Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 15 of 2022

In the matter of:

Petition for issuing necessary directions to UPCL to withdraw invoices issued against the Petitioner imposing 25% additional Temporary Supply Tariff and issue revised invoices under RTS-5 consumer category.

In the matter of:

M/s Dhanshree Agro Products (P) Ltd. … Petitioner

AND

In the matter of:

Uttarakhand Power Corporation Ltd. … Respondent

CORAM

Shri D.P. Gairola	**Member (Law) / Chairman(I/c)**
Shri M.K. Jain	**Member (Technical)**

Date of Hearing: May 04, 2022

Date of Order: June 27, 2022

The Order relates to the Petition dated 28.03.2022 filed by M/s Dhanshree Agro Products (P) Ltd. (hereinafter referred to as "Petitioner") requesting to issue necessary directions to Uttarakhand Power Corporation Limited (hereinafter referred to as "UPCL" or "Respondent") to withdraw invoices issued under RTS-9 category, i.e. Temporary Supply by levying additional 25% of tariff approved by the Commission under RTS-5 category, i.e. LT & HT Industry and issue revised invoices in accordance with RTS-5 consumer category.

1. Background

1.1 The Petitioner is a company registered under the Company's Act, 1956. The Petitioner

apart from the manufacture of sugar, also uses the byproducts of the sugar manufacturing process to generate electricity from Bagasse Based Cogeneration Plant, having a capacity of 20 MW. The Petitioners entered into a Power Purchase Agreement (PPA), dated 12.10.2011 with the Respondent for the sale of entire 20 MW power scheduled to the Petitioner.

1.2 The Commission approved the aforesaid PPA vide its Order dated 07.11.2014 in Petition no. 21 of 2014 subject to certain modifications in the provisions of PPA.

2. Petitioner's submission

2.1 The Petitioner submitted that it is a seasonal industry and does not operate throughout the year. The Petitioner submitted that the manufacture of sugar and the consequent generation of electricity is dependent on the availability of the raw material, i.e. sugar cane and hence, the factory and the generating plant of the Petitioner is only operational during the sugarcane season, which on average lasts for approximately six months every year.

2.2 The Petitioner submitted that the generating plant is not operational for nearly six months every year, in order to provide for its electricity needs, it has availed a permanent electricity connection from the Respondents, bearing connection no. 2321G, category RTS-5, HT Industry above 75 kW upto 1000 kW.

2.3 The Petitioner submitted that the regular bills were being paid by the Petitioner against the bills issued by the Respondent against the above stated electricity connection, as applicable for category RTS-5. The Petitioner also submitted that out of the export bills issued by the Petitioner to UPCL, for the month of March 2021, the Petitioner had deposited a sum of Rs. 70 Lakh with the Respondent, as advance payments against the future bills for importing of power. However, the bill invoice issued by the Respondent against the electricity connection of the Petitioner for the month of June 2021 included 25% additional charge for temporary charge.

2.4 The Petitioner submitted that the category stated in the bill was still marked as category RTS-5, however, the word temporary was added thereafter. The amount of the modified bill was deducted from the advance payments that had already been deposited with the Respondent. Furthermore, arrears for temporary supply charges were deducted for the

month of April 2021 and May 2021 by the Respondent.

2.5 The Petitioner submitted that it wrote a letter to the Executive Engineer, UPCL Roorkee requesting an explanation for the change in the computation of the bill for June 2021 against the same, a reply was issued by the Executive Engineer stating that the bill has been issued on the basis of the tariff, after adjusting the prior dues.

2.6 The Petitioner submitted that the letter issued by the Executive Engineer is untenable as the Petitioner had already paid Rs. 70 Lakh in advance in lieu of future bills. Hence, it is improbable that any prior dues would be existing against the Petitioner. No rational reasons were provided by the Respondent with respect to the query of the Petitioner regarding the tariffs being charged to the Petitioner.

2.7 The Petitioner submitted that the bills issued for every subsequent month included 25% surcharge for a temporary connection, which were deducted from the advance payments already deposited by the Petitioner with the Respondent. The Petitioner submitted that vide bill for the month of July 2021, the Respondents arbitrarily deducted the temporary supply charges for the month of June 2018 to October 2020 from the amount already deposited with the Respondent.

2.8 The Petitioner submitted that owing to the discrepancies in the bill and the arbitrary retrospective deductions being made by the Respondent from the corpus deposited by the Petitioner, an explanation was sought from the Executive Engineer, UPCL, for the additional surcharge of 25% and the retrospective deductions being made by the opposite party, without any prior notice or issuance of a valid bill, for temporary connection in the bills issued by the Respondent.

2.9 The Petitioner submitted that the Executive Engineer, UPCL, informed the Petitioner that the additional surcharge of 25% was being levied due to the operation of provisions of Regulation 47 of RE Regulations, 2018 issued by the Commission from time to time as per which the connection of the Petitioner is to be charged as per the temporary category. The Petitioner also submitted that no explanation was provided for the retrospective application of the provisions on prior bills, the invoices for which were duly raised by the Respondent and were duly paid by the Petitioner.

2.10 The Petitioner submitted that Regulation 47 of RE Regulations, 2018 is not applicable on

it and hence, the imposition of the 25% additional temporary supply tariff is not applicable on the Petitioners.

2.11 The Petitioner submitted that Regulation 47 (1) of RE Regulations, 2018 specifies as follows:

> "*Any person, who establishes, maintains and operates a generating station and normally does not need power from the licensee round the year, may purchase electricity from generating company or a distribution licensee in case his plant is not in a position to generate electricity to meet the requirement of his own use or for start up and consequently power is required to be drawn from distribution licensee*."

The Petitioner submitted that as per aforesaid regulation, the pre-condition for the applicability of the regulation is that the generating company should not "normally need power from the licensee round the year". The Petitioner submitted that it does not fulfill the above stated qualification as the Petitioner does not generate electricity round the year. Further, the Petitioner is a Bagasse based Cogeneration Plant and are therefore constrained to operate in seasons where the raw material for the operation of the factory and consequently the generating plant is available. As the sugarcane season and consequently, the operation of the factory and the generating plant is limited to 180 days a year, the Petitioner needs to draw electricity from the UPCL for the nearly half a year. Hence, a permanent electricity connection (category RTS-5) has been installed in the premises of the Petitioner since the inception of the factory, wherefrom the electricity needs of the Petitioner are fulfilled during the period when the plant is not operational.

2.12 The Petitioner also submitted that the first proviso of Regulation 47(1) provides as follows:

> "*…in case electricity generated from the plant is being exclusively sold to the State Distribution Licensee, the electricity (in kWh) procured by the generating Station from the State Distribution Licensee to meet its requirement of his own use or for startup power, will be adjusted from the electricity sold to the Distribution Licensee on month to month basis. The distribution Licensee shall make the payment for net energy sold to the Generating Company, i.e. difference of the total energy injected into the grid and energy drawn from the grid by the Generating Company. In case the energy supplied by the distribution licensee is more than the energy injected by the*

generating company, the net energy (in kWh) thereof shall be billed by the distribution licensee in accordance with 2nd proviso below."

The Petitioner submitted that as stated above the proviso shall only be applicable to generating company in accordance with the Regulation 47. In the present case, the Petitioner falls beyond the ambit and scope of Regulation 47 of the RE Regulations, 2018. The Petitioner further submitted that as per the proviso the legal assumption for the applicability of the proviso is injection of energy by the generating company, as the difference between the energy drawn and the energy injected shall be charged, by the operation of the regulation, as per the tariff determined by the Commission for temporary supply. Hence, the regulation presumes the injection of energy by the generating company for the applicability of the proviso, which is inapplicable in the case of the Petitioner. As stated above the Petitioner is not in a position to inject energy into the grid throughout the year owing to the limited period of operation of the generating plant. Hence, the charging of the 25% additional tariff on the entire energy drawn by the Petitioner during the period where the generating plant is non-operational, through a permanent connection is not maintainable.

2.13 The Petitioner submitted that the electricity connection of the plant availed from the Respondent is a permanent connection, as is evident from the tariff category RTS-5. As per the guidelines, rules of the Respondent itself, a temporary connection is one which is granted for a limited period of time and requires renewal of the connection once the time period for the connection has expired. The Petitioner submitted that it had availed of a permanent connection, which after the connection was installed has never been renewed as is required for a temporary connection. Hence, the depiction of the connection, in the invoices raised, as RTS-5 (temporary) is contradictory as per the rules and the tariff categories determined by the Respondent. As per the tariff orders a temporary connection is determined as category RTS-9 and has to be charged as per the tariff plans determined for the same. Therefore, the invoices raised by the Respondent are invalid, contradictory and against the tariff scheme of the Respondent and are hence liable to be quashed.

2.14 The Petitioner submitted that the PPA executed between the Petitioner and the

Respondent clearly states that the rate applicable for supply of electricity by UPCL to the Generating Company shall be as per the tariff determined by the Commission under appropriate "Rate Schedule Tariff" for the consumer category-determined on the basis of total load requirement of the plant and billing done in the manner specified by the Commission in the Regulations. The Petitioner submitted that the connection of the Petitioner has been categorized as RTS-5 which is evident from the bills/invoices issued by the Respondent. Hence, as per the PPA, the tariff applicable is for the category RTS-5. As per the Tariff scheme the RTS-5 category does not include any 25 % surcharge which has been added to the invoices of the Petitioner. As the terms and conditions of the PPA are sacrosanct for the sale and purchase of energy between the Petitioner and the Respondent, the issuance of the amended invoices by the Respondent is in violation of the PPA.

2.15 The Petitioner submitted that even though Regulation 6(7) of RE Regulations, 2018 provides that all PPAs signed by the generating stations existing on the date of notification of these regulations shall be amended in accordance with these regulations and such amended PPAs shall be valid for entire life of RE based generating station and co-generating stations. The Petitioner submitted that in case of a contradiction between the PPA and the Regulations, it has been mandated that the PPAs be amended to incorporate the rational of the regulations, and the same shall be applicable for the lifetime of the respective PPA. Hence, as per regulations, if the Regulations are inconsistent with the PPA, the same shall only come into force after consequent and relevant amendments have been made in the PPA. The Petitioner submitted that in the present case no amendments have been proposed in the PPA by the Respondent, and the regulations have been applied without making the mandatory amendments in the PPA. It is further submitted that as the operation of the Regulations is not retrospective and are applicable from the date of the notification, no invoices can be raised in lieu of the regulations prior to the amendment of the PPAs to reflect provisions of the regulations.

2.16 The Petitioner submitted that owing to the controversy with respect to the payment of invoices for the month of February 2022, the Respondents have withheld the bills sent by the Petitioner in lieu of the energy sold to the Respondent dated 05.03.2022 amounting to Rs. 55.22 Lakh for the months of February, 2022. The Petitioner submitted that it has to

make further payments to the farmers for the purchase of raw materials, i.e. sugar cane and due to the non-payment of the bills by the Respondent, the Petitioner has come under immense financial strain to fulfill its obligations to the farmers.

2.17 The Petitioner also submitted that Rs. 54.54 Lakh has also been deducted from the bill for the month of January 2022 against the energy generated by the Petitioner for the power exported to the Respondent without prior intimation to the Petitioner, which is in clear violation of the provisions of the PPA. The Petitioner submitted that as per clause 5.4 of the PPA, UPCL is liable to make full payment against such monthly bills to the Generating Company within 30 working days of the receipt of the Monthly Bill after availing 2% rebate. Furthermore, as per the clause 5.6 of the PPA specifically states the bills raised by the Generating company shall be paid in full subject to the fact that a) there is no arithmetic error in the bills; and (b) The bills are claimed as per tariff referred to in Para 2 of this agreement, which are in accordance with the energy account.

2.18 The Petitioner submitted that PPA does not empower the Respondent to make deductions or make recoveries from the export bills of the Petitioner in any manner whatsoever. The actions of the opposite party are arbitrary, unjustified and without any legal justification and is hence liable to be quashed.

3. Respondent's reply and Petitioner's rejoinder

3.1 The Commission in order to provide transparency forwarded the copy of the Petition to the Respondent for comments on admissibility of the Petition. In the matter, UPCL vide letter dated 29.04.2022 submitted its reply in the matter. Subsequently, the Commission heard the matter on 04.05.2022 for admissibility of the Petition. The Commission vide Order dated 04.05.2022 admitted the Petition and directed the Respondent to submit its comments on merit of the Petition with a copy to the Petitioner and also directed the Petitioner to submit rejoinder, if any, before the Commission. The Respondent submitted its reply on merit of the Petition vide letter dated 13.05.2022 and in compliance to the Commission's direction, the Petitioner submitted its rejoinder on 25.05.2022 which have been dealt in the subsequent paragraphs of this Order.

3.2 UPCL submitted that the Petition is based on total misconception and wrong understanding of the provisions of the tariff regulations, therefore, the Petition being

against the provisions of the regulations cannot be entertained. Further, the Respondent submitted that the Petitioner is wrongly representing to have availed the permanent electricity connection to suggest that the same will continue, the status of the connection of the Petitioner before the installation of the captive generating plant has no relevance with the present nature of the connection.

In reply, the Petitioner denied that it has wrongly represented that it has availed a permanent electricity connection and that it has no relevance with the present nature of the connection. The Petitioner submitted that the electricity bill depicts the permanent connection number issued to it by the Respondent.

3.3 UPCL submitted that the Petitioner has admitted that it is a seasonal industry and does not operate throughout the year and has submitted that its plant is not operational for nearly six months in a year and in order to provide for its electricity needs depends on UPCL yet subsequently has denied applicability of the Regulation 47 of RE Regulations, 2018 although the Petitioner has admitted that the pre-condition for applicability of the provisions is that the generating company should not "normally need power from the licensee round the year" and has denied that the said provision is not applicable to them as they do not generate electricity round the year, this reasoning itself is contradictory and on the face of it appears absurd. UPCL submitted that the Petitioner has wrongly stated that aforesaid regulation is not applicable to them and that its plant falls beyond the ambit and scope of Regulation 47, the Petitioner has not given any basis for making such an assumption even otherwise the basis of the Petition is mere conjecture and surmise as can be seen from the Petition wherein the Petitioner has stated the criteria for applicability of the provision as injection of energy by the generating company which is inapplicable in case of the Petitioner as they believe that injection can only be throughout the year. UPCL submitted that the Petitioner has made argumentative submission based upon wrong understanding and misinterpretation of the true import of Regulation 47 of RE Regulations, 2018. UPCL submitted that the Petitioner is wrongly understating the concept of permanent electricity connection and suggesting as if the same can be utilized as per needs and convenience of the Petition. The Petitioner has not disclosed as to quantum of contracted load of his permanent connection and is further not clarifying the fixed demand charges paid by him throughout the year with respect to the contracted

load of his permanent connection.

In reply, the Petitioner submitted that it is admitted that the Petitioner is a seasonal industry and it is also admitted that the provision of Regulation 47 of RE Regulations, 2018 are only applicable when the generating company does not need power from the licensee round the year. It submitted that the submissions of the Petitioner were contradictory in any manner. Being a seasonal industry, when the generating plant of the Petitioner is not functional, i.e. for half of a year, the Petitioner normally needs electricity from UPCL. Regulation 47 is applicable only to the industries which normally do not need power from the licensee round the year. It does not apply to the Petitioner as the Petitioner requires electricity from UPCL in the season when it is not operational, i.e. nearly half year. The explanation merely flows from a single interpretation of the provision. The Petitioner admitted that it has a permanent connection and that when the generating plant is not operational electricity need of the Petitioner are fulfilled by the licensee. The Petitioner further submitted that the criteria for the application for the Regulations is not the existence of a permanent connection as has been misconstrued by UPCL but the need of power from UPCL, i.e. drawing of power as is enumerated in the regulations. Hence, the two concepts are not contradictory to each other in any manner as suggested by UPCL and the existence of the permanent connection cannot be considered to be an admittance of the applicability of Regulation 47 of RE Regulations, 2018. Furthermore, in the months when the Petitioner exports power to UPCL, the Petitioner does not incur any fixed demand charges. The Charges are levied alongwith the consumption charges, on the basis of consumption during the off season of the Petitioner.

3.4 UPCL submitted that in case of any inconsistency between the provisions of the PPA and the regulations, provisions of regulations shall prevail irrespective of the fact whether the PPA is revised or not. UPCL submitted that this question had been settled in various decisions and recently this question also come up directly for consideration of the Commission in the matter of M/s Uttam Sugar Mills and the Commission in its Order dated 14.12.2021 in Petition no. 41 of 2021 has mandated that whenever provision of the PPA and regulations are contrary, provisions specified in Regulation shall prevail.

In reply, the Petitioner submitted that relation between the parties is governed by the provisions of the PPA. Without prejudice to the submissions of the Petitioner with respect to the applicability of Regulation 47 of RE Regulations, 2018 it is submitted that the applicability of the provisions on the generating company are not being denied. The Petitioner also submitted that Petition no. 41 of 2021 does not deal with the interpretation of Regulation 47 vis~a~vis its applicability on a seasonal generating plant which normally is unable to sustain its electricity needs in months when the plant is not operational and not producing electricity and is completely reliant on UPCL for its electricity needs.

3.5 The Respondent vide its reply dated 13.05.2022 submitted the Executive Engineer (Ramnagar), Roorkee has informed the Petitioner that the billing has been done in accordance with the Regulation 47 of RE Regulation, 2018. It is wrong to say that no rational reasons were provided with respect to the query of the Petitioner. The Petitioner is knowingly not accepting the rightful imposition of the charges. UPCL submitted that the Petitioner has raised the issues pertaining to bills which falls within the category of a consumer dispute which can only be subject to the jurisdiction of consumer grievance redressal forums established under the provisions of Electricity Act, 2003.

In reply, the Petitioner denied that the nature of the dispute falls within the category of consumer dispute. The Petitioner submitted that Consumer Grievance Redressal Forum is not empowered to grant the relief with respect to the invoice of the Petitioner that have been withheld by UPCL in contravention to the PPA agreement between the parties and hence, the dispute falls within the jurisdiction of the Commission. Further, the Petitioner denied that the letter of the Executive Engineer was self-explanatory and that legally imposable charges had escaped from billing for earlier months. The Petitioner submitted that it is challenging the applicability of the Regulation 47 of RE Regulations, 2018 upon the Petitioner and in view of the same the letter of Executive engineer cannot be considered as self-explanatory.

3.6 UPCL submitted that the Petitioner has mistakenly mentioned the period from June 2018 to October 2018 in place of October, 2020.

In the matter, the Petitioner admitted that an inadvertent typographical error has

caused the words October, 2020 to be written as October 2018 and hence be read as October 2020.

3.7 With regard to the provisions of PPA, UPCL submitted that the clauses of PPA itself laid down the billing of the plant would be done in the manner specified by the Commission in the Regulations. The contention of the Petitioner making distinction of RTS-5 category or 25% additional surcharge are wrong and that the Petitioner does not seem to have clarity regarding these provisions. UPCL submitted that bills are being paid in accordance with the provisions of the PPA and the payment of Rs. 5.16 Crore has been made after deduction of TDS and Rebate on 08.04.2022 against the bill for the February 2022 amounting to Rs. 5.22 Crore.

The Petitioner submitted that the contents of the Respondent are wrong and denied. The Petitioner submitted that the bills of the Petitioner are being withheld by UPCL which is evident from the record. The Petitioner further denied that the bills are being paid in accordance with the terms of PPA, as the PPA does not stipulate the arbitrary withholding of bills issued by the Petitioner.

4. Commission's Analysis and view

4.1 The Commission conducted a hearing on the Petition on 04.05.2022. After hearing both the parties, the Commission vide Order dated 04.05.2022 admitted the Petition and directed the Respondent to submit its comments on the merits of the Petition and the Petitioner was directed to submit rejoinder within two weeks from the receipt of the reply from the Respondent. Both the parties submitted their comments in accordance with the directions of the Commission. After examining the relevant material available on records, issues raised by the Petitioner in the Petition and in the rejoinder, reply of the Respondent, the analysis of the Commission are dealt in the subsequent paragraphs of this Order.

4.2 M/s Dhanshree Agro Products Pvt. Ltd. is engaged in the business of electricity power generation from bagasse based cogeneration plant at Roorkee, Uttarakhand having capacity of 20 MW. A PPA has been executed on 12.10.2011 between UPCL and the Petitioner for supply of electricity upto 20MW from the said cogeneration plant. Further, the Commission vide Order dated 07.11.2014 approved the PPA and directed UPCL to

take note of the modifications suggested by the Commission in the said order and carry out the same in the PPA and submit the amended/supplementary PPA to the Commission within 45 days of the date of that Order.

4.3 The generating plant of the Petitioner supplies 20 MW of surplus power to UPCL and during off-season, the Petitioner imports power to cater its maintenance requirements. The electricity rate for export and import of electricity to/from grid is applicable as per clause 2 of the PPA. The relevant extract of the clause 2 of the PPA specifies as follows:

"2.1 UPCL shall accept and purchase entire 20 MW power made available to UPCL system from Generating Company at the levellised rate (as opted by generating Company for such plant in Annexure I of Uttarakhand Electricity Regulatory Commission (Tariff and other terms for supply of Electricity from Renewable Energy Sources and non-fossil fuel based co-generating stations) Regulations, 2010 as amended from time to time based on sources and technologies as mentioned at point no. (v) below:-

(i) Small Hydro with capacity upto 25 MW.

(ii) Wind

(iii)Solar including its integration with combined cycle

(iv) Biomass/Biogas

(v) Bagasse based cogeneration as per MNRE guidelines.

(vi) Urban/Municipal waste, or

(vii)Any new source of technology which would qualify as 'Renewable Energy' only after approval of Commission based on the Ministry of Non-conventional Energy Sources (MNRE) approval in accordance with the terms and conditions of this agreement.

2.2 The rate applicable for supply of electricity by UPCL to the Generating Company shall be as per the tariff determined by the Commission under appropriate 'Rate Schedule of Tariff for the consumer category determined on the basis of the total load requirement of the plant and billing done in the manner as specified by the Commission in the Regulations.

…"

Accordingly, UPCL is liable to pay for the power made available from the Petitioner's generating plant to it at the levelized rate specified by the Commission in

Annexure-I of RE Regulations, 2010. Further, if the generating company imports electricity from UPCL, the rate shall be as per the tariff determined by the Commission under appropriate 'Rate Schedule of Tariff for the consumer category determined on the basis of the total load requirement of the plant and the billing shall be done in accordance with the provisions of Regulations.

4.4 Before going into the merits of the Petition, it is worth mentioning that the Respondent has submitted that the Petitioner has raised the issues pertaining to bills and thus, the same is a consumer dispute and falls within the jurisdiction of Consumer Grievance Redressal Forums (CGRF) established under the provisions of the Electricity Act, 2003. In the matter, the Petitioner stated that CGRF is not empowered to grant the relief with respect to the invoices of the Petitioner that have been withheld by UPCL in contravention to the PPA.

The Commission agrees with the submission of the Respondent to the extent that the instant matter prima facie appears to be a billing dispute between the generator and the licensee. The cause of action arose when the bills which were raised by the Petitioner in the capacity of a generator were being adjusted against the bills issued by UPCL to the Petitioner.

4.5 Now, coming down to the core issue that is applicability of Regulation 47(1) of RE Regulations, 2018 and rate schedule. In this regard, the Petitioner has submitted that UPCL's demand for additional 25% over and above electricity tariff specified under RTS-5 is unjustified. The Petitioner has also submitted that Regulation 47(1) of RE Regulations, 2018 is applicable only on generators which normally do not need power from the licensee round the year and does not apply to the Petitioner as the Petitioner requires electricity from UPCL in the season when it is not operational. The Petitioner stated that existence of permanent connection cannot be considered to be an admittance of the applicability of Regulation 47 of RE Regulations, 2018.

With regard to the above submission of the Petitioner regarding non-applicability of Regulation 47 of RE Regulations, 2018 on it, it would first be appropriate to examine Regulation 47 of RE Regulations, 2018 which specifies as follows:

"47. Purchase of Electricity by the Generating station including Start up Power

(1) ***Any person, who establishes, maintains and operates a generating station and normally does not need power from the licensee round the year, may purchase electricity from a generating company or a distribution licensee*** *in case his plant is not in a position to generate electricity to meet the requirement of his own use or for start-up and consequently power is required to be drawn from distribution licensee:*

Provided that in case electricity generated from the plant is being exclusively sold to the State Distribution Licensee*, the electricity (in kWh) procured by the Generating Station from the State Distribution Licensee to meet its requirement of his own use or for startup power, will be adjusted from the electricity sold to the Distribution Licensee on month to month basis. The Distribution Licensee shall make the payment for net energy sold to it by the Generating Company, i.e. difference of the total energy injected into the grid and energy drawn from the grid by the Generating Company.* ***In case the energy supplied by the distribution licensee is more than the energy injected by the generating company, the net energy (in kWh) thereof shall be billed by the distribution licensee in accordance with 2nd proviso below****;*

Provided further that in case electricity generated from the plant is sold to third party other than the Distribution Licensee, then ***such purchase of electricity by the generating company from the distribution licensee, shall be charged as per the tariff determined by the Commission for temporary supply under appropriate "Rate Schedule of tariff" for Industrial Consumers considering maximum demand during the month as the contracted demand for that month.*** *The Fixed/Demand charges for that month shall be payable for the number of days during which such supply is drawn. Such Generating Company shall, however, be exempted from payment of monthly minimum charges or monthly minimum consumption guarantee charges or any other charges."*

(Emphasis added)

It is explicitly clear from the above regulation that sub-regulation (1) of Regulation 47 of RE Regulations, 2018 specifies that any generating station which does not need power from the licensee round the year, may purchase electricity from a distribution licensee in case his plant is not in a position to generate electricity to meet the requirement of his own use or for start-up and consequently power is required to be drawn from distribution licensee. Thus, any generator which does not require power

from the licensee throughout the year is covered under this Regulation. The Petitioner has interpreted the regulation stating that it is applicable to the generating plants which normally do not need power from the licensee round the year, however, the Petitioner requires power from UPCL in the season when it is not operational.

The Petitioner in the instant case does not require power round the year from the licensee and hence, is also covered under the said Regulations. The contention of the Petitioner that it is a seasonal industry and hence, is outside the purview of the RE Regulations is incorrect. The benefit of seasonal tariffs in accordance with the Tariff Orders issued by the Commission from time to time is accorded to the industrial consumers of the licensee and in the instant case the Petitioner is governed by RE Regulations and is not a consumer of the licensee.

In the present case, the generating plant of the Petitioner falls within the ambit of sub-regulation (1) of Regulation 47 of RE Regulations, 2018 as the bagasse based power plant remains in operation for six months and for the remaining period the Petitioner draw power from UPCL's to meet its own requirement of electricity.

4.6 With regard to the submission of the Petitioner that since it does not inject energy into grid throughout the year owing to limited period of operation of its generating plant, it does not qualify to be treated under the proviso of Regulation 47(1) of RE Regulations, 2018.

Let us again look into first proviso of Regulation 47 (1) of RE Regulations, 2018 which specifies as follows:

"*Provided that in case electricity generated from the plant is being exclusively sold to the State Distribution Licensee, the electricity (in kWh) procured by the Generating Station from the State Distribution Licensee to meet its requirement of his own use or for startup power, will be adjusted from the electricity sold to the Distribution Licensee on month to month basis. The Distribution Licensee shall make the payment for net energy sold to it by the Generating Company, i.e. difference of the total energy injected into the grid and energy drawn from the grid by the Generating Company. In case the energy supplied by the distribution licensee is more than the energy injected by the generating company, the net energy (in kWh) thereof shall be billed by the distribution licensee in accordance with 2nd proviso below;".*

It is to elucidate that the said proviso is a mechanism for billing of generators falling in the scheme of Regulation 47. Since it is already established above that Regulation 47 is applicable in the present case of the Petitioner, the requirement of the said regulation including the proviso is inevitable and cannot be discounted. The submission of the Petitioner that it is operational only for limited period and therefore, is out of the purview of the said proviso is irrelevant as it falls under the present scheme where it is injecting energy as well as drawing energy from the grid as already discussed above.

Provision 1 of Regulation 47 deals with billing in the scenario when the generator injects energy into the grid and when it draws energy from the grid. The rationale submitted by the generator that it does not fall under the purview of regulation 47(1) and its proviso for the reason that the generating plant in certain months is not injecting power into the grid and therefore, "adjustment" cannot happen and the said regulation cannot apply is a very flimsy argument. The issue must be read in the light and intent of Regulation 47. Twisted interpretation must not be made to secure personal interests.

4.7 Further, the first proviso of Regulation 47(1) of RE Regulations, 2018 precisely and clearly expresses that if a generating plant supplies electricity exclusively to State Distribution Licensee, UPCL in present case, the electricity imported by the generating plant from the State Distribution Licensee to meet its requirement for maintenance or start up power, will be adjusted from the electricity sold to distribution licensee by such generating plant on monthly basis and net energy shall be billed by UPCL in accordance with second proviso of aforesaid regulation which states that such purchase of electricity by the generating company from UPCL shall be charged as per tariff determined by the Commission for temporary supply under appropriate "Rate Schedule of Tariff" for industrial consumers.

However, Annexure-II of the PPA provides that under no circumstances the saleable energy would be net-off of energy supply by the generating station to UPCL and energy used by Generating company in case of breakdown or any other emergency conditions and the condition of charging tariff do not arise.

With regard to inconsistency between the provisions of prevailing regulations

and PPA, the Petitioner has submitted that as Regulation 6(7) of RE Regulations, 2018 recognises the possibilities of conflict between the regulations and the PPAs and hence, it has been mandated that the PPAs be amended to incorporate the rationale of the regulations and the same shall be applicable for the life time of PPA. Accordingly, as per the provisions of regulation, if the regulations are inconsistent with PPA, the same shall only come into force after consequent and relevant amendments has been made in the PPA. Further, no amendment has been made in the PPA and regulations have been applied without making mandatory amendments in PPA.

With regard to contradiction between the provisions of PPA and regulations, Regulation 6(7) of RE Regulations, 2018 specifies as follows:

> *"(7) All Power Purchase Agreements (PPAs) signed by the generating stations existing on the date of notification of these regulations shall be amended in accordance with these regulations, if inconsistent with these Regulations, and such amended PPAs shall be valid for entire life of the RE Based Generating Stations and Co-generating Stations."*

It is evident from the above-mentioned regulation that all the existing PPA needs to be amended in accordance with the provisions of RE Regulations, 2018. With regard to the submissions of the Petitioner, it is pertinent to mention that a contract entered into between the parties is definitely binding on the parties but only in so far as the conditions contained in a contract are not contradictory to the law and corresponds to the provisions of law. If the contract is the outcome of duress or coercion or where the contract does not conform to the law, the law will prevail over the contract. It is trite law that in case of statutory contracts, the terms of statute prevails over the terms of the contract as held by the Hon'ble Supreme Court in M/s. Soma Isolux NH One Tollway Private Ltd. Vs. Harish Kumar Puri & others reported in 2014 AIR SCW 3421. Further, Hon'ble Supreme Court in PTC India Ltd. v. CERC (2010) 4 SCC 603 also held that Regulations override contractual relationship under the PPA between regulated entities. Accordingly, in case of any contradiction between the provision of PPA and Regulations, provisions specified in the Regulations shall prevail. Hence, billing will be done in accordance with the provisions of RE Regulations, 2018.

In the present case, the Petitioner supplies 20 MW electricity to UPCL and during

off-season, imports power from UPCL to meet its own requirements. Accordingly, during the off season when the energy supplied by UPCL is more than the energy injected by the Petitioner's plant, the net energy (in kWh) thereof shall be billed by UPCL as per the tariff determined by the Commission for temporary supply under appropriate "Rate Schedule of tariff" for Industrial Consumers considering maximum demand during the month as the contracted demand for that month. Accordingly, the Respondent is acting correctly by billing the Petitioner under Temporary Rate of charge in accordance with the RE Regulations, 2018.

Further, as discussed under Para 4.2 of this Order, the Commission vide Order dated 07.11.2014 directed UPCL to take note of the observations of the Commission in said Order and carry out the same in the PPA and submit the amended/supplementary PPA to the Commission within 45 days of the date of the Order. However, the Commission observed that UPCL has not executed amended PPA with the Petitioner to incorporate the modification pointed out by the Commission. In the matter, the Commission expresses its extreme displeasure towards the lackadaisical approach and lack of seriousness to comply with the directions of the Commission. The Commission cautions the licensee that such practices should be strictly avoided, and this should not be repeated in future.

4.8 The Petitioner has submitted that it had deposited a sum of Rs. 70 Lakh with UPCL as advance payment against the future bills for importing power. However, UPCL has adjusted the advance amount against prior period bills stating that additional 25% charges is applicable on the Petitioner in accordance with Regulation 47 of RE Regulations, 2018. Subsequently, UPCL adjusted the said additional 25% from payment towards the invoices issued by the Petitioner to UPCL for supply of electricity. As per clause 5.4 of PPA UPCL is liable to make full payment against such monthly bills to the generating company within 30 working days of the receipt of monthly bills after availing 2% rebate.

In the matter, UPCL submitted that explanation was provided to the Petitioner by the concerned Executive Engineer and the revision was necessitated as the legally imposable charges had escaped from billing for the earlier months and were statutorily

required to be recovered.

The Commission has gone through the submissions of the Petitioner and the Respondents. Clause 5 of PPA deals with the billing procedure and payment. Further, with regard to payment towards the bills raised by the generating company, clause 5.4 and Clause 5.5 specify as follows:

"5.4 UPCL shall make full payment against such Monthly Bills to the Generating Company subject to receive with complete documents within thirty (30) working days of the receipt of the Monthly Bill after availing the 2% rebate.

5.5 The bills raised by the Generating Company shall be paid in full subject to the conditions that

The bill(s) is/are claimed as per tariff referred to in Para 2 of this agreement. They are in accordance with the energy account referred to in Para 14 of this agreement."

In the matter, it is worth mentioning that the generating company can be treated as a prosumer who generates electricity from the byproducts of the sugar manufacturing process to meets its own requirement during sugarcane season and sells the excess power to UPCL whereas during the off-season draws electricity from UPCL and is liable to pay the charges towards electricity consumed. It is a commercial practice generally being followed by the discom to maintain a single account of a party and make all the adjustment with respect to the payment received, dues and amount received from the party in the capacity of generator or consumer. Accordingly, the Commission is of the view that the Respondent has correctly adjusted the amount due from the Petitioner.

4.9 UPCL submitted that when it was realised that the billing of consumer for the off-season period is not being done in accordance with Regulation 47 of RE Regulations, 2018, the mistake was rectified and a corrected bill was raised to the Petitioner.

In the matter, the Commission observed that the first-time adjustment was made in the invoice of April 2021 towards the error in prior period invoices starting from June, 2018 and the Petitioner was making payment towards the invoices raised by UPCL till March 2021 without raising any issue and UPCL had also accepted the payment. However, UPCL issued revised invoices once the error came to its notice after 2 years. In the matter, the Commission is of the view that it would be a prudent business practice to inform the generator before making any adjustment pertaining to past dues.

Accordingly, the Commission advises the Respondent to intimate the opposite parties before making any adjustments towards the past dues.

4.10 Based on the above discussions, the Commission is of the view that the Petitioner falls under the ambit of Regulation 47(1) of RE Regulations, 2018 since it procures power from UPCL only in case of shortage of power from its power plant to meet its requirement and does not need power from UPCL round the year. The requirement of power from UPCL by the Petitioner is temporary in nature. Accordingly, the Petitioner will be billed under RTS-9 (temporary category) in accordance with the first proviso of Regulation 47(1) of RE Regulations, 2018 only for payment towards the said net electricity procured by it from UPCL.

4.11 Ordered accordingly.

(M.K. Jain)
Member (Technical)

(D.P. Gairola)
Member (Law)- Chairman (I/c)