Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Petition dated 06.12.2012

In the matter of:

Dispute between M/s Swasti Power Engineering Limited and Uttarakhand Power Corporation Limited arising out of the Power Purchase Agreement dated 03.07.2009.

AND

In the matter of:

M/s Swasti Power Engineering Limited. **Petitioner**

VERSUS

Uttarakhand Power Corporation Limited. **Respondent**

Coram

Shri Jag Mohan Lal **Chairman**
Shri C.S. Sharma **Member**

Date of Order: 17th December 2012

ORDER

The Petitioner, M/s Swasti Power Engineering Limited has a 22.5 MW small hydro project located at Ghansali, District Tehri Garhwal in the State of Uttarakhand.

2. This Petition was filed seeking following relief:

a. *Hold and direct the Respondent to remit the tariff as per the tariff of Rs. 3.30 per unit as determined by the Hon'ble Commission and applicable for the supply of electricity by the Applicant to the Respondent.*

b. *Hold that the unilateral adjustment/withholding of payment by the Respondent is contrary to the terms of the PPA and illegal.*

c. *Pass such other orders as this Hon'ble Commission may deem fit and proper in the facts and the circumstances of the case.*

3. A hearing in the matter was fixed on 13.12.2012 at 12:00 noon in the Commission's office.

Submission of the Petitioner:

4. The Petitioner submitted before the Commission that it has a Power Purchase Agreement dated 03.07.2009 with the Respondent i.e. Uttarakhand Power Corporation Limited for supply of electricity on the terms and conditions as provided in the said PPA. The tariff for supply of electricity to the Respondent is Rs 3.30 per unit w.e.f. 01.07.2010 in accordance with UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2010 (RE Regulations, 2010). Prior to promulgation of the said regulations the tariff was Rs.2.65 per unit which was as per the Regulations in vogue at that time.

5. The Petitioner further stated that prior to the above PPA with the Respondent, it had a separate Power purchase Agreement dated 24.8.2005 with M/s PTC India Limited for sale of the entire power generated at the Bhilangana generating station excluding the free royalty power to be given to the Government of Uttarakhand.

6. The Petitioner informed that since the Commission had then taken a view with regard to the sale of electricity to PTC vis-a-vis the definition of "Consumer" and due to the matter pending with the Hon'ble Appellate Tribunal, it signed the PPA dated 03.07.2009 with the Respondent to avoid bottling up of the generation and has been supplying power since the commissioning of the project in August 2009.

7. According to the Petitioner there is a specific clause in the PPA which empowers it to terminate the PPA subject to the outcome of the Order of the Hon'ble Appellate Tribunal.

8. The Petitioner submitted before the Commission that w.e f. 01.07.2010, the date from which the new RE regulations,2010 were promulgated, till the month of August, 2012, the Petitioner was being paid the tariff of Rs.3.25 per unit, as per the terms of the PPA for the supply of electricity to the Respondent. However, after its communication dated 16.07.2012 wherein, it sought to invoke its contractual right to terminate the PPA dated 03.07.2009, the Respondent has unilaterally stopped paying the tariff to the Petitioner and has started adjusting the past payments made in terms of the PPA. The Petitioner informed the Commission that in the said communication it also requested the Respondent to enter into a separate agreement for sale of electricity by it at average pooled power purchase cost.

9. The Petitioner further stated that Respondent has been adjusting an amount of 65 paise per unit w.e.f. 01.07.2010 (amounting to Rs.9.5 Crores upto September 2012) and consequently no payments have been made to it for the months of September,2012 onwards. This unilateral adjustment by the Respondent, according to the Petitioner, is illegal, arbitrary and against the principals of natural justice. The Petitioner informed the Commission that due to the unilateral adjustments made by the Respondent there has been no payment made to it from September, 2012 onwards and it is not possible for it to repay its loan to the lenders or pay the salary to its employees.

10. The Petitioner submitted that it has not terminated the present PPA dated 03.07.2009, which is a long term PPA, therefore it should be continued to be paid at the rate of Rs. 3.25 per unit from 01.07.2010, the date of promulgation of the RE Regulations, 2010 till date and the unilateral action of the Respondent reducing the tariff and withholding payments to it is totally illegal and arbitrary.

11. The Petitioner further submitted before the Commission that it approached the Respondent in the year 2005 for entering into a Power Purchase

Agreement with it. However, the Respondent then stated that it does not have any mechanism in place for signing of PPA with small hydro power projects like that of the Petitioner and expressed its inability to do so. According to the Petitioner, it was left with little option but to enter into a PPA with a trader namely PTC for sale of power outside the State. The Petitioner further submitted before the Commission that in the year 2009 when its project was about to be commissioned, the State Commission (UERC), considering the policies of the State Government with regard to small hydro projects in the State and taking cognizance of the conditions provided in the Implementation Agreement of the State Government with small hydro projects, vide its Order dated 30.12.2009 restricted the RE generators from selling power outside the State to entities other than consumers. The Petitioner informed the Commission that under these circumstances it had no other option but to sign a conditional PPA with the Respondent to avoid bottling of generation from its plant.

12. The Petitioner further brought to the notice to the Commission that originally its upcoming generating plant was proposed to be connected at 220/33 kV substation at Ghansali proposed by PTCUL for evacuation of power from its plant. The Petitioner further submitted before the Commission that when its generating plant was ready for commissioning, the work at the proposed 220/33 kV substation at Ghansali had not even started. Therefore, the Petitioner, left with no option got its plant connected to UPCL's 33/11 kV substation Ghansali. The Petitioner further submitted that under these circumstances where a generating plant is connected to 33 kV network system, the Commission would appreciate that availing Open Access for transmitting power outside the State would be highly uneconomical considering the incidence of significant amount of wheeling/distribution charges and the associated distribution losses in addition to levy of transmission charges and losses for both Intra-State and Inter-State transmission network systems. Moreover, the 33 kV network being highly unreliable and prone to frequent outages would make the scheduling of power by the Petitioner and its obligations, under the Grid Code, for

adhering to the day ahead schedule meaningless. The Petitioner stated that as a result of the above it did not find exercising the option of taking power outside the State under Open Access feasible and consequently had to sign a conditional PPA with the Respondent for sale of power within the State .

Submission of the Respondent:

13. The Respondent submitted before the Commission that issuance of the Order by Hon'ble APTEL in January 2011 upholding the Appeal of the Petitioner for sale of power to entities other than consumers outside the State, it approached the Petitioner in March, 2011 for entering into a revised long term PPA with the Respondent. However, the Petitioner did not come forward for signing the same.

14. The Respondent brought to the notice to the Commission that the Petitioner vide letter dated 16.07.2012 informed that it is desirous to terminate the contract for supply of power to UPCL and at the same time it is willing to supply power to UPCL on APPC mode for 18 months and requested that the notice period of 2 months be condoned and an agreement on APPC mode be executed with it for supply of power to Respondent for the said period. Thereupon, the Respondent vide its letters dated 24.09.2012 and 16.10.2012 requested the Petitioner to enter into a fresh long term PPA on preferential tariff as per the provisions of UERC RE regulations, 2010 at the earliest, failing which the Petitioner shall be paid at the old tariff as provided in UERC RE Regulations,2008 from July 2010 onwards and the differential amount from July 2010 to August 2012 shall be recovered from the energy bills of September 2012 onwards till the recovery of excess payment, against the raised energy bills, already made by the Respondent is done.

Commission's View:

15. With regard to the submission of the Petitioner at para 11 above the Commission is of the view that on 03.07.2009 when the conditional PPA was signed by the Petitioner, the UERC RE regulations, 2008 were effective. The Petitioner as well as the Respondent were required to abide by the relevant provisions of that regulation and must have framed the PPA consistent with

the said Regulations. The parties should have come up before the Commission for obtaining approval of the agreement executed.

16. Taking cognizance of the terms and conditions of the PPA dated 03.07.2009 entered between the Petitioner and the Respondent, the Commission is of the view that the said PPA cannot be construed as a valid long term agreement particularly on account of the conditions provided in the agreement. Some of the conditions are reproduced below:

> *"WHEREAS, the Generating Company desires to sell entire 22.5 MW (Plus 10% overload) power scheduled to be generated in the Generating Company's facility to UPCL pending resolution of legal issues regarding the sale of power other than consumer outside the state of Uttarakhand subject to the following conditions:*
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> 1. *Company's right in regard to sale of power outside the State of Uttarakhand to PTC and others on the Final decision on the issue by UERC/Tribunal/Court if the decision is in the favour of the Company*
> 2. *The terms and conditions contained in the PPA and the rights and obligations specified would be subject to the final decision on the legal issues of the sale of power by the company to PTC. However, generating company shall give two months notice to UPCL before termination of this agreement."*
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> ***"19. Duration***
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> *19.1 Unless terminated by default, this agreement shall be valid till the expiry of 30 years or after two months from received of notice from Generating Company if the final decision on the legal issue is in favour of Generating Company regarding the sale of power to other than consumer outside the state of Uttarakhand to PTC and permitted the company to give the power outside the State to PTC, whichever is earlier."*

It is noted that both recital and duration of PPA are not only conditional but also bestow unilateral power of termination to the Petitioner. In view of this, the Commission holds that the power purchase agreement, as it exists today, is not a valid long term agreement.

17. The Commission also takes cognizance of Petitioner's letter dated 16.07.2012 wherein the Petitioner has desired to terminate the contract for supply of power to UPCL and at the same time the Petitioner has stated that it is willing to supply power to UPCL on APPC mode for 18 months. Further the Petitioner in the said letter has also requested that the notice period of 2 months be condoned and an agreement on APPC mode be executed with the company for supply of power to UPCL for 18 months. On this letter of the Petitioner, the Commission during the course of hearing enquired from the Petitioner that why this be not construed as termination notice served by the Petitioner to the Respondent under the conditions of the PPA between them. The Petitioner could not forward any justification on whether this PPA still continues after the issuance of such notice by the Petitioner to the Respondent. It is also noted that the Petitioner vide letter dated 05.11.12 has offered to sign a PPA on preferential tariff. During hearing, the Commission enquired whether they are willing to sign a fresh PPA as mentioned in their aforesaid letter. The Petitioner did not answer in affirmative.

18. The Commission on examination of the past events in the matter is of the view that the Petitioner was keeping all the options open for selling its generation from its hydro project, namely, selling outside the State to a trader under Open Access for which it has entered into a PPA on 24.08.2005 with M/s PTC India Limited, entered into a conditional PPA on 03.07.2009 with UPCL for selling its power till the decision on the Appeal filed by the Petitioner in the Hon'ble APTEL is taken. Notwithstanding the circumstances, the Commission feels that there was no regulatory vacuum on Tariff and other terms & conditions on RE generation regulations and the Petitioner cannot indefinitely keep things uncertain.

19. The Commission would refer to relevant provisions on life and agreement period of the projects and accordingly:

Regulation 30 of RE Regulation, 2008 is reproduced below:

"(1) 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."

Relevant provisions of RE Regulation, 2010 is reproduced below:

Regulation 1 (gg):

"Tariff period means the period for which tariff is to be determined by the Commission on the basis of norms specified under these Regulations;

Regulation 1 (hh)

"Useful life in relation to a unit of a generating station including evacuation system shall mean the following duration from the date of commercial operation (CoD) of such generation facility namely:-

...

(iii) Small Hydro Plant 35 Years

Further, provisions of Regulation 13 on Tariff and PPA period is reproduced below:

" (1) The Tariff Period for Renewable Energy power projects shall be equal to Useful life of the Project.

(2) Tariff Period under these Regulations shall be considered from the date of commercial operation of the renewable energy plant.

(3) The PPA shall be required to be executed with distribution licensee for the entire Tariff Period."

20. Examining the above provisions, the Commission is of the view that RE Regulations, 2008 do specify that for SHPs the life of the project shall be 35 years and also specifies PPA period as 30 years. However, these regulations do not provide that for tariffs determined in the Regulations would only be applicable for projects who enter into a long term PPA with the distribution licensee. Whereas, RE Regulations, 2010 specify the Tariff period which shall be the period for which tariff is to be determined by the Commission on the basis of norms specified under these Regulations and this Tariff period shall be equal to the useful life of the project i.e. 35 years for SHPs. Further specifying that PPA shall be required to be executed with the distribution licensee for the entire Tariff period. Therefore, the Commission holds that in the absence of Petitioner having long term PPA with the Respondent, the

Petitioner is neither entitled to nor can claim for payment of Tariffs as per rate of charge prescribed in RE Regulations, 2010.

21. Based on the above, the Commission holds that the Petitioner's plea for making payment at the preferential tariff prescribed in the RE Regulations, 2010 is not sustainable as they, as of now, do not have a valid long term PPA with Respondent which is a pre-requisite according to that regulation. However, considering the submissions made by the Petitioner during the proceedings and taking a holistic view in the matter, the Commission decides to give the Petitioner an option to either enter into a fresh long term PPA or execute a supplementary agreement to the existing PPA with the Respondent consistent with the provisions of the RE Regulations, 2010, for sale of power for the entire useful life of the plant. The Commission further allows a period of 30 days from the date of this Order to exercise the option of executing fresh/supplementary PPA. The Respondent shall execute PPA within three days of receipt of option of the Petitioner.

22. The Commission further decides that if a valid long term PPA is executed, as above, after execution of the long term Power Purchase Agreement between the Petitioner and the Respondent, the tariff provided in RE Regulation, 2010 shall be applicable for the Petitioner's plant from date of effectiveness of these regulations. Further, the Respondent shall ensure that all the payment which will become due, as a consequence, to Petitioner shall be settled based on this tariff rate within 3 days of signing of such agreement.

Ordered accordingly.

(C.S. Sharma) Member	(Jag Mohan Lal) Chairman