.11 The arbitrator would also be entitled to claim reimbursement of actual travelling expenses for travels, if required, in connection with the arbitration.
- 4.12 The arbitrator may conduct the proceedings as expeditiously as possible, preferably within 3 months of application to be made by the Petitioner as mentioned in Para 4.8 above.
- 4.13 The parties may approach the named arbitrator with a copy of this Order to enable the arbitrator to enter into the reference.
- 4.14 As regards prayer of the Petitioner as stated above, it is ordered that a comprehensive time bound plan for appropriate and reliable evacuation of power from Petitioner's plant be formulated by the Respondent within one month of the order and be submitted to the Commission.
- 4.15 Ordered accordingly.

**(K.P. Singh)**  
**Member**

**(Subhash Kumar)**  
**Chairman**