

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No.285 of 2016
AND
IA 585 OF 2016

Dated: 14th November, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I. J. Kapoor, Technical Member

In the matter of :-

M/s DANS Energy Pvt. Ltd.
5th Floor, Building No. 8,
Tower C, DLF Cyber City, Phase-II
Gurgaon- 122 002

... Appellant

Versus

- 1. Uttarakhand Electricity Regulatory Commission (UERC)**
Vidyut Ninyamak Bhawan
Near ISBT, Majra, Dehradun
Uttarakhand- 248 171 **...Respondent No. 1**
- 2. Uttarakhand Power Corporation Ltd. (UPCL)**
VCV Gabar Singh Bhawan, Kanwali Road
Balliwala Chowk,
Dehradun
Uttarakhand- 248 001 **...Respondent No. 2**

Counsel for the Appellant(s): **Mr. M G Ramachandran**
Mr. Anand K Ganeshan
Ms. Swapna Seshadri
Ms. Neha Garg
Mr. Ashwin Ramanathan

Mr. Shubham Arya
Ms. Rhia Luthra
Ms. Saloni Sacheti
Mr. Sandeep Rajpurohit
Ms. Poorva Saigal

Counsel for the Respondent(s): Mr. Buddy A Ranganadhan
Mr. Raunak Jain
Mr. D V Raghuvamsy
Mr. Satish Arya for R-1

Mr. Pradeep Misra
Mr. Manoj Kr. Sharma
Mr. Shashank Pandit
Mr. Suraj Singh for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s DANS Energy Pvt. Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 20.9.2016 (“**Impugned Order**”) passed by the Uttarakhand Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in the Petition filed by the Appellant under Section 62 and 86 (1) (a) of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) seeking determination of tariff for supply of electricity to the Respondent No. 2.
2. The Appellant, M/s DANS Energy Pvt. Ltd. is a company incorporated under provisions of Companies Act, 1956 having registered office at 207, Chiranjeev Tower, 43, Nehru Place, New

Delhi and is a generating company within the meaning of Section 2 (28) of the Act.

3. The Respondent No.1, Uttarakhand Electricity Regulatory Commission is the Regulatory Commission for the State of Uttarakhand, exercising jurisdiction and discharging functions in terms of the Act.
4. The Respondent No. 2, i.e. UPCL, is the distribution licensee in the State of Uttarakhand engaged in the business of retail supply of electricity to the consumers at large.
5. **Facts of the present Appeal:**
 - a) The Appellant has established a 96 MW (2 x 48 MW) Jorethang, run of the river hydro-electric power project ('Project') located on the Rangit river in the State of Sikkim. Unit-1 of the Project achieved Commercial Operation Date (COD) on 25.9.2015 and Unit-2 achieved COD on 30.9.2015.
 - b) The Appellant vide letter dated 29.4.2016 offered to supply entire capacity of the Project (excluding free power to the State of Sikkim) to the Respondent No. 2. On 8.6.2016 the Respondent No. 2 agreed to procure entire capacity offered by the Appellant and filed a petition before the State Commission for approval of the draft Power Purchase Agreement (PPA) to be entered into with the Appellant.

- c) The State Commission on 21.6.2016 admitted the petition seeking approval of the draft PPA and held that final approval of the draft PPA would be considered after determination of tariff of the Project in the petition to be filed by the Appellant. Thereafter on 7.7.2016 the Appellant filed a petition for determination of tariff of its Project under Section 62 read with Section 86 of the Electricity Act, 2003. In the said petition the Appellant restricted capital cost to Rs. 1008 Cr which was being ceiling cost.
- d) In response to communications (13.7.2016 & 26.7.2016) received from the State Commission regarding furnishing of actual completed capital cost as per the Multi Year Tariff (MYT) Regulations, 2015, the Appellant vide letter dated 14.7.2016 and on 27.7.2016 submitted that the completed capital cost of the Project which as per audited accounts worked out to Rs. 1507.52 Cr., however, for the purpose of tariff determination the capital cost claimed is Rs. 1008 Cr. On 9.8.2016, the State Commission dismissed the tariff petition of the Appellant and granted liberty to the Appellant to resubmit the petition based on actual capital cost as per the MYT Regulations, 2015 of the State Commission.
- e) The Appellant on 12.8.2016 filed the fresh petition before the State Commission for determination of tariff for supply of electricity to the Respondent No. 2. UPCL submitted the reply to the petition on 19.9.2016 which was served on the Appellant on 21.9.2016 i.e. after issuance of the Impugned Order dated 20.9.2016. The State Commission vide Impugned Order dated 20.9.2016 dismissed the tariff Petition filed by the Appellant at the stage of admissibility on the ground that power would not be required to be purchased by the

Respondent No. 2 and also rejected the Petition filed by the Respondent No. 2 for approval of the draft PPA. The State Commission based on the reply filed by the Respondent No. 2 also indicated that the tariff would be very high from the Project of the Appellant.

- f) The State Commission during 2015 and 2016 approved the provisional tariff by an interim arrangement for M/s Greenko Budhil hydro power pvt. Ltd. and M/s Gama Infrapop pvt. Ltd. & M/s Sravanthi Energy Pvt. Ltd. gas based power projects. After dismissing the petition of the Appellant, the State Commission also approved provisional tariff for M/s Beta's gas based project. The final tariff of these projects is yet to be determined by the State Commission. The Appellant has contested that the power procurement from gas based projects are costlier and not economical in comparison to the power from the Appellant's Project.
- g) Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present appeal.

6. QUESTIONS OF LAW

The Appellant has raised the following questions of law in the present appeal:

- a. Whether the State Commission has followed the principles of natural justice and procedure prescribed in law in rejecting the petition of the Appellant?

- b. Whether the State Commission is justified in facts and circumstances of the case to dismiss the tariff petition of the Appellant at the admissibility stage?
 - c. Whether the State Commission is justified in dismissing the tariff petition of the Appellant on admissibility for the reason that electricity is not required by the Respondent No. 2 while admitting the tariff petition of a much larger Gas plant heard soon after the petitioner's tariff petition?
 - d. Whether the State Commission is justified in rejecting the power procurement from the Appellant without determination of tariff, contrary to the practice for other generators for whom the tariff petitions are pending, and having disregard to the UERC Regulation 21 (1) which clearly specifies that the tariff can only be determined on the basis of admitted cost after prudence check of the capital cost?
7. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments putforth during the hearings etc. Gist of the same is discussed hereunder.
8. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
- a) The State Commission has erred in passing the Impugned Order without appreciating the issues involved and the process to be

followed as per the Act and the Regulations of the State Commission for determination of tariff and decision on procurement of electricity.

- b) The State Commission has violated the principles of natural justice. The State Commission failed to appreciate that the petition was listed for admissibility on 20.9.2016 and was required to go into issue of whether the petition was within the jurisdiction of State Commission, whether it was barred by limitation and whether petition disclosed any cause of action. The admission stage is not for considering the grounds in reply that may be taken or the merits of matter in detail. Considering such aspects violate the principle of natural justice as the Appellant was even not made aware of grounds in reply being taken on issues on which the State Commission dismissed the petition. On this aspect the Appellant has submitted the judgements of Hon'ble Supreme Court viz. in case of Dharamapal Satyapal Ltd v. Deputy Commissioner of Central Excise Gauhati & Ors. (2015) 8 SCC 519 and in case of Liverpool & London SP&I Association Ltd. v. M.V. Sea Success I & Anr. (2004) 9 SCC 512.
- c) The petition for approval of the PPA was already admitted by the State Commission and it was stated that the said approval will be taken up after determination of tariff. The issue of demand supply gap was not in question before the State Commission in petition for determination of tariff. The State Commission was required to determine the tariff as per the procedure laid down in Section 64 of the Act. The State Commission failed to appreciate that even under Section 64 a tariff petition can be rejected only after giving the

petitioner a reasonable opportunity of hearing. The State Commission has erred in not giving opportunity to the Appellant of being heard before the petition was rejected. The State Commission rejected the petition based on the statement of Respondent No. 2 that the tariff determined is likely to be excessive. This Tribunal in its judgement dated 12.8.2013 in Appeal No. 149 of 2013 in case of Sasan Power Ltd. V. Central Electricity Regulatory Commission has held that matters cannot be rejected at the admissibility stage without following the due procedure in law. The principle of natural justice is well settled by various decisions of the Hon'ble Supreme Court like Brajlal Manilal & Co. V. Union of India (1964) 7 SCR 97 and Appropriate Authority & Commissioner, Income Tax V. Varshaben Bharatbhai Shah (2001) 4 SCC 1.

- d) The State Commission failed to appreciate that the question of requirement of electricity was not in dispute and in fact the petition for approval of the PPA by Respondent No. 2 was admitted by the State Commission. The said petition was based on procurement of power on long-term basis. The proposals for power procurement from other generators by Respondent No. 2 are pending before the State Commission. The State Commission failed to appreciate the power deficit position in the State of Uttarakhand and the requirement of electricity was brought out by Respondent No. 2 in its petition for approval of the PPA. This position was reinforced by the Respondent No. 2 in its reply regarding petition for determination of tariff of the Project. This position was also held by the State Commission in its order dated 19.1.2016 in petition no. 3 of 2016 filed by M/s Gama Infrapop. Similar petition for approval of PPA was filed by the Respondent No. 2 in case of M/s Sravanthi

Energy subsequent to the application of the Appellant. The power purchase plans filed by the Respondent No. 2 in both the cases were identical. M/s Sravanthi Energy is supplying power to Respondent No. 2 under provisional tariff. The State Commission has also approved the provisional tariff of M/s BETA after issuance of the Impugned Order. Further, the Public Sector Development Fund (PSDF) support based on which PPAs were approved was temporary till March'2017 only and the PPAs of the gas stations were approved on long term basis for a period of 25 years. The dismissal of the petition of the Appellant on grounds of no requirement of power is baseless and amounts to unfair discrimination. The details related to these gas based projects are as hereunder:

M/s Sravanthi Energy Pvt. Limited:

The capacity of the project is 214 MW. On 13.7.2015 UPCL filed an application under Section 86 (1) (b) for approval of the draft PPA it proposed to execute with Sravanthi for procurement of 208 MW from the gas power projects to be set up at Kashipur in Uttarakhand. There was a reference to the Ministry of Power Memorandum dated 27.3.2015 for allocation of gas and the Power Sector Development Fund Power Sector Development Fund ("PSDF") subsidy. The tariff was to be determined in terms of Section 62 of the Act. After hearing the parties, the State Commission vide Order dated 30.7.2015 rejected the petition holding that *'since no process was adopted as required under the law, to identify this generator for procurement of power on medium term by the distribution licensee as well as confirmation by the*

Petitioner, that cheaper power is available, the Commission does not agree to approve the PPA with or without modifications as it holds that the basic premises of the PPA, i.e. rate of purchase is not only ambiguous basis of arriving at has not been established. The Commission decides to dispose off the petition as dismissed.'

Subsequently in the year M/s Sravanthi filed a fresh petition before the State Commission for determination of tariff and had proposed an interim tariff of Rs 4.70 per unit. The State Commission vide Order dated 20.7.2016, on the same day when the Appellant's Petition was heard, approved the PPA to be entered into between UPCL and M/s Sravanthi for 214 MW. Thereafter, by Order dated 9.8.2016 the State Commission directed the following:

Accordingly, it is ordered that:

- a. UPCL is directed to treat the Petitioner's generating station as a must-dispatch station and dispatch the Gross energy equivalent to 214 MW from the date of commissioning of the project.*
- b. UPCL is directed to pay a provisional tariff of Rs. 4.70 per unit (exclusive of the PSDF support) to the generator for energy supplied to it or for the period after September, 2016 the capped price decided by Gol in accordance with the Gol (PSDF) Scheme.*
- c. UPCL is also directed to submit its comments, if any, on the merits of the Tariff Petition within one month from the date of the Order.*
- d. The Petitioner is directed to furnish full details as required by the regulations, consequent to the commissioning of the first phase of the project, so that the normative Station Heat Rate could be determined.*

e. The Petitioner is also directed to furnish the details of the total capital cost including IDC consequent to the commissioning of the first phase of the project.

f. The Petitioner is directed to submit the copy of the fortnightly bills raised by GAIL and also the details of PSDF support amount received by it during the month by 7th of the ensuing month.

g. The Petitioner is directed to furnish any further information/clarifications as deemed necessary by the Commission during the processing of the Petition and provides such information and clarifications to the satisfaction of the Commission within the time frame as may be stipulated by the Commission failing which the Commission would proceed to dispose of the matter as it deems fit based on the information available with it.

M/s GAMMA Infrapro Pvt. Limited:

The capacity of the project is 107 MW. The State Commission vide Order dated 19.1.2016, approved a provisional tariff of Rs 4.70 per unit for supply of electricity by GAMMA to UPCL. The tariff petition was pending before the State Commission for final determination of tariff. The State Commission vide Order dated 8.1.2016 had admitted the petition filed by GAMA for determination of tariff. The final tariff is yet to be approved by the State Commission.

M/s BETA Infratech Pvt. Limited:

The capacity of the project is 107 MW. UPCL filed a petition for approval of the draft PPA to be entered into between UPCL and BETA. BETA filed a petition for determination of tariff for generation and sale of electricity from its Gas Power

Station. The State Commission vide Order dated 10.2.2017 decided the petition of BETA providing provisional tariff of Rs. 4.70 per kWh and with similar directions as held in the order of M/s Sravanthi reproduced above.

- e) The State Commission in Multi Year Tariff Order dated 5.4.2016 of the Respondent No. 2 has held that there is power deficit situation in the State for the period FY 2016-17 to FY 2018-19 and pressed upon to make efforts to procure deficit energy through a mix of long/medium/short term purchases by the Respondent No.2.
- f) The State Commission has erred in appreciating that the decision of procurement of power can be finalised when tariff is determined. This is also true for the cases where tariff is determined by the Central Commission. The State Commission is required to decide in such cases whether to procure electricity or not based on such tariff determined. In the present case also the petition of the Appellant needs to be admitted and the tariff at which power is to be supplied is to be determined and approved by the State Commission. The question of decision of approval of PPA can be made only after determination of tariff of the Project. In case of other generators the State Commission has approved provisional tariff before details of capital cost were submitted by the developers before the State Commission.
- g) The State Commission also failed to appreciate that the Appellant agreed to consider ceiling capital cost of Rs. 1008 Cr. for determination of tariff. The ceiling on capital cost is a well-accepted principle by the Regulatory Commissions in determination of tariff under Section 62 of the Electricity Act, 2003. The State Commission

has also erred in quoting the case of M/s Gati Infra wherein the power procurement was not acceptable to the Respondent No. 2. The reasons for not accepting the power were not clear in the ruling. It was implied that it was due to tariff of Rs. 5.53 per unit. The indicative tariff of the Appellant was much less and works out to Rs. 4.60 per unit considering ceiling capital cost. The Respondent No. 2 has proposed to procure power from gas-based plants at much higher tariff of Rs. 5.50 per unit and from upcoming thermal stations where tariff would be higher with applicable fuel escalations.

- h) The State Commission also failed to appreciate that procurement of power from hydro sources is in the interest of the State and the same has also been reaffirmed in the latest Tariff Policy of Government of India. The hydropower source is clean form of energy, does not require any burning of fossil fuel, and is away from vagaries of escalation in fuel prices.
- i) In the reply before this Tribunal the State Commission has submitted that the issue is only power requirement and not of tariff. The Respondent No. 2 has submitted that even after the Impugned Order further power is being tied up with the approval of the State Commission as there is power deficit. There is an inherent factual contradiction in the statements of the State Commission and the Respondent No. 2. Further, the Impugned Order is not reasoned and on this ground only it is to be set aside. In this regard, the Appellant has made reference to this Tribunal's judgement dated 28.5.2015 in Appeal No. 88 of 2015 in case of Noida Power Company Ltd. Vs. UPERC &Ors.

- j) The State Commission by not considering the Project of the Appellant being cheaper than that of the gas based projects has acted against the interest of the consumers of the State. In the recent decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited V. Solar Semiconductor Power Company (India) Pvt. Ltd. and Ors. decided on 25.10.2017 in Civil Appeal No. 6399 of 2016 has again emphasized the need to apply the provisions of the Act with the touchstone of safeguarding the interest of consumers.
9. The learned counsel for the Respondent No. 2 and the State Commission have made following arguments/submissions on the issues raised in the present Appeal for our consideration:
- a) On the issue of peak load demand the Respondent No. 2 on the directions of the State Commission in the MYT Order submitted a revised plan in accordance with the demand projected in MYT Petition wherein there is no deficit of power till FY 2018-19.
- b) In March, 2015 Government of India (GoI) issued scheme for utilisation of gas based power generation. In this regard on directions from the State Government the Respondent No. 2 signed PPAs with gas generators in the State of Uttarakhand viz with M/s Gama on 11.2.2016, with M/s Sravanthi on 28.7.2016 and filed petition before the State Commission seeking approval of PPA with M/s BETA on 25.10.2016.
- c) While considering proposal of the Appellant, M/s Beta was not having gas arrangement and was not in position to supply power on immediate basis. M/s Beta was included in power purchase plan but

in absence of gas arrangement, the Respondent No. 2 opted the Appellant for procurement of power. After securing gas by M/s Beta and direction from the State Commission, the Respondent No. 2 issued Letter of Award (LoA) to M/s BETA on 19.11.2016 and to sign PPA in due course of time. Accordingly, the power purchase plan from the Appellant was considered as per the previous plan, which was rejected by the State Commission due to some deficiency. Presently there is no power deficit in the State and M/s BETA is also to start power supply power in couple of months. The reason stated at the time of admission of the petition of the Appellant was that the Respondent No. 2 cannot purchase the costlier power from its Project.

- d) The Appellant is making vague allegation that the ceiling capital cost was agreeable to the Respondent No. 2. The grant of provisional tariff to any generator is within the domain of the State Commission. The Respondent No. 2 has not given any firm commitment for procurement of power, however due to deficit of power at that time, any interim tariff which the Respondent No. 2 is willing to accept should be reasonable and which can be determined from the average price of power from the Central Generating Station and the same should be around Rs. 4 per unit and further the rate of power during the interim period should not be subject to any variation upon final determination of tariff i.e. the tariff for the interim period should be fixed at Rs. 4 per unit without true up/ adjustment of the same in future and upon an undertaking given by the Appellant in this regard.

- e) The State Commission has rejected the tariff petition of the Appellant in compliance of the provisions of the Act, Regulations issued there under and relevant judicial precedents and is not liable to be interfered with.
- f) On the issue of natural justice raised by the Appellant, the State Commission has decided the petition after hearing the parties and submissions made by them. The State Commission decided the case based on facts and submissions of parties and gave a reasoned order. On this issue the State Commission has relied on the judgment of this Tribunal dated 28.11.2014 in Appeal No. 64 of 2015 in case of WESCO & Ors. Vs. OERC wherein it has been held that natural justice is not an unruly horse and cannot be put into a straight-jacket formula. Accordingly, the same is to be seen with reference to particular situations and facts. The submissions made by UPCL vide its reply dated 19.9.2016 were reiterated during the hearing before the State Commission. The contentions of UPCL in the submissions regarding tariff and power deficit were rejected by the State Commission in the Impugned Order against UPCL. Hence, there can be no grievance about violation of natural justice. As such the reliance of the Appellant on the judgments of Hon'ble Supreme Court on the issue of natural justice does not stand.
- g) Section 64 of the Act does not contemplate that every tariff petition must be admitted in all cases. The State Commission in terms of Regulation 11 (8) of the Conduct of Business Regulations is fully empowered to reject petition at the admission stage itself. The Respondent No. 2 submitted before the State Commission that they are having surplus power availability considering the upcoming

three gas based power generating stations and is not willing to purchase additional power at a higher cost. The State Commission dismissed the petition of the Appellant on the grounds that no power requirement was there in the State giving reasons in the Impugned Order. The State Commission cannot be possibly called upon to determine tariff of a generating station when the licensee does not require the power. The State Commission is required to balance the interests of all the stakeholders and could not saddle the consumers of the State with surplus power and surplus cost. The Respondent No. 2 has projected surplus power during summer months of FY 2017-18 and FY 2018-19 and deficit during winter months of the said FYs which could be off-set against the surplus through reverse banking. The Respondent No. 2 in its submissions also stated that in view of the revised power requirement submitted after PPA petition was filed it does not make any sense to purchase power at a cost exceeding Rs. 4 per unit. The comparison of the Appellant's Project with gas based plants cannot be done as the gas based plants were being considered by the Respondent No. 2 as per Government of India scheme for revival of stranded gas based projects and directions from the State Government.

- h) The Appellant has not filed the petition as per the Regulations of the State Commission despite reminders given by the State Commission from time to time. When the Appellant finally filed the petition as per the Regulations by that time the power requirement of the Respondent No. 2 was fulfilled by power purchases from the gas based plants.

- i) The reference to Regulation 21(1) of the UERC MYT Regulations, 2015, made by the Appellant regarding providing for capital cost of a project is not tenable and aims at diverting the attention of this Tribunal since the Appellant's petition was rejected on the grounds of non-requirement of power by the Respondent No. 2 and not on the issue of cost of Project or tariff.
- j) The Impugned Order is based on neither presumptions nor conjectures but it was based on facts and figures of power availability and requirement in the State.
- k) As per Section 86 (1) (b) of the Act, one of the functions of the State Commission is to regulate the price at which electricity shall be procured from the generating companies by the licensees. The term 'regulate' cannot be construed in a narrow manner and has made reference to the Supreme Court judgement in U.P. Co-operative Cane Unions Federation in this regard. The State Commission has also pointed to the judgement dated 14.7.2016 of this Tribunal in case of BSES Rajdhani in Appeal No. 306 of 2013 on the issue of entering into PPA between the distribution licensee and generator.
- l) There can be no question of maintaining the tariff petition of the Appellant without a subsisting agreement to sell power to UPCL. In this connection the State Commission has relied on Section 62 and Section 86 (1) (b) of the Act, UPCL's contention to procure power if tariff determined is about Rs. 4 per unit which indicates no clear agreement between the Appellant & UPCL, non-requirement of power by UPCL and against the interests of the consumers of the State.

- m) At the time of filing the PPA petition for approval of power purchase from the Appellant, the Respondent No. 2 had submitted power purchase plan which was subsequently revised by it vide letter dated 1.9.2016. The PPA petition was admitted by the State Commission vide order dated 21.6.2016 and was kept in abeyance till determination of tariff for the Project by the State Commission. It was clear that the Respondent No. 2 did not have power deficit in all the months. Hence, it is incorrect on part of the Appellant that the State was power deficit. The reference made by the Appellant regarding order dated 19.1.2016 of the State Commission has no relevance considering the power purchase plan submitted by the Respondent No. 2 during the then aforesaid proceedings.
- n) The proposal of the Appellant in the tariff petition to quote the tariff at ceiling capital cost could have been valid only where generator quotes tariff under competitive bidding process under Section 63 of the Electricity Act, 2003. In cases where tariff is determined under Section 62, the tariff has to be based on the actual capital cost in accordance with the Regulations and is applicable to the case of the Appellant. Further, the negotiable tariff referred to by the Appellant could not be permissible as per the provisions of Electricity Act and Regulations. The State Commission has made reference to the order of M/s Gati Infra because of inconsistent approach shown by the Respondent No. 2 in proposing to enter PPA with the Appellant generator.
- o) The State Commission has already held against the Appellant regarding restriction of cost of power about Rs 4 per unit in its order dated 9.8.2016 which has not been challenged by the Appellant and

has become final. On the contention of the Appellant that UPCL purchasing expensive power at Rs 7-8 per unit from gas based power stations is misconceived. The tariff order dated 29.3.2017 in the ARR for 2017-18 for UPCL the procurement from gas based projects is projected at Rs. 4.70 per unit. Further, the State Commission's order dated 16.5.2017 shows the approved tariff of M/s Gamma Infrapop is in the range of Rs. 4.89-5.15 per unit.

- p) The contention of the Appellant that UPCL still need power after approval of the PPAs with the gas based generators is misconceived as UPCL's power procurement plan already accounts for power projected to be procured from the three gas based plants which is the premise for tariff order of FY 2017-18, the order of the State Commission dated 29.3.2017 is not under challenge and the gas based generators are not the parties before this Tribunal in the present proceedings. If the power is to be procured from the Appellant the power procurement from other gas based generator(s) is to be reduced or burden is to be shifted to the consumers of the State.
- q) On the issue of benefits of power procurement from hydro sources, the State Commission recognises the said need. Presently the State is meeting about 50% of its power requirement from hydro projects. The balance is to be made on the cost of such energy.
10. After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-

- a. The present case pertains to decision of the State Commission vide its Impugned Order rejecting the Petition filed by the Appellant for determination of Tariff for its Project for sale of electricity to the Respondent No. 2 and the Petition filed by UPCL for approval of the draft Power Purchase Agreement (PPA) to be entered into by UPCL with the Appellant for purchase of electricity from the Project. The Appellant is aggrieved by these rejections and non-consideration of its Project for procurement of electricity required by UPCL for maintaining the retail supply to consumers in the State of Uttarakhand. The State Commission has proceeded to approve the procurement of electricity from certain gas power projects which are costlier and not economical in comparison to the power from the Appellant's Project.

- b. On Question No. 6. a. i.e. Whether the State Commission has followed the principles of natural justice and procedure prescribed in law in rejecting the petition of the Appellant?, we decide as follows:
 - i. The Appellant has alleged that the Impugned Order has been passed by the State Commission in violation of the principles of natural justice i.e. without giving an opportunity to the Appellant to deal with the reply filed by UPCL, the copy of which was not served to the Appellant. The State Commission has entirely relied on the said reply to reject the petition filed by the Appellant for determination of tariff and also the petition filed by the UPCL for approval of the draft PPA.

- ii. In the present case, it is observed that the State Commission has issued the Impugned Order without serving the copy of reply filed by the Respondent No. 2 to the Appellant and without giving an opportunity to the Appellant to file its rejoinder/ or being heard on the issues raised in the said reply. From the Impugned Order it is observed that Respondent No. 2 filed the reply to the tariff petition on 19.9.2016 i.e. a day prior to the hearing date. In this regard the Appellant has relied on the judgement of the Hon'ble Supreme Court in case of Dharamapal Satyapal Ltd v. Deputy Commissioner of Central Excise Gauhati & Ors (2015) 8 SCC 519. The relevant extract of the said judgement is reproduced below:

“17. The neat submission made by Mr Soli Sorabjee on behalf of the appellant was that the impugned demand of the Assistant Commissioner was in the nature of adjudication whereby the amount demanded in the order dated 6-6-2003 was crystallised and, therefore, there could not have been demand for recovery of the stipulated amount without issuing notice to the appellant and giving the appellant herein right of hearing. He also submitted that merely because vires of Section 154 of the 2003 Act were upheld by this Court in R.C. Tobacco [(2005) 7 SCC 725] could not be a ground to dispense with the aforesaid mandatory requirements of principles of natural justice. His further submission was that “no prejudice” principle adopted by Cestat amounted to erroneous approach. He sought to draw a fine distinction in this behalf by contending that the authority passing the order could not presume that prejudice would not be caused to a person against whom the action is contemplated and on that

presumption dispense with the mandatory requirement of issuance of the notice. According to him, such a doctrine could be applied only by the courts while dealing with such issues where it is found that the action of the authority was violative of principles of natural justice, the Court could still choose not to remit the case back to the authority concerned if it finds that it will be a futile exercise.

18. As a pure principle of law, we find substance and force in the aforesaid submission of Mr Sorabjee. No doubt, the Department was seeking to recover the amount paid by virtue of Section 154 of the 2003 Act which was enacted retrospectively and the constitutional validity of the said section had already been upheld by this Court in R.C. Tobacco [(2005) 7 SCC 725] at the time of issuance of notice for recovery. Further, no doubt, the effect of the said amendment retrospectively was to take away the benefit which was granted earlier. However, the question is whether before passing such an order of recovery, whether it was necessary to comply with the requirement of show-cause notice? The appellant wanted to contend that Section 11-A of the Excise Act was applicable, which requires this procedure to be followed. Even if that provision is not applicable, it is fundamental that before taking any adverse action against a person, requirement of principles of natural justice is to be fulfilled. This Court in CCE v. I.T.C. Ltd. [(1995) 2 SCC 38] has held that show cause and personal hearing is necessary before saddling an assessee with additional demand. It is also trite that when a statute is

silent, with no positive words in the Act or the Rules spelling out need to hear the party whose rights or interests are likely to be affected, requirement to follow fair procedure before taking a decision must be read into the statute, unless the statute provides otherwise.”

From the above it is clear that as a principle of natural justice the other party should have been given opportunity before taking a decision unless the statute provides otherwise.

- iii. Now let us analyse the Section 64 of the Act. The relevant portion of the same is reproduced below:

“Section 64. (Procedure for tariff order): --- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

.....
(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.”

From the above it is clear that before rejecting a tariff petition, appropriate commission is required to give a reasonable opportunity of being heard to the applicant/petitioner. The tariff petition/application can only be rejected if it is not in accordance with the provisions of the Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force.

- iv. The Section 64 of the Act speaks about acceptance or rejection of the petition/application filed under Section 62 of the Act. The application/petition can only be rejected on the grounds if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force. For such rejection the appropriate commission is required to record the reasons in writing. The Act also requires that the applicant shall be given a reasonable opportunity of being heard before rejecting his application. We observe that the Appellant has been deprived of opportunity by not serving the reply of UPCL to it and providing it the time to respond to the said reply. The application of the Appellant was merely rejected based on the reply filed by UPCL without providing appropriate opportunity for the Appellant to be heard.

- v. The learned counsel for the State Commission has submitted that the contentions of UPCL in its reply before the State Commission on the tariff petition of the Appellant regarding tariff and power deficit were rejected by the State Commission in the Impugned Order against UPCL. These are the main points raised by the Appellant in the present Appeal. The learned counsel has made a point that since these issues are already dealt by the State Commission there is no violation of natural justice and has also relied on the judgment of this Tribunal dated 28.11.2014 in Appeal No. 64 of 2015 in case of WESCO & Ors Vs. OERC. The learned counsel for the State Commission also relied on Regulation 11 (8) of the UERC, Conduct of Business Regulations, 2014 regarding rejection of the petition at the admission stage itself. We have gone through the UERC, Conduct of Business Regulations, 2014. The relevant extract from the said regulations are reproduced below:

Regulation 11 (8) under the heading 'Presentation and scrutiny of the pleadings etc.' of the UERC, Conduct of Business Regulations, 2014:

"The Commission may admit the Petition without requiring the attendance of the parties, under intimation to the parties that the same has been admitted alongwith the date for submission of counter/replies. The Commission shall not pass an order refusing admission without giving the party(s) concerned an opportunity of being heard."

From the above it is clear that the counter/replies can be filed by the parties only after the petition is admitted. The admission of the

petition cannot be denied without giving an opportunity of hearing to the concerned party(s).

Regulation 9 (2) under the heading 'Initiation of Proceedings' of the UERC, Conduct of Business Regulations, 2014:

“When the Commission initiates the proceedings, it shall by a notice issued by the Office of the Commission may give such orders and directions as may be deemed necessary, for service of notices to the respondent(s), other affected parties or interested parties for filing of replies and rejoinder in opposition or in support of Petition in such form as the Commission may direct.....”

From the above it can be seen that if felt necessary, the State Commission may direct party(ies) for filing of replies and rejoinders during initiation of proceedings on a petition filed before it.

In present case it becomes more important that the petition of the Appellant was rejected after considering the reply dated 19.9.2016 filed by UPCL. In the present case it is not known that whether UPCL has filed the reply suo-moto or on the directions of the State Commission. If the reply was filed suo-moto by UPCL then it was discretionary on the part of the State Commission to take it on record or not. But if the reply is taken on record and petition is decided after dealing with it, as has been done in this case, it amounts to unfair treatment being given to the Appellant, because the Appellant has not been given time and opportunity to file rejoinder to the same. Hence, although the Appellant was heard but it was deprived of time and opportunity to counter the reply of UPCL. It is also not understood why the State Commission was in

such hurry that it issued the Impugned Order on the date of hearing itself. Accordingly, the reliance placed by the learned counsel for the State Commission on the said judgement of this Tribunal and Regulation 11 (8) of the UERC, Conduct of Business Regulations, 2014 is misplaced.

- vi. In view of the above we are of the considered opinion that had the Appellant been served with the reply filed by UPCL and had been given the hearing on the change in the stand of UPCL to not to procure Electricity from the Appellant and to purchase electricity from the gas power projects, the Appellant would have had an opportunity to place the materials in support of the relative merits of its project in comparison to the Gas Power projects. By not affording the said opportunity to the Appellant, the State Commission has acted in violation to basic principles of natural justice.
- vii. Accordingly, this issue is decided in favour of the Appellant.
- c. Now we take all the remaining questions of law raised by the Appellant together as they all are related to rejection of the petition of the Appellant by the State Commission. On Question No. 6. b. i.e. Whether the State Commission is justified in facts and circumstances of the case to dismiss the tariff petition of the Appellant at the admissibility stage?, on Question No. 6 c. i.e. Whether the State Commission is justified in dismissing the tariff petition of the Appellant on admissibility for the reason that electricity is not required by the Respondent No. 2 while admitting the tariff petition of a much larger Gas plant heard soon after the petitioner's tariff petition? and on Question No. 6 d. i.e. Whether the

State Commission is justified in rejecting the power procurement from the Appellant without determination of tariff, contrary to the practice for other generators for whom the tariff petitions are pending, and having disregard to the UERC Regulation 21 (1) which clearly specifies that the tariff can only be determined on the basis of admitted cost after prudence check of the capital cost?, we decide as follows:

- i. Let us first analyse the findings of the State Commission in the Impugned Order. The relevant extract from the Impugned Order is reproduced below:

“2. Commission’s View and Decision

2.1 Status of the Petition

2.1.1 UPCL vide its written submissions had submitted that it had filed the Petition on Draft PPA to be executed with the Petitioner for approval by the Commission and further that as per the calculations given by the Petitioner, the projected tariff is highly excessive and it would not be possible for it to purchase such costly power and also that UPCL had not made a firm commitment to the Petitioner to purchase power at any rate. However, UPCL has submitted that it would execute the final PPA with the Petitioner if the final tariff determined by the Commission comes to around Rs. 4 per unit.

2.1.2 UPCL also referred to its Power Purchase Plan for next 3 years (i.e. for the 2nd Control Period) wherein it is apparent that it is having deficit of power for

various months. UPCL further submitted that any interim tariff allowable to the Petitioner should be reasonable and should be around Rs. 4.00 per unit equivalent to average price of power from CG Stations and the same should be fixed and shall not be allowed to vary consequent to determination of final tariff by the Commission. In our opinion, UPCL cannot take this stand now.

2.1.3 From the above submissions filed by UPCL, it appears that UPCL has without looking into the cost and tariff of the project, proposed to enter into a PPA with the Petitioner's project. Notwithstanding the above, UPCL has now submitted that the projected tariff of the Petitioner's plant is excessively high and that it would not be possible for it to purchase such costly power. However, UPCL has contended that it would execute the PPA with the Petitioner if the final tariff determined by the Commission comes to around Rs. 4 per unit.

2.1.4 Moreover, the power purchase plan submitted by UPCL for the second Control Period in accordance with the MYT Regulations and Tariff Order of the Commission, wherein for FY 2017-18 and FY 2018-19 UPCL has projected surplus power of 733 MU & 1230 MU respectively during Summer months and deficit of about 643 MU & 623 MU respectively during Winter months. UPCL is directed to review the power purchase plan keeping in view the availability of power from various sources.

2.1.5 It would also be relevant to mention that previously Gati Infra (P) Ltd. had filed a Tariff Petition claiming a tariff of Rs. 5.53 per unit based on the actual capital cost of Rs. 11 Crore/MW. At that time UPCL had refused to buy power from the said generator. The Commission is of the view that there is no rationale for UPCL to purchase power from the Petitioner's plant now keeping in view its requirement of power as per the power purchase plan submitted by UPCL for next three financial years.

2.1.6 UPCL is hereby cautioned that in future it should propose any procurement of power only in accordance with perspective power purchase plan laid down by the licensee from time to time. Further, UPCL before proposing to enter into a PPA should have an estimate of the capital cost of the project and the estimated tariffs thereof in accordance with the Regulations of the Commission and that the licensee should make a conscientious decision based on the cost of power incident on it.

2.1.7 The Instant Petition along with the Petition filed by UPCL in the matter of draft PPA and Business Plan Petition earlier filed by the Petitioner is hereby dismissed as rejected.

2.1.8 Ordered accordingly.”

From the above it can be seen that the State Commission has rejected and dismissed the tariff petition of the Appellant and petition filed by UPCL for approval of draft PPA in view of the

requirement of power by UPCL for next three financial years. While doing so the State Commission based on the submissions made by UPCL has also discussed about the excessive cost of power from the Project and cautioned UPCL for the same in future for power procurement.

- ii. The decision of the State Commission related to the rejection of the tariff petition filed by the Appellant for determination of Tariff of the Appellant's Project and the petition filed by UPCL for approval of the draft PPA for purchase of electricity from the Appellant on grounds of non requirement of electricity seems to be in narrow compass. In the proceedings before this Tribunal certain issues related to exercise of regulatory functions have been raised. The rejection of the petitions relating to the Appellant's Project is only on grounds of surplus availability of the power as assessed by the State Commission at the time of the passing of the Impugned Order. This has been categorically stated in the Impugned Order passed and the reply filed by the State Commission. In the reply filed by the State Commission, it has been stated that the Appellant's Petition was rejected on the grounds of non - requirement of Power by UPCL and not on the issue of tariff of the project.
- iii. At the time when the Impugned Order was passed, soon thereafter the State Commission has considered the purchase of electricity from three Gas Power projects of the capacities of Sravanthi (214 MW), BETA (107 MW) and GAMMA (107 MW) amounting to about 428 MW. The capacity of the Appellant's project is 96 MW. The Appellant has agreed to restrict the capital cost for the purpose of determination of tariff at Rs. 1008 Cr. and the final tariff computed

based on the same would work out to Rs 4.60 per kWh as submitted by the Appellant but there would be an additional transmission cost. The provisional tariff of gas power station approved by the State Commission is Rs. 4.70 per kWh and the final tariff claimed by the Gas Power projects (which is yet to be determined) is about Rs 8 per kWh.

- iv. In the Order dated 10.2.2017 at para 5 the State Commission has itself referred to the Capacity Charges, Variable Charges etc claimed by BETA as under:

“Accordingly, the capacity charges, variable charges and saleable MUs claimed by the Petitioner for FY 2016-17 to FY 2018-19 are as follows:

Particulars	FY 2016-17	FY 2017-18	FY 2018-19
<i>No. of saleable units (MUs)</i>	<i>3.67</i>	<i>772.82</i>	<i>772.82</i>
<i>Capacity Charges (Rs/Kwh)</i>	<i>120.99</i>	<i>4.27</i>	<i>4.35</i>
<i>Energy Charges (Rs/Kwh)</i>	<i>47.92</i>	<i>4.26</i>	<i>4.26</i>
<i>Total Charges (Rs/Kwh)</i>	<i>168.91</i>	<i>8.54</i>	<i>8.62</i>

However, in accordance with the PSDF Support Agreement entered into by the Petitioner with Gol on September 14, 2016, the capped unit price i.e. the maximum price payable by the distribution licensee is Rs 4.70 per unit, which is lower than the

provisional tariff claimed by the Petitioner. Hence, the Commission decides to allow a provisional tariff of Rs 4.70/Unit (exclusive of the PSDF support) to be recovered by the Petitioner from UPCL till determination of final tariff by the Commission.”

The tariff as claimed by the Gas Power Projects are in the range of above Rs 8/kWh.

- v. The Gas Power projects have also filed petitions for determination of Tariff and the same have been pending. In the case of Gas Power projects also, UPCL had filed petitions for approval of draft PPA. The Gas Power projects as well as the hydro power projects have been in the similar time frame of consideration by the State Commission. There is no rationale for the State Commission to abruptly reject the two petitions filed relating to the Appellant's Project and proceed with the three Gas Power projects only.

- vi. The regulatory commission's function in such circumstances should obviously be to consider the merits and demerits of all the available sources of power and decide the sourcing from such projects which would be most economical, cheaper and in the interest of the consumers at large. The State Commission ought to have considered the selection of the project safeguarding the consumer interest, as envisaged under Section 61 of the Act. The State Commission has however rejected the petitions relating to the Appellant's Project without any such consideration and has deprived the consumer of the State with a possibility of getting electricity to the extent of 96 MW at economical and cheaper cost.

vii. The State Commission was required to evaluate all the four projects in order to decide on the economical and cost effective purchase of power. The most important function to be discharged by the State Commission is to ensure that the procurement of power by the distribution licensees is economical so that no extra burden is placed on the consumers. This has been duly recognised by the State Commission itself in the Order dated 30.7.2015 in case of M/s Sravanthi. The State Commission had then rejected the approval for purchase of power from M/s Sravanthi on the ground that UPCL had not examined the availability of cheaper power. This Tribunal has also emphasised economical purchase of power in the judgement dated 23.9.2016 passed in Appeal No. 53 of 2016 in case of Tamil Nadu Generation and Distribution In the matter of Corporation Limited (TANGEDCO) Vs. M/s. Century Flour Mills Ltd and Anr. The relevant portion of the judgement is reproduced below:

“f) On the sixth issue for our consideration i.e. Whether under the Regulatory regime, cost incurred by the distribution licensee is required to be minimised?, we observe as follows;

i. The Regulation 75 (1) of the terms and conditions for determination of tariff regulations, the State Commission provides for cost of power purchase, as follows:

"75. Cost of Power Purchase

(1) The Distribution licensee shall procure power on least cost basis and strictly on merit order despatch and shall have flexibility to

procure power from any source in the country. A two-part tariff structure shall be adopted for all long term contracts to facilitate merit order dispatch.

.....

(5) In case of power purchased from Captive Generators and other non conventional energy sources, the cost shall be worked out as per the policy approved by the Commission.

.....

Hence the need for optimization of power purchase cost has been established by the State Commission identifying principles and methodologies.

- ii. However considering other provisions of the Act like promotion of New and Renewable energy sources, RPO obligation etc., there will be an additional cost element on the Distribution licensee, which will have to be passed on to the end consumers.*

- iii. Hence in our view under the Regulatory regime, the cost incurred by the distribution licensee is required to be optimized considering various provisions of Act, Applicable Regulations and Regulatory directions.*

iv. Hence this issue is also decided against the Appellant.

viii. This Tribunal vide judgement dated 4.9.2012 in Appeal No. 94 of 2012, decided in the context of the tariff having been determined by the Central Commission and purchase of electricity to be decided by the State Commission and the application of Rule 8 of the Electricity Rules, 2005 as under.

“The role of the State Commission is only to decide whether the Power Purchase Agreement to be entered into between the NTPC and the Distribution Company for purchase of Electricity from NTPC Stations at the tariff determined by the Central Commission has to be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State.

47. The said power of scrutiny by the State Commission cannot be taken to mean that the State Commission has got the powers to suggest modifications to the terms and conditions or even reserving to deal with the implications of the terms and conditions at a later stage.”

ix. In view of the above, the State Commission ought to have adopted the same approach in the present case as it did in the order dated 30.7.2015 passed in case of M/s Sravanthi instead of making a departure of not evaluating the relative merits and demerits of all the available sources.

- x. The contention of the State Commission that it did not consider the case of the Appellant on 20.9.2016 in view of the Appellant's project being not included in the business plan filed by UPCL on 1.9.2016 cannot be sustained. The most important function to be discharged by the State Commission while dealing with the approval for purchase of power by a distribution licensee from a generating company is to ensure that the power is purchased in an economical manner. The approval of the power purchase plan price is entirely the function of the State Commission and it is not open to the licensee to dictate to the State Commission that it will purchase power from a particular source. Here in this case purchase of power by UPCL generated by the Gas Power Stations and not by the Hydro Power Station. UPCL itself had approached the State Commission for approval of the draft PPA in respect of the Appellant and the said petition was pending before the State Commission. Further, the tariff petition of the Appellant was also pending. The State Commission was fully aware of the availability of the power from the Appellant's Project. The State Commission should not have ignored the omission by UPCL regarding purchase of power from the Appellant's Project. The State Commission is not justified in stating that it cannot compel UPCL. This is contrary to the basic principle of exercise of regulatory functions safeguarding consumer interest.
- xi. A perusal of the power purchase plan submitted by UPCL on 1.9.2016 on which the State Commission has placed heavy reliance clearly shows that UPCL was in requirement of about 428 MW power. The State Commission's decision that UPCL is in surplus

and not in deficit is after factoring the 428 MW of purchase from GAMMA, BETA and Saravanthi. The purchase from these companies have been approved by the State Commission subsequent to the rejection of the petition filed by the Appellant on 20.9.2016 based on the above business plan. It was incumbent on the part of UPCL to have included the availability of power from the Appellant's Project before the State Commission to be considered along with the availability of the power from the three Gas Power Stations to decide on the most economical purchase. The proceedings in the present case and other material placed by the State Commission and UPCL during the proceedings of present Appeal before this Tribunal give no indication as to why the Appellant's case was suddenly being not considered at all and the consideration was being restricted to Gas Power projects only.

- xii. If the State Commission after hearing the Appellant and the developers of all the other projects, evaluates all the four projects and comes to the conclusion that the tariff at which the power will be available to UPCL from the Gas Power Projects will be cheaper and economical on a long term basis, there will be a justification for purchase of power from the Gas Power projects and rejecting the sourcing of Power from the Appellant's project. The Appellant cannot then claim any right that UPCL should procure Electricity from the Appellant. On the other hand if in the facts and circumstances of the case, the availability of power to UPCL from the Appellant's Project would be cheaper and economical on long term basis, there is no rationale for rejecting the Appellant's Project and proceeding to source Power from the three Gas Power Projects. The Appellant has the right to claim that the State

Commission should consider the Appellant's project for evaluation when the UPCL had approached the State Commission to approve the draft PPA and the Appellant had filed an application for determination of Tariff. The State Commission's Order is erroneous in rejecting the petition relating to the Appellant's Project on 20.9.2016 and thereafter approving the purchase from the Gas Power Projects. The State Commission should not have proceeded on the assumption that the Appellant's project will be costlier than the Gas Power Projects, particularly, in the context of the three Gas Power Projects seeking higher tariff.

- xiii. The State Commission is also not right in proceeding on the basis that the capital cost of the Appellant's project for determination of Tariff should not be considered restricted to Rs 1008 Cr., when the Appellant itself had agreed to the same in writing in the pleadings filed before the State Commission. In this regard it is important to analyse the Regulation 21 (8) of the MYT Regulations, 2015 notified by the State Commission. The relevant extract of the said regulation is reproduced below:

“Where the PPA or the transmission or wheeling agreement provides for a ceiling of capital cost, the capital expenditure admitted by the Commission shall take into consideration such ceiling for determination of tariff.”

From the above it is clear that the MYT Regulations, 2015 itself recognise the ceiling capital cost to be considered by the State Commission in the determination of tariff for a generating company.

Even though the MYT Regulations, 2015 require that the claim of the capital cost by a generator is to be done in the desired formats based on actual completed capital cost the same regulations also speak about consideration of ceiling of capital cost for determination of tariff. The Appellant before the State Commission has agreed to the ceiling capital cost of Rs. 1008 for its Project. The State Commission ought to have considered the ceiling capital cost being lower than actual capital cost of Rs. 1507 Cr. for analysis of approving power procurement by UPCL and determination of tariff of the Appellant to the benefit of the consumers at large. UPCL had also acted and applied for the approval of the draft PPA based on the said ceiling capital cost.

- xiv. The Appellant would be bound by the said restriction on the capital cost to be considered even in the second proceedings filed by the Appellant for determination of Tariff as per the liberty granted by the State Commission in the Order dated 9.8.2016. It is not understandable as to why the State Commission is either insisting on the Appellant to file a new petition and not proceeding on the first petition where the Appellant had stated that it would restrict the capital cost to Rs 1008 Cr. or the plea taken before the Tribunal that the Appellant cannot make any submission of capital cost being considered at Rs 1008 Cr. or less than Rs 1507 Cr. Such a course is rather strange to the functions being discharged by the State Commission as a regulator to safeguard consumer interest. Similarly there is no substance in the contention of the State Commission that the Appellant should have either challenged the business plan submitted by the UPCL or the order dated 9.8.2016

passed by the State Commission rejecting the first petition of the Appellant for determination of Tariff with liberty to file a new petition.

- xv. There is also no merit in the contention of the State Commission that the Appellant had not approached the State Commission with the finalised PPA & had only a draft PPA and that the tariff petition of the Appellant is not maintainable without a subsisting agreement to sell power to UPCL. UPCL filed the Petition on 8.6.2016 before the State Commission seeking approval of the draft PPA to be entered into with the Appellant. Such an approval for the draft PPA is provided in the Regulations notified by the State Commission. Regulation 39 (3) of the Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2014 provided as under:

“The distribution licensee shall apply to the Commission for approval of the draft Power Purchase agreement that it proposes to enter into with the suppliers. The Commission may pass orders:

- (a) Approving the agreement ; or*
- (b) Approving the agreement with modifications proposed to the terms of the agreement; or*
- (c) Rejecting the agreement.”*

The above Regulation require UPCL to apply before the State Commission for approval of the draft PPA based on which the State Commission approve it/ reject it or approve with modifications. Till such time the PPA is termed as draft PPA.

- xvi. The State Commission itself having provided for the proceedings to be initiated in the draft PPA cannot make a ground for not considering the case of the Appellant where the UPCL had filed a petition for approval of the draft PPA. Similar course has been followed in the Gas Power projects also. There is therefore no justification for the State Commission to defend the Impugned Order based on its being a draft PPA only.
- xvii. During the hearing, UPCL had referred to the Order dated 29.3.2017 passed by the State Commission on the true up for FY 2015-16, the annual performance review for FY 2016-17 and the Annual Revenue Requirements for FY 2017-18. A reference has been made to the power purchase cost for FY 2017-18 in table 4.30 where the energy source available has been given. The details of the power purchase cost given in the said table in regard to the three Gas Power Stations, viz GAMMA (Kashipur CCPP), Sravanthi and BETA show that the Project Developer has been given a provisional tariff of Rs 4.70 per unit on an average basis. However, the Order passed by the State Commission dated 19.1.2016 in the case of GAMMA shows that the amount of Rs 4.70 per unit is exclusive of the PSDF support which the project was getting. In the said Order the State Commission has also taken into account the ambiguity in the PSDF support agreement in regard to the adjustment for Foreign Exchange Rate Variation in the price of gas or in the exchange rate formula specified. The PSDF support has been taken at Rs 1.42 per unit. In the absence of PSDF support, the provisional tariff of Rs 4.70 per unit will not be a correct indicative price of the supply of electricity by GAMMA to UPCL.

xviii. Similarly, the Order dated 30.7.2015 passed by the State Commission dealing with the purchase of power from M/s Sravanthi had referred to the provisions of the distribution and retail supply licence granted by the State Commission to UPCL with an obligation on UPCL to acquire electricity from the generating company or any other person under the PPA or procurement process approved by the State Commission. The distribution and retail supply licence, inter alia, provides as under:

“5.1 The Licensee shall be entitled to –

(a) Purchase of otherwise acquire electricity from any Licensee on the tariffs and terms and conditions to be approved by the Commission;

(b) Purchase, import or otherwise acquire electricity from any generating company or any other person under Power Purchase Agreement or procurement process approved by the Commission.

5.2 The Licensee shall not without the general or special approval of the Commission:

(a) Purchase or import or otherwise acquire electricity under this Licence from any person other than generating companies or any other person as per the purchase agreements or agreements approved by the Commission.

5.4.

(a) The Licensee shall purchase the energy required by the Licensee for distribution and retail supply in an economical manner and under a transparent power purchase or procurement process and in accordance with the Regulations, Guidelines, Directions made by the Commission from time to time;

(b) In case of purchases of allocated share of electrical capacity and/or energy from Central Sector Generation and Inter-utility Exchange of electrical capacity and/or energy from other Regional Electricity Boards, such processes as are stipulated by the Central Electricity Regulatory Commission shall also be complied with, in addition to the directions and orders of the Commission.

(c) An authorisation required from the Commission shall be granted when the Licensee has demonstrated to the Commission's satisfaction that –

i. the additional electrical capacity and/or energy is necessary to meet the Licensee's service obligation in accordance with this Paragraph 5; and

ii. The Licensee has examined the economic, technical system and environmental aspects of commercially viable alternatives to the proposal for purchasing additional electrical capacity and/or energy and such examination has been carried out in a manner approved by the Commission.

The restriction imposed in this paragraph 5.4 shall not be applicable to short term purchases (less than six months in duration) provided that such short term purchases are made in accordance with guidelines, if any, issued by the Commission and the details of such purchases shall be submitted to the Commission in the manner the Commission directs.”

In terms of the above and as specifically noted in Regulation 5.4 (a), UPCL is required to source electricity requirements in an economical manner and under a transparent process of bidding.

In the said Order, it was stated that M/s Sravanthi offered to supply 300 MW power to UPCL. The State Commission did not approve the said process on account of lack of transparent process and non-valuation of other alternative sources of supply.

- xix. In the Order dated 9.8.2016 passed by the State Commission, which is subsequent to the filing of the petition by UPCL for approval of the draft PPA in the case of the Appellant and also the petition filed by the Appellant for determination of tariff, the State Commission has referred to the interim tariff of Rs 4.70 per kWh. This was given in the background of the PSDF support being available. The Order does not mention the capital cost at which M/s Sravanthi had claimed the determination of tariff.
- xx. While the purchase of power from the Appellant's Project has been rejected on grounds of non-requirement of power, namely, there being surplus power availability, in the Order dated 17.2.2017, in Petition No. 65 of 2016 regarding approval of draft PPA with M/s Beta, UPCL represented to the State Commission as under:

“The Petitioner submitted that it was facing continued power shortage throughout the year and had to depend on short term power purchase by undertaking power purchase through short term tenders and banking arrangements with other utilities. UPCL also submitted that it had to purchase power through IEX on day-ahead basis where the rates were volatile and the power availability was not firm.”

The State Commission then proceeded to approve the purchase of power from BETA on the basis of shortage of power by UPCL.

- xxi. Accordingly, the State Commission has proceeded to deal with the issue of power procurement in an inconsistent manner, namely, by rejecting the purchase of power from the Appellant's Hydro Power Project on grounds of UPCL having surplus power but at the same time proceeding to approve the purchase of power from the three Power Projects on and after 20.9.2016, namely, the date on which the petitions filed in relation to the Appellant's Project was rejected.
- xxii. The reliance placed by the State Commission on the decision of the Hon'ble Supreme Court in Uttar Pradesh Cooperative Cane Unions Federation case on the regulatory functions of the State Commission being wider has no implication to the present case. It can't be disputed that the functions exercised by the Electricity Regulatory Commission should be construed wider. But such regulatory functions are to be exercised in the larger interest of the consumers as well as balancing the rights of the generator. The dominant objective of the Regulator is to protect the interest of the consumers. This has been emphasised in the recent decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited V. Solar Semiconductor Power Company (India) Pvt. Ltd. and Ors. decided on 25.10.2017 in Civil Appeal No. 6399 of 2016. The Hon'ble Supreme Court has observed as under:

“35. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of

consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions “protecting interest of consumers” and Section 61(d) requires that the interests of the consumers are to be safeguarded when the Appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.”

Similarly, the reliance placed by the State Commission on the judgement of this Hon'ble Tribunal in Appeal No. 306 of 2013 regarding the petition filed by the Appellant becoming infructuous is also not correct in view of the discussions in the foregoing paragraphs.

- xxiii. In view of discussions as above, we are of considered opinion that the State Commission is not justified in dismissing the tariff petition of the Appellant at the admissibility stage without going into the detailed analysis by comparing the tariff of the Appellant's Project vis-à-vis gas based projects considered by the State Commission while approving their tariff and PPAs. Accordingly, the impugned Order passed by the State Commission deserves to be set aside. The petition filed by UPCL before the State Commission for

approval of the draft PPA and the petition filed by the Appellant before the State Commission for determination of tariff should be restored for consideration of the State Commission. The matter needs to be remanded to the State Commission for fresh consideration of the said two petitions (i.e. tariff petition of the Appellant and draft PPA petition of UPCL) to decide on the appropriate source or sources including that of the Appellant on merits from which the requirement of electricity of UPCL on long term basis should be made with the primary objective of safeguarding the interest of the consumers of the State at large.

ORDER

We are of the considered opinion that the issues raised in the present appeal have merit as discussed above.

The Impugned Order dated 20.9.2016 passed by the State Commission is set aside. The matter is hereby remanded to the State Commission to consider the case of the Appellant on merits independently and in accordance with law. In light of above, the Appeal as well as IA stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **14th day of November, 2017.**

(I.J. Kapoor)
Technical Member

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(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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