APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 17 OF 2017

Dated : 09th May, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

IN THE MATTER OF :

M/s Him Urja Private Limited
E-14, East of Kailash,
New Delhi-110065 **….Appellant**

VERSUS

1. Uttarakhand Electricity Regulatory Commission
Viduyt Niyamak Bhawan,
Near I.S.B.T., P.O. Majra,
Dehradun -248171
Uttarakhand

2. Uttarakhand Power Company Limited
Victoria Cross Vijeyta Gabar Singh Bhawan,
Kanwali Road, Balliwala Chowk,
Dehradun-248001,
Uttarakhand **..Respondent(s)**

Counsel for the Appellant(s) **:** Mr. Anand K.Ganesan
Ms. Swapna Seshadri
Ms.Neha Grag

Counsel for the Respondent(s) **:** Mr. Buddy A.Ranganadhan
Ms. Stuti Krishn for R-1

Mr. Pradeep Misra
Mr. Manoj Kr. Sharma for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal is preferred under Section 111 of the Electricity Act, 2003 against order dated **08.07.2016** passed by the Uttarakhand Electricity Regulatory Commission (hereinafter called the '**State Commission**') whereby the State Commission has rejected the petition of the Appellant for revision of tariff on account of non-receipt of subsidy from the Government of India, which subsidy was assumed by the State Commission while determining the tariff for the Appellant. The tariff order had proceeded on the basis that the capital subsidy was available with the Appellant, whereas no such subsidy has been received by the Appellant.

1.1 The Appellant had challenged the tariff order dated 10.04.2014 before the Tribunal in Appeal No. 178 of 2014 on various grounds including the ground that the tariff ought not to assume the receipt of capital subsidy. During the proceedings in the said appeal, the State Commission had undertaken to carry out necessary corrections in the tariff as was also stated in the tariff order dated 10/04/2014. In the circumstances, the Tribunal did not interfere with the said decision of the State Commission. However, when the Appellant approached the State Commission pursuant to the decision of the Tribunal for revision in the tariff on account of the fact that the subsidy was not received, the State Commission has rejected the Petition holding that till the time the final decision of MNRE is taken for the subsidy amount, the existing tariff which assumes the receipt of subsidy shall continue.

2. The Appellant has prayed for the following reliefs:

(a) Allow the appeal and set aside the order dated 08/07/2016 passed by the State Commission to the extent challenged in the present appeal.

(b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

3. Brief Facts of the Case :-

3.1 The Appellant is a company incorporated under the Companies Act, 1956 having its registered office at E-14, East of Kailash, New Delhi – 110065. The Appellant is engaged in the business of generation and supply of electricity. Since its incorporation, the Appellant has been developing and operating run of the river small hydro generation projects in the State of Uttarakhand.

3.2 The State Commission, Respondent No. 1, is the Regulatory Commission initially constituted under the provisions of the Electricity Regulatory Commission Act, 1998. The State Commission presently exercises powers and discharges functions under the provisions of the Electricity Act, 2003.

3.3 The Respondent No. 2 is the distribution licensee in the State of Uttarakhand and came into existence upon the division of the undivided State of Uttar Pradesh and creation of the State of Uttarakhand. The Respondent No. 2 is responsible for distribution of electricity in the state of Uttarakhand and is also responsible for maintaining the transmission system of the state till the formation of

the state transmission utility – Power Transmission Corporation of Uttarakhand Limited.

3.4 The Appellant has set up a 15 MW (2 x 7500 Kw) Small Hydro Power Project at Vanala, District Chamoli in the State of Uttarakhand (**Project**). The Appellant achieved Commercial Operation Date of the Project on 05/12/2009.

3.5 The Appellant approached the State Commission by application dated 26/03/2010 for determination of tariff for its Project in accordance with Regulation 33 read with Regulation 49 of the UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 (hereinafter '**UERC RE Regulations, 2008'**) and the UERC (Tariff and Other Terms for Supply of Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2010 (hereinafter '**UERC RE Regulations, 2010'**) which were notified on 06.07.2010 The tariffs and related norms under these Regulations were effective from 01/07/2010 for projects commissioned on or after 01/04/2009.

3.6 In the interim period, the Appellant after achieving COD, intended to supply the power outside the state through open access. The State Commission after obtaining advice from the State Government rejected the Appellant's request for open access in view of the then prevailing power shortage in the State. Aggrieved by this order, the Appellant filed a Writ Petition 529 of 2009 before the Hon'ble Supreme Court on 16.11.2009 regarding the issue of taking power generated by it outside the State under Open Access.

The SLP was admitted by Hon'ble Supreme Court on 07/05/2010. The Hon'ble Supreme Court vide its order dated 28/07/2010 directed the Appellant to generate power and provide the same to Respondent No. 2 till the outcome of decision in SLP. Subsequently, Respondent No. 2 continued the purchase of power from the Project @ Rs 2.75/kWh in accordance UERC RE Regulations, 2008.

3.7 The Appellant on 02/12/2009 entered into a short-term Power Purchase Agreement (PPA) with the Respondent No. 2 for a period from 2.12.2009 to 31.3.2010. Subsequently, the Appellant and Respondent No. 2 entered into another PPA on 15.5.2010 upto 14.5.2011. The tariff as per the PPA was – the levelised rate specified for such plant in Schedule 1 of the UERC RE Regulations, 2008 as amended from time to time.

3.8 In the interim period, on 06.07/2010, the State Commission enacted the UERC RE Regulations, 2010 under Section 61 of the Electricity Act. Regulation. Regulation 11 (2) of UERC RE Regulations, 2010, provides that a generating stations may opt for the generic tariff or may file a petition before the State Commission for determination of "Project Specific Tariff" and Regulation 11 (3) provides that such determination will be in accordance with Chapters 4 & 5.. Chapters 4 & 5 of the UERC RE Regulations, 2010 which provided for project specific tariff determination were made effective from 01/07/2010 onwards.

3.9 Subsequently, the Hon'ble Supreme Court vide its order dated 06/05/2011 directed that Respondent No. 2 to purchase power

from the Project in accordance with rates specified by the State Commission under RE Regulations, 2010. Thereafter, the Appellant withdrew the Writ Petition from Hon'ble Supreme Court on 25/07/2012.

3.10 The earlier application dated 26/03/2010 filed by Appellant for determination of tariff was kept in abeyance before the State Commission till the pendency of Writ Petition 529 of 2009 before the Hon'ble Supreme Court and also in view of absence of any long term PPA between Appellant and Respondent No. 2. After the Writ Petition was withdrawn on 25/07/2012, the Appellant vide its letter dated 16/08/2012 wrote to the State Commission requesting for tariff determination for its Project. The State Commission vide its letter dated 12/09/2012 intimated that a revised petition is required to be filed for seeking determination of tariff in accordance with UERC RE Regulations, 2010 based on the audited Capital Cost of the Project.

3.11 Thereafter, the Appellant filed a Supplementary Petition 22/11/2012 in continuation to the original application to the State Commission praying for determination of tariff for supply of electricity from its generating station to the Respondent No. 2.

3.12 The State Commission vide its letter dated 04/12/2012 directed Respondent No. 2 to enter into a long term PPA with the Appellant and intimate the same to the State Commission. Respondent No. 2 was also directed to pay provisional tariff of Rs 3.50/kWh for supply of power from the Project only after execution of the long term PPA and till the final determination of tariff for the Project by the State

Commission. In compliance with the State Commission's directive, a PPA was executed between the Appellant and Respondent No. 2 on 21/12/2012.

3.13 By Order dated 10/04/2014, the State Commission determined the project specific tariff for the Appellant. In the said order, the State Commission had disallowed certain claims of the Appellant. Amongst other issues, the State Commission in the said order dated 10/04/2014 has reduced an amount of Rs. 4.90 crores as capital subsidy assuming the same to be received by the Appellant from the Government of India, despite the fact that this amount was not received by the Appellant.

3.14 In the circumstances and aggrieved by the above order dated 10/04/2014, the Appellant had filed an appeal being Appeal No. 178 of 2014 before the Hon'ble Tribunal. The Appellant, amongst other issues, also raised the issue that the tariff ought not to assume the capital subsidy of Rs. 4.90 crores as being received by the Appellant and therefore the tariff being artificially reduced and the Appellant not recovering its reasonable costs and expenses.

3.15 The appeal was disposed of by the Hon'ble Tribunal vide judgment dated 03/05/2016. While the Hon'ble Tribunal did not interfere with the other issues raised by Appellant, on the issue of assumption of receipt of capital subsidy, the Hon'ble Tribunal noted the decision of the State Commission that the tariff would be corrected in the absence of capital subsidy being received, which was a liberty granted by the State Commission.

3.16 While the Appellant has challenged the judgment of the Hon'ble Tribunal before the Hon'ble Supreme Court in Civil Appeal 7185 of 2016 on the other issues decided by the Hon'ble Tribunal, on the issue of the capital subsidy assumed the Appellant filed a separate petition for revision and adjustment of tariff on account of the capital subsidy which was assumed by the State Commission not being received by the Appellant.

3.17 By the impugned order dated 08/07/2016 the State Commission dismissed the petition filed by the Appellant on the ground that that the redetermination of tariff without the subsidy would only be considered after the ascertainment of refusal of subsidy by the MNRE. Till such time, the existing tariff as determined by the State Commission assuming the subsidy (though not received by the Appellant) would continue. The State Commission has, inter-alia, held as under:

> *"2.3 The Commission during the hearing held on 21.06.2016 enquired the Petitioner regarding the likelihood of obtaining the subsidy from MNRE in the future. In response, the Petitioner submitted that it may get the same in this financial year also or in the ensuing financial years, since it has not been denied of its claim for perpetuity by the competent authority.*
>
> *2.4 Further, reason for not availing the subsidy from MNRE is on account of not meeting the certain predetermined criteria. From the above mentioned submission of the Petitioner, it is apparent that the generator's prospects of obtaining subsidy from MNRE still exists since it has not been denied in perpetuity. Regarding prayer of the Petitioner for revision of capital cost and corresponding redetermination of tariff of its*

Vanala SHP, the Commission is of the view that considering the capital subsidy from MNRE levelised tariff had already been determined by the Commission for life of the SHP. Redetermination of tariff without considering the subsidy, as requested by the Petitioner, and levying of the same for the period till ascertainment of grant or permanent denial of subsidy to the Petitioner by MNRE may become futile in the event subsidy is granted to the Petitioner which shall further reinstate the tariff since the existing approved tariff is based on the similar eventuality. Since the tariff of the project has been determined for life of the project in accordance with the Regulations, frequent changes in the same, as envisaged above, may frustrate the intent of uniform levelised tariff for the renewable energy based project. Further, this would also set a precedence allowing other RE generators to approach the Commission to get their tariffs revised each year which would defeat the intent of a generic tariff. Revision in tariff in accordance with the Regulations may be carried out once the subsidy is received or it is established that the developer will no longer be getting any subsidy from MNRE in future. The same is the intent of the Regulations also which says that corrections in tariffs would be carried out by the Commission if MNRE reduces the amount of subsidy.

2.5 Accordingly, the Commission is of the view that redetermination of the tariff without deduction of subsidy from capital cost, as requested by the Petitioner, shall be considered subsequent to ascertainment of refusal of subsidy by the MNRE. Till such time existing levelised tariff as determined by the Commission shall remain applicable. Hence, the Petitioner's prayer in this regard is, hereby, rejected".

3.18 The impugned order proceeded with the tariff assuming the subsidy for the past period even though it has not been received by

the Appellant. The tariff is to be determined based on the costs and expenses and the question of assuming receipt amounts does not arise. Only when the amounts are received can the tariff be reduced and for the period when the amounts are available with the Appellant. The State Commission has however proceeded on assumptions when the amounts are not even available with the Appellant.

3.19 In the circumstances, the Appellant filed a review petition before the State Commission for review of the Order dated 08/07/2016. By order dated 20/09/2016 pursuant to the hearing held on the same day, the State Commission has dismissed the review petition on the ground that there are no errors apparent on the face of the record.

3.20 Aggrieved by the main Order dated 08/07/2016, the Appellant has filed the present appeal before the Hon'ble Tribunal.

4. QUESTIONS OF LAW:

The following questions of law have been raised in the present appeal for our consideration:

4.1 Whether the State Commission is justified in deducting the capital subsidy based on assumptions, without actual receipt by the Appellant?

4.2 Whether the State Commission is justified in not revising the tariff based on the assumption of capital subsidy which has not been received by the Appellant?

4.3 Whether the State Commission is justified in denying the present day cost based on assumption for the future?

4.4 Whether the State Commission is justified in denying the capital cost for the period when no capital subsidy was actually received by the Appellant?

4.5 Whether the State Commission has erred in not revising the tariff in the facts and circumstances of the present case.

5. Shri Anand K.Ganesan, the learned counsel appearing for the Appellant, has filed the written submissions for our consideration as under:-

5.1 The State Commission has grossly erred in not entertaining the petition filed by the Appellant and revising the tariff for the Appellant considering the non-receipt of the capital subsidy from the Government of India. The State Commission has failed to appreciate that the Appellant has been prejudiced on account of inadequate tariff and the decision of the State Commission goes contrary to the very concept of cost plus tariff determination under Section 61 and 62 of the Electricity Act, 2003. The State Commission has erred in not revising the tariff of the Appellant in the petition filed and also dismissing the review petition filed by the Appellant.

5.2 The State Commission has failed to appreciate that the question of assuming the capital subsidy does not arise in the present case when the appellant has specifically placed on record the fact that

the subsidy has not been received from the Government of India. In the circumstances, the question of reduction of the tariff on the ground of assumed entitlement or receipt does not arise. As a consequence, the Appellant is not in a position to recover the legitimate costs and expenses as recognized by the State Commission and the tariff is artificially reduced to the extent of the subsidy amount assumed.

5.3 The State Commission erred in reducing the amount of capital subsidy from the capital cost determined even though the capital subsidy has not been received by the Appellant. One of the conditions for receiving capital subsidy is that the plant should operate at 80 % capacity for a continuous period 80 days. The Appellant was not able to run the plant at 80% capacity because the adequate water to sun at 80 % is available only in the months of July - September of a year and during this period, there is excessive silt in the river affecting the performance of the hydro plant. Therefore the subsidy was not given to the Appellant.

5.4 The State Commission has failed appreciate that the Appellant's generating station has been prejudice by cloudbursts in the year 2013 due to which the project was shut down from June, 2013 to March, 2014. Further, the restoration work for the damage caused to the said cloudburst is not fully complete and is still continuing. Due to the above the Appellant could not achieve the conditions for availing the capital subsidy. In fact, the Appellant in the review proceedings also placed on record the fact that the Appellant's generating station has been seriously prejudiced by the cloudburst

that took place on 20/06/2016 and again on 01/07/2016 and the project is once again in shut-down and is expected to begin operations only by 15th December, 2016. It is also expected that the restoration work would take alteast another one month. In the circumstances, it would not even be possible to obtain any capital subsidy for the next three years. The State Commission ought not to have assumed the capital subsidy and reduced the tariff. The State Commission has erred in not entertaining the petition of the Appellant for revision of tariff and also the review petition filed by the Appellant seeking review of the impugned order.

5.5 The State Commission has failed to appreciate that the most appropriate mechanism would be to determine the full tariff with the condition that in case the capital subsidy is received, the tariff would be appropriately reduced. This would take into account the actual receipt of the subsidy and the tariff determined and recovered being corresponding to the legitimate costs and expenses incurred by the Appellant. As a consequence of the methodology followed by the State Commission, the legitimate capital cost has been reduced including for the period when the subsidy amount has actually not been received by the Appellant. Even if the subsidy is received in the future, the reduction in capital cost is to be given only from such period when the amount is received, whereas the tariff for the past period ought to be compensated with capital cost.

5.6 The State Commission has failed to give effect to Regulation 16 (3) of the UERC RE Regulations, 2010 which provides as under -

"(3) The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator."

In the present case when the subsidy is not received for no fault of the Appellant, the question of artificially reducing the tariff by assuming the subsidy does not arise.

5.7 The State Commission also erred in not following the Judgment of this Tribunal dated 20.12.2012 in Appeal No. 150 of 2012 & batch - SLS Power limited v. Andhra Pradesh Electricity Regulatory Commission & Ors, wherein it has been held as under-

"x) Regarding subsidy provided by the Government to small hydro, the learned counsel in Appeal no. 172 of 2011 has submitted the following provisions of disbursement of subsidy under MNES subsidy scheme announced vide circular no. 14(5)/2003-SHP dated 29.7.2003.

"13. After being satisfied regarding power generation from the project for a minimum of three months, the Ministry would release the subsidy to financial institution in one go, subject to availability of funds.

14.The financial institution, after receipt of the subsidy amount would reduce the loan by the equal amount as pre-payment of loan. Pre-payment penalty, if any, will be borne by the developer.

15. After utilization of the subsidy amount as pre-payment, the FI would submit a utilization certificate as per format (Proforma P) to the Ministry".

Thus, the disbursement of subsidy to the financial institution

will reduce the outstanding debt and consequently some reduction in amount of interest but pre-payment penalty, if any, has to be borne by the Developer. According to the Govt. of India circular the subsidy has been given to improve the economic viability of the small hydro projects.

xi) We feel that it would not be desirable to reduce the normative capital cost of mini hydel projects by the subsidy amount for the following reasons:

a) The subsidy is being given later in post commissioning period directly to the lending agency towards repayment of loan. Reduction of capital cost by subsidy amount will reduce the equity component too whereas in fact there is no reduction in equity resulting in lower return to the Developer. The debt component will also reduce upfront if the capital cost is reduced by the subsidy amount whereas for construction of the project debt component corresponding to capital cost will be arranged by the Developer as subsidy is available only later after commissioning of the project.

b) Subsidy is not available to all the Developers.

c) Reduction in capital cost by subsidy amount will also reduce the O&M charges as these are determined as a percentage of capital cost which will not be correct as O&M charges are not dependent on subsidy and will not reduce if the subsidy is paid by the Central Government.

xii) However, the actual subsidy amount received by the project developer from Government of India after adjusting the pre-payment penalty, if any, may be adjusted against the arrears due to the Developers as a result of determination of tariff as per the directions given in this judgment or against the payments made to the Developers for the energy supplied.

xiii) Accordingly, we decide the capital cost for mini hydel projects at Rs. 4.5 Cr./MW."

5.8 The Appellant craves leave to add to the grounds mentioned above and submits that the contentions are in the alternate and without prejudice to one another.

6. Shri Buddy A. Ranganadhan the learned counsel appearing for the Respondent No.1, has filed the written submissions for our consideration as under :-

6.1 The present appeal has been preferred against the Order dated 08-07-2016 of the Commission in Case of 2016 in which the Appellants petition praying for a re-determination of the tariff was rejected.

6.2 The prayer of the Appellant before the Commission, inter alia, was:-

> "*Determination and true up the revised capital cost and tariff of Vanala Hydro Power Project of Him Urja (p) Ltd* ***without deducting capital subsidy which has not been received*** *applicable from the date of commissioning of the project*…".

6.3 The same/similar claim had been made by the Appellant in the first round which led to the Judgment of this Tribunal in Appeal No. 178 of 2014. By the Commission's Order dated 10-4-2014 (which was impugned in Appeal 178 of 2014) it was held as under:-

> *"3.7.4 The Commission in this regard, had asked the Petitioner to submit a statement containing full details of calculation of any subsidy and incentive received, due or assumed to be due from the Central Government and/from State Government. The Petitioner vide its reply dated February 2A, 2013 submitted that it had applied with MNRE for grant of capital subsidy but no subsidy had been received by it till date as it was unable to fulfil the conditions of grant of subsidy which requires the plant to be tested*

at 80% of the capacity for 80 days, However, the Petitioner could not run the plant for such period due to excessive silt in the river. Therefore testing has not been done, The Petitioner further submitted that as per policy circulated by MNRE dated 11.12.2009 the subsidy eligible for its project works out to Rs, 5.20 Crore.

3.7.5 Accordingly, from the loan amount worked out in sub-para (1) above, the capital subsidy equal to 75% of Rs 6.20 crore has been considered to have been utilized towards pre-payment of debt in accordance with the Regulations."

6.4 By Judgment dated 3rd May 2016, this Tribunal was inter alia, pleased to uphold the aforesaid finding of the Commission and held as under:-

"*After going through the rival contentions and findings recorded by the State Commission on this issue in the impugned order,* ***we agree to the views taken by the State Commission in the impugned order.*** *The State Commission, in the impugned order has provided that the same may be reviewed in accordance with Regulation 16(3) of the RE Regulations, 2010.* ***The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE****. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the State Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator. In view of this relaxation or liberty, we do not find any illegality and perversity in the impugned order and, accordingly,* ***this issue, being Issue No.(C), is also decided against the Appellant.***"..

6.5 Hence, from the aforesaid judgment of this Tribunal, three things are clearly established, namely:-

(i) The decision to deduct the capital subsidy from the debt repayment, even without its being received by the Appellant, was affirmed;

(ii) The provision of the Regulations that the capital subsidy has to be taken into account on the basis of its being "available" as per the MNRE policy was affirmed, irrespective of whether it was received or not; and

(iii) Only when a final decision were taken by the MNRE on the grant of subsidy, could the Commission consider as to whether and if the subsidy were reduced, such reduction would be taken into account, if such reduction was **not due to the inefficiency of the generator.**

6.6 Even in the present petition, leading upto the impugned Order, there is no change in the circumstances.

6.7 The Commission's RE Tariff Regulations 2010, inter alia provide that:-

The 3rd and 4th proviso to regulation 16(2) of RE Regulations, 2010 specifies as under:

*"**Provided further that subsidy available from MNRE**, to the extent specified under Regulation 25, shall be considered to have been utilized towards pre-payment of debt leaving balance loan and 30% equity to be considered for determination of tariff.*

Provided further that it shall be assumed that the original repayments shall not be affected by this prepayment."

Further, Regulation 25 of RE the Regulations, 2010 specifies as under:

"25. Subsidy or incentive by the Central / State Government

*The Commission **shall take into consideration any incentive or subsidy offered by** the Central or State Government, including accelerated depreciation benefit if availed by the generating company, for the renewable energy power plants while determining the tariff under these Regulations.*

Provided that only 75% of the capital subsidy for the financial year of commissioning as per applicable scheme of MNRE shall be considered for tariff determination."

6.8 It is therefore clear that that, as was held by the Commission in the first round and upheld by this Hon'ble Tribunal, the subsidy "available" from the MNRE and "offered" by it has to be taken into account while determining the tariff of the SHP.

6.9 The intention behind the said Regulations are clear. When a subsidy is available to an SHP, there should ordinarily be no question of the SHP not availing of such subsidy and burdening the consumer of such power to pay for the full capital cost. This is clear reinforced in Regulation 16(3) of the RE Regulations, 2010 which reads as under:-

*"The amount of subsidy shall be considered for each renewable source **as per the applicable policy of MNRE**. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the Commission **provided the reduction in subsidy amount is not due to the inefficiency of the generator**."*.

6.10 The above Regulation makes it clear that if the SHP is unable to avail the full subsidy offered by MNRE due to its own efficiency, then the tariff would still be determined by the Commission as if the entire subsidy offered by the MNRE is available to the SHP. The rationale behind this provision is also beset by the overarching principle that if a Generator is so inefficient that it doesn't qualify for a subsidy which is available, then the consumers ought not to pay the cost of such inefficiency.

6.11 However, what is important is that Regulation 16(3) cannot, obviously, be applied till the MNRE were to take a decision on the subsidy claim. Admittedly, the MNRE has not yet taken a decision on the Appellants claim for subsidy. Hence the Commission has held in the impugned Order, inter alia, that

"..*Further, reason for not availing the subsidy from MNRE is on account* ***of not meeting the certain predetermined criteria****. From the above mentioned submission of the Petitioner, it is apparent that the* ***generator's prospects of obtaining subsidy from MNRE still exists*** *since it has not been denied in perpetuity. Regarding prayer of the Petitioner for revision of capital cost and corresponding redetermination of tariff of its Vanala SHP, the Commission is of the* ***view that considering the capital subsidy from MNRE levelised tariff had already been determined by the Commission for life of the SHP****. Redetermination of tariff without considering the subsidy, as requested by the Petitioner, and levying of the same for the period till ascertainment of grant or permanent denial of subsidy to the Petitioner by MNRE may become futile in the event subsidy is granted to the Petitioner which shall further reinstate the tariff since the existing*

approved tariff is based on the similar eventuality. ***Since the tariff of the project has been determined for life of the project in accordance with the Regulations, frequent changes in the same, as envisaged above, may frustrate the intent of uniform levelised tariff for the renewable energy based project.*** *Further, this would also set a precedence allowing other RE generators to approach the Commission to get their tariffs revised each year which would defeat the intent of a generic tariff.* ***Revision in tariff in accordance with the Regulations may be carried out once the subsidy is received or it is established that the developer will no longer be getting any subsidy from MNRE in future.*** *The same is the intent of the Regulations also which says that* ***corrections in tariffs would be carried out by the Commission if MNRE reduces the amount of subsidy****…"*

Accordingly, the Commission is of the view that redetermination of the tariff without deduction of subsidy from capital cost, as requested by the Petitioner, shall be considered subsequent to ascertainment of refusal of subsidy by the MNRE*. Till such time existing levelised tariff as determined by the Commission shall remain applicable. Hence, the Petitioner's prayer in this regard is, hereby, rejected*.."

6.12 It is therefore clear that the Commission has only followed its own earlier Order which has been upheld by this Tribunal APTEL in the earlier round of litigation. Further, the Commission has only applied the Regulations of the Commission which are certainly binding on the Appellant.

6.13 For all the aforesaid reasons it is prayed that the present appeal may be dismissed.

7. Shri Pradeep Misra the learned counsel appearing for the Respondent No.2, has filed the written submissions for our consideration as under :-

7.1 The present appeal is gross abuse of process of law and thus not maintainable.

7.2 The Appellant has challenged the order dated 10.04.2014 passed by the Uttarakhand Electricity Regulatory Commission in Petition No. 19 of 2012 wherein the project specific tariff of the appellant has been determined by the Commission for entire life of the project. Against the said order Appellant filed Appeal No. 178 of 2014 before this Tribunal wherein following three issues have been raised:

> "(A) Whether the tariff determined by the State Commission should be applied from 1.7.2010 when RE Regulations, 2010 were given effect to or from 15.05.2011?
>
> (B) Whether the State Commission has rightly disallowed the interest on the difference in tariff of Rs. 3.50 per unit paid on provisional basis and Rs. 4.00 per unit which has been determined by the State Commission?
>
> (C) Whether the deduction of capital subsidy from the capital cost, which is actually not received by the Appellant, is correct and legally justified?"

7.3 This Tribunal vide judgment and order dated 03.05.2016 has decided the said appeal wherein all the above three issues have been decided by this Tribunal against the Appellant. The finding on

Issue No. (C) which is the present dispute in this case are as follows:

> *"After going through the rival contentions and findings recorded by the State Commission on this issue in the impugned order, we agree to the views taken by the State Commission in the impugned order. The State Commission, in the impugned order has provided that the same may be reviewed in accordance with Regulation 16(3) of the RE Regulations, 2010. The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the State Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator. In view of this relaxation or liberty, we do not find any illegality and perversity in the impugned order and, accordingly, this issue, being Issue No. (C) is also decided against the Appellant".*

7.4 Thus, this Tribunal dismissed the Appeal No. 178 of 2014 filed by the Appellant.

The operative portion of the judgment as contained in Para Nos. 11 and 12 of the said judgment are as follows:

> "11. *Since, all the three issues have been decided against the Appellant, the instant Appeal, being Appeal No. 178 of 2014, merits dismissal.*
>
> *ORDER*
>
> *12. The present Appeal, being Appeal No. 178 of 2014, is hereby dismissed and the Impugned Order, dated 10.04.2014, passed by Uttarakhand Electricity Regulatory Commission, in Petition No. 19 of 2012, is hereby upheld. There shall be no order as to costs."*

7.5 Against the said judgment the Appellant has filed Civil Appeal No. 7185 of 2014 before Hon'ble Supreme Court wherein it has challenged only the findings of this Tribunal in respect of above Issue Nos. (A) and (B). Issue No. (C) has not been challenged which is also admitted by the Appellant in its memo of present Appeal in Para 7(P) which is as follows:

> *"P. While the Appellant has challenged the judgment of the Hon'ble Tribunal before the Hon'ble Supreme Court in Civil Appeal 7185 of 2016 on the other issues decided by the Hon'ble Tribunal, on the issue of capital subsidy assumed the Appellant filed a separate petition for revision and adjustment of tariff on account of the capital subsidy which was assumed by the State Commission not being received by the Appellant."*

7.6 Thereafter Appellant has filed a fresh Petition seeking adjustment of tariff for Vanala Small Hydro Power Project (15 MW) of M/s. Him Urja Pvt. Ltd. as per Section 61 and 62 of the Electricity Act,2003 readwith Regulation 16(3) & 25 of UERC (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 and Regulation 3 & 4(4) of the UERC (Terms and Conditions for Truing Up of Tariff) Regulations, 2008.

7.7 The Commission has decided the said Petition vide order dated 08.07.2016 wherein the Commission has specifically asked a question regarding likelihood of getting subsidy from MNRE in future and in response to the same the Appellant has submitted that it may

get the same in this financial year also or in ensuing financial years since its claim has not been denied for perpetuity by the competent authority. Thus, the Commission in Para 2.4 and 2.5 of the impugned order has held that there is no ground for revising the order and the Petition filed by the Appellant was dismissed.

7.8 It is submitted that once the Appeal No. 178 of 2014 filed by the Appellant has been dismissed by this Tribunal including on the ground of subsidy and the Petitioner has challenged the said decision before Hon'ble Supreme Court, the Petition filed by it was barred under Order 2 Rule 2 of CPC. Thus, the present Appeal against an issue which has been heard and decided between the parties is not maintainable.

7.9 The Appellant has not given up the claim for MNRE subsidy neither the subsidy has been refused hence also the Petition is not legally maintainable. It is pertinent to mention here that the Government of India, Ministry of New and Renewable energy scheme dated 11.12.2009 does not provide for any contingency to refuse the application for subsidy of the eligible SHP and the criteria of attaining 80% of the quantum of generation is not only nominal but also the essential parameter to ascertain the efficiency of a generator as it would be a farse to consider the full capacity of a plant for the purpose of deriving capital cost when in fact the plant is not even capable of reaching 80% of its capability, even the Commission would consider that it must be a basic achievable norm for every generator so that the consumer of the State do not get penalize for the inefficiency of any generator. The SHPs are allotted upon

the parameters as shown in their DPRs and accordingly the best utilization of the natural resources is ascertain but if the projection in the DPRs are not actually attainable then the whole purpose for choosing the generator with the best projections would become futile.

7.10 The replying Respondent respectfully submits that if any reason whatsoever given by generator for not achieving a particular amount of generation is considered and the benefit of the same is given to the generator then it would not only be compensating the generator for his inefficiency but in fact in such a situation it would become impossible to hold any generator to be inefficient. The inefficiency of a generator cannot be permitted to cast additional burden upon the consumers of the State rather strict measures are required to be taken so that the generators are prompted to achieve and maintain their efficiency which would not only be beneficial for the State in general but also to the Respondent who will receive much needed additional generation specifically from Renewable Source of Energy.

In view of aforesaid facts and circumstances, Appeal is liable to be rejected and accordingly be rejected.

9. We have heard learned counsel appearing for the Appellants and learned counsel appearing for the Respondents at considerable length of time and we have considered carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-

Issue No.1: Whether the State Commission is justified in deducting the capital subsidy based on only assumptions, without its actual receipt by the Appellant?

Issue No. 2: Whether the State Commission has taken a judicious decision in not revising the tariff based on the fact that the capital subsidy has not been received by the Appellant from MNRE?

OUR CONSIDERATION AND FINDINGS

As both the issues are intertwined, we consider and decide them jointly.

10. Issue No.1 & Issue No. 2:

10.1 Learned counsel for the Appellant submitted that the Appellant is aggrieved by the decision of the State Commission rejecting its petition for revision of tariff on account of non-receipt of subsidy from the Government of India, which was assumed by the State Commission while determining the tariff for the cited project of the Appellant.

He further submitted that the Commission has erroneously proceeded on the basis that the capital subsidy was available with the Appellant, whereas no such subsidy has been received by the Appellant. Learned counsel was quick to point out that this Tribunal while deciding the Appeal No. 178 of 2014 did not interfere with the said decision of the State Commission on the premise that the State Commission would carry out

necessary corrections in the tariff as was also stated in the tariff order dated 10.04.2014. However, when the Appellant approached the State Commission pursuant to the judgment of this Tribunal for the revision of tariff on account of the fact that subsidy was not received, its petition came to be rejected holding that till the time the final decision of MNRE is taken for grant of subsidy, the existing tariff which assumes the receipt of subsidy shall continue.

10.2 Learned counsel for the Appellant contended that one of the conditions for receiving capital subsidy was that the plant should operate at 80 % of the capacity for a continuous period of 80 days which it has not been able to run at 80 % capacity because the adequate water to run at this load factor is available only in the months of July to September of a year and during this period there is excessive silt in the river affecting the performance of the hydro plant. Further, the learned counsel submitted that the generating station of the Appellant has been adversely affected by the cloudbursts in the year 2013 due to which the project was shut down from June, 2013 to March, 2014. The restoration work for the damage caused due to the said cloudburst is not fully complete and is still continuing. Due to these reasons, the Appellant could not achieve the performance conditions for availing the capital subsidy.

10.3 Learned counsel also placed on record the statement of generation at both of its hydro plants namely Rajwakti (4.4

MW) and Vanala (15 MW) plants with a view to indicate the adverse impact of silt on the generation pattern of these two hybro plants. Learned counsel citing the reference of UERC RE Regulations 2010 and judgment of this Tribunal dated 20.12.2012 in Appeal No. 150 of 2012 and batch reiterated that in the present case when the subsidy has not been received for no fault of the Appellant, the question of artificially reducing the tariff by assuming the subsidy does not arise.

Learned counsel for the Appellant in view of the above facts contended that the State Commission ought to have given effect to the Regulations 16(3) to grant the tariff for the project of the Appellant without assuming the capital subsidy with the condition to review the same after ascertaining the actual amount of subsidy as and when received by the Appellant from MNRE.

10.4 ***Per Contra*** learned counsel for the Respondent No. 2 / Uttrakhand Power Company Limited (UPCL) submitted that the State Commission has rightly taken the decision in the Impugned order that there is no ground for revising the tariff and the petition filed by the Appellant was accordingly dismissed. He further contended that the Appellant has not given up the claim for MNRE subsidy neither the subsidy has been refused hence also the Petition is not legally maintainable.

10.5. Learned counsel was quick to point out that the MNRE scheme dated 11.12.2009 for grant of subsidy does not provide for any

contingency to refuse the application for subsidy of the eligible Small Hydral Projects (SHP) and the criteria of attaining 80 % of the quantum of generation is not only nominal but also the essential parameters to ascertain the efficiency of a generator. Learned counsel advancing his arguments further submitted that the Appellant has not been granted the capital subsidy by MNRE till date only because of inefficiency of its plant in not generating 80% power for prescribed 80 days. As such, if any benefit out of the same is given to the Appellant then it would not only be compensating the generator for his inefficiency but in fact in such a situation it would be impossible to hold any generator to be inefficient. He further submitted that the inefficiency of a generator cannot be permitted to cast additional burden upon the consumers of the State rather strict measures are required to be taken so that the generators are prompted to achieve and maintain their efficiency which would not only be beneficial for the State in general but also to the Respondent who will receive much needed power specially from Renewable Source of Energy.

10.6 Learned counsel for the Respondent Commission vehemently submitted that the intention behind Regulation 16 (3) of the RE Regulations 2010 are clear as when a subsidy is available to an SHP, there should ordinarily be no question of the SHP not availing of the subsidy and instead burdening the consumers of such power to pay for the full capital cost. Regulation 16(3) reads as under:

"The amount of subsidy shall be considered for each renewable source as per the applicable policy

of MNRE. If the amount of subsidy is reduced by MNRE, then necessary corrections in tariffs would be carried out by the Commission provided the reduction in subsidy amount is not due to the inefficiency of the generator."

10.7 The said regulations thus specially provide for that reduction in subsidy amount should not be due to the inefficiency of the generator. He further emphasised that rationale behind this provision by the State Commission is also beset by the overarching principle that if the generator is so inefficient that it does not qualify for a subsidy, which is available, then the consumers ought not to pay the cost of such inefficiency. Moreover, what is important is that the Regulations cannot be, obviously, applied till MNRE takes the final decision on the subsidy claim. Admittedly, MNRE has not yet taken a final decision on the claim of the Appellant for reference subsidy. Hence, the finding of the Commission in the Impugned Order is fully justified.

10.8 Learned counsel for the Respondent Commission highlighted that the Commission only followed its own earlier order which has been upheld by this Tribunal in the earlier round of litigation and accordingly, the present appeal deserved to be dismissed.

11. OUR FINDINGS AND ANALYSIS :-

11.**1** We have carefully considered the submissions of the learned counsel for the Appellant as well as the learned counsel for the Respondent Nos. 1 & 2 and also taken note of applicable

Regulations of the State Commission on the subject. What thus transpires is that the SHP of the Appellant was eligible for obtaining the capital subsidy from MNRE, Government of India but failed to avail the same because it could not achieve the performance criteria of 80% PLF for 80 days, as prescribed for availing the subsidy from MNRE. The learned counsel for the Appellant repeatedly emphasised that the subsidy has not been granted by MNRE for none of its faults as project could not operate at prescribed performance criteria due to excessive silt passing their machines in high discharge period. On the other hand, learned counsel for the Respondent Nos. 1 & 2 contended that the Appellant has miserably failed in achieving the prescribed performance parameters for getting the subsidy from MNRE on account of its own inefficiency and the Appellant cannot be compensated for its own under performance.

11.2 Having regard to the submissions of the learned counsel for the both the parties, it is relevant to note that the grant of capital subsidy by MNRE is yet to be decided and the Appellant has admitted during the arguments that it is still hopeful of availing the same. We are unable to accept the contentions of the Appellant that it is not able to achieve desired eligibility parameters on account of excessive silt in the river Nandakini due to the fact that all such hydro projects are planned and constructed considering the silt problems and considering adequate remedial measures based on the water / silt analysis of the river. Moreover, achieving 80 % PLF for 80 days is not a non achievable criteria for small hydro projects. If the Appellant's project at Vanala could not

achieve, the same, it may be additionally due to some other technical problems in the generating units. In view of these facts, we are of the considered opinion that the findings of the State Commission in the Impugned Order do not suffer from infirmity or perversity and hence, any interference by this Tribunal is not called for.

ORDER

For the foregoing reasons, we are of the considered view that the instant Appeal being Appeal No. 17 of 2017 is devoid of merits and hence dismissed. The Impugned order dated 08.07.2016 passed by Uttrakhand Electricity Regulatory Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this day of **09th May, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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