IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.145 OF 2020

Dated: 12th February, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

1. UTTAR BHARAT HYDRO POWER PRIVATE LIMITED
Through its Managing Director,
A-2/252, Sector-08
Rohini, New Delhi-110085 ... Appellant(s)

VERSUS

1. UTTARAKHAND POWER CORPORATION LIMITED,
Through its Managing Director,
Urja Bhawan, VCB Ghabbar Singh Bhawan,
Kanwali Road, Dehradun,
Uttarakhand - 248001 ... Respondent No.1

2. POWER TRANSMISSION CORPORATION OF UTTARAKHAND LIMITED
Through its Managing Director,
Vidyut Bhawan, Saharanpur Road,
Near ISBT Crossing, Dehradun,
Uttarakhand - 248002 ... Respondent No.2

3. UTTARAKHAND ELECTRICITY REGULATORY COMMISSION,
Through its Secretary,
ISBT Chowk, Majra, Dehradun,
Uttarakhand - 248171 ... Respondent No.3

Counsel on record for the Appellant(s)	:	Shikha Ohri Samyak Mishra for App1
Counsel on record for the Respondent(s)	:	Pradeep Misra Manoj Kumar Sharma for Res1 Sonam Anand

Santosh Krishnan
Akshay Thakur
Deepshikha Sansanwal for Res2

Buddy A. Ranganadhan for Res3

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. The present appeal is instituted against the order dated 11.03.2020 passed by the Uttarakhand Electricity Regulatory Commission in Petition No. 09 of 2019, whereby the Commission has restricted the claim of the Appellant towards deemed generation for the year FY 2016-17 and FY 2017-18, and in particular, denied the deemed generation to the extent of non-availability of the evacuation system attributable to Respondent No.1-Uttarakhand Power Corporation Limited.

2. The Appellant in this matter is Uttar Bharat Hydro Power Private Limited, a corporate entity duly incorporated under the Companies Act, 1956. The Appellant has established two small hydroelectric projects situated in Kapkote, within the district of Bageshwar, Uttarakhand.

i. 10.5 MW Sarju-III project commissioned on 11.07.2014**(**hereinafter referred to as '**Sarju-III')**.
ii. 12.6 MW Sarju-II project commissioned on 28.05.2016 **(**hereinafter referred to as '**Sarju-II').**

3. The Respondent No. 1, Uttarakhand Power Corporation Limited ("**UPCL"**) is a licensee to undertake distribution and retail supply of

electricity as per the provisions of the Electricity Act, 2003 in the State of Uttarakhand. The Respondent No. 2, Power Transmission Corporation of Uttarakhand Limited (**'PTCUL'**) is a Government of Uttarakhand Enterprise and a Government Company. The Respondent No. 3 is the Uttarakhand Electricity Regulatory Commission ("**UERC/State Commission**").

4. The Appellant and the Respondent No.1-UPCL had entered into a Power Purchase Agreement (**'PPA'**) dated 16.12.2002, whereby the Appellant had agreed to set up Sarju-III small hydro power project in order to generate and supply electricity to Respondent No.1-UPCL. The said PPA dated 16.12.2002 was superseded by a Power Purchase Agreement dated 13.10.2011.

5. The State Commission by its Order dated 14.10.2015 had approved the PPA with certain amendments, including the inclusion of provision of deemed generation. Pursuant thereto, the parties entered into a Supplementary Agreement dated 23.02.2016. The delivery point, as per the PPA, is to be the interconnection point being the generating station.

6. As per the terms of the PPA, the Appellant had set up a small hydro generating project of 10.5 MW (Sarju-III) and constructed a transmission line from the generating station to the 33 KV Kapkote sub-station of Respondent No 1-UPCL. The said project was commissioned on 11.07.2014 and the Appellant was ready to deliver 10.5 MW of electricity.

7. However, in a meeting held on 22.05.2014, UPCL had restricted the evacuation of power from the project to 7 MW instead of 10.5 MW, due to downstream constraints faced by it in its system on account of pending of strengthening of 33 KV Kapkote – Bageshwar line (i.e. converting the entire 33 KV line into ACSR DOG line which is 07 km of ACSR DOG and 15 Km on ACSR RACOON). Even for evacuation of 7 MW, PG clamps and jumper need to be changed. The Appellant has submitted that even against the 7 MW, UPCL did not take delivery of full quantum of power. As per Minutes of meeting dated 25.02.2016, evacuation from Sarju III was further reduced to 3.5 MW from 7 MW and that of 4.2 MW from Sarju II Hydro Project (3*4.2 MW) till completion of 33 KV ACSR panther conductor line between Kapkote and Bagheshwar. Subsequently, since the work on replacement by dog conductor was completed in May 2016, the capacity for Sarju III was increased to 6.5 MW. In the minutes of meeting dated 25.02.2016, UPCL also stated that without the panther line between Kapkote Sub-station and Bageshwar Sub-station, it is not possible to evacuate the full capacity of 10.5 MW of Sarju III and 12.6 MW of Sarju II. The said line was completed in October 2019, which is more than 5 years after the commissioning of the power project – Sarju III.

8. The Appellant had submitted that they had raised invoice for deemed generation claim for 2014-15 and 2015-16 on Respondent No. 1 UPCL, which denied the claim of deemed generation stating that the restriction in generation was due to the improvements being carried out in the evacuation system. The Appellant then filed a petition before the State Commission UERC, Respondent No. 3, which through its order

dated 28.10.2016 reiterated that the claim of the appellant was admissible and referred the matter to Arbitration. Aggrieved thereby, UPCL filed a Review Petition before the State Commission, which was rejected by the State Commission on 23.12.2016. On 29.09.2017, an arbitration award was passed as regards deemed generation claims of the Appellant for the FY 2014-15 and FY 2015-16, in pursuance to the State Commission's Order dated 28.10.2016. This said arbitral award has now been impugned before the District Judge, Dehradun, Uttarakhand, under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996.

9. The Appellant submitted that it had raised invoices for deemed generation benefit for the un-availed quantum for the FY 2016-17 on monthly basis on the provisional tariff of Rs. 4.52/4.57 per unit. However, the UPCL neither responded to nor called the Appellant for any reconciliation. Subsequent to the issuance of above invoices, the State Commission has passed an Order dated 16.03.2017 determining a levelised tariff of Rs. 5.52 per unit for the project of the Appellant. The tariff determined was inclusive of capital cost of the transmission line upto Kapkote sub-station, but did not include expenses for operation and maintenance of transmission line. The claim of the Appellant for deemed generation was revised. The Appellant had also enclosed details of outages as well as voltage issues along with the invoices. However, UPCL had not undertaken any reconciliation. The Appellant had written various letters to UPCL on the outages and grid failure issues as well as voltage issues and also seeking reconciliation; however, there was no response from UPCL. Due to inaction on the part of UPCL for reconciliation, the Appellant filed an Application before the State

Commission being Misc. Application No. 40 of 2017 with regard to FY 2016-17. The State Commission vide Order dated 09.08.2017 directed the parties to seek amicable settlement and also stated that any unresolved issues may be agitated before the State Commission.

10. The Appellant submitted that in pursuance to the State Commission's Order dated 09.08.2017, the parties convened a meeting on 09.10.2017, wherein the UPCL while denying the claim of the Appellant for deemed generation, stated that there was no capacity restriction, despite clear evidence of the inadequate capacity of the line. UPCL also claimed that the data related to outages were not supplied by UPCL. On 08.11.2017, UPCL submitted the information for interruption details during the FY 2016-17. UPCL did not give reasons for each of the said outages to the Appellant and the reasons cited by UPCL do not seem to indicate the force majeure as claimed by UPCL in the meeting held on 09.10.2017.

11. On 15.12.2017, UPCL vide a letter stated that the deemed generation calculation against voltage fluctuation is not in accordance with the RE Regulations. Despite a meeting convened between UPCL and the Appellant on 28th February, 2018 on the above said issues, no resolution was reached. In the meanwhile, the Appellant had also raised invoices for FY 2017-18 for deemed generation benefit for the unavailed quantum on a monthly basis at the tariff of Rs. 5.52/Rs. 5.77 per unit. Subsequent attempts to negotiate an amicable settlement were made, but it did not culminate in a mutually acceptable resolution between the parties. Thus, the Appellant referring to Regulation 47 of the RE

Regulations 2013, filed a Petition No. 9 of 2019 before the State Commission and claimed deemed generation under the heads (i) capacity restriction, (ii) voltage fluctuation (iii) grid failure and further the Delayed Payment Surcharge applicable.

12. The State Commission, vide its Order dated 11.03.2020 in Petition No. 9 of 2019 has partially allowed the deemed generation claim of the Appellant and directed the UPCL to make payment of deemed generation bills, within one month of bills being served by the Appellant. However, the State Commission has rejected the claim in relation to the capacity restriction by UPCL in view of insufficient evacuation capacity. Further, the State Commission has also held that the Appellant is the owner of the dedicated line between Sarju-III and the 33 kV Kapkote Sub-Station and the full responsibility of its maintenance lies on the Appellant. The State Commission while holding that it is the responsibility of UPCL to maintain the existing distribution system to ensure availability of maximum generation, has directed the UPCL to frame a detailed procedure for monthly reconciliation of deemed generation bills together with the Appellant and submit the same to the Commission within one month of issue of the order. The UPCL was also directed to ensure that voltage profile at the substation is maintained within the limits prescribed in the RE Regulation 2013. Aggrieved by certain aspects of the Impugned Order, the Appellant has preferred the present appeal for the deemed generation claim for the year 2016-17 and 2017-18 with the following main prayers:

a) Allow the appeal and set aside the order dated 11.03.2020 passed by the Uttarakhand Electricity Regulatory commission in Petition No. 09 of 2019 to the extent challenged in the present appeal;
b) Direct the Respondent No. 1 to make payments for the deemed generation for the Insufficient evacuation capacity as well as for outages/grid failures and voltage fluctuations from the inter connection point as per the claim of the Appellants.

13. The Appellant submitted that the State Commission has misread the Regulation 47 [1] of RE Regulations 2013 and held that the scope of the said Regulation is restricted to the non-availability of 'existing distribution system' on account of tripping/ outage/ interruption of line etc. and it does not include 'insufficient capacity of the system resulting in dispatch restrictions'. The said finding is erroneous and contrary to the plain and natural reading of the Regulation, and the Commission has added words into the regulation changing its scope and has acted contrary to the scheme and purpose that the Developers should not suffer on account of the failure of UPCL to fulfil its obligations, namely in the servicing of the capital cost invested and admissible expenditure through the tariff applicable. The Appellant contended that the non-availability of evacuation system covers both situations such as failure on the part of UPCL to establish the adequate evacuation system (10.5 MW from Sarju III) and also to maintain the system established in accordance with the Regulation affecting the evacuation. Further, the tripping/ outage/ interruption of line etc. is dealt in the proviso to Regulation 47 (1) by way of exclusion from deemed generation, only when it is within the specified limits and not beyond. Contending that these cannot be used to interpret the main clause 47 (1) to restrict its

scope and exclude failure of UPCL in not establishing adequate capacity, Appellant submitted that the State Commission is wrong in arriving at the above interpretation especially when it had, in various earlier orders conclusively held that UPCL had delayed the establishment of the adequate evacuation system, which has seriously affected the Appellant and other developers.

14. The Appellant also submitted that it has agreed to restrict the evacuation from Sarju III based on technical consideration during the meetings held on 22.05.2014 and 25.02.2016 as it had no option for synchronisations of its project to the grid and there is no express agreement for giving away its right for deemed generation compensation. In this context a reference is made to **2016 SCC Online SC 1436 (para 44).**

15. The Appellant also submitted that UPCL had filed a Petition No.36 of 2016 seeking specific relaxation in RE Regulations 2013 from the payment of deemed generation in respect of Sarju III (as well as Sarju II) on account of restrain in evacuation system due to allowance of evacuation of power from Sarju II HEP till the under construction 33 KV line between Kapkote & Bageshwar, is completed. However, the same was rejected by the State commission vide its order dated December 08, 2016, thus the same had become final and constitutes *res judicata* for UPCL to claim that restriction of capacity from 10.5 MW to 7 MW or less is not covered under deemed generation.

16. As regards the term 'Availability' used in Regulation 47 in RE Regulation 2013, in the context of evacuation system, the Appellant

submitted that the same cannot be given the meaning of the term 'availability' defined in the Tariff Regulations for the extent of already established capacity, since both the contexts are totally different.

17. So far as voltage fluctuation and grid failure are concerned, according to the Appellant, it is on account of non-maintenance of lines/ system by UPCL beyond Kapkote. The extent of voltage fluctuation and grid failure is always available on real time basis for every minute whereas the restriction of evacuation capacity is ascertainable by the log books maintained by UPCL and the STU. Though the Appellant has produced its log books to establish the same, the State Commission has not considered the same, on the ground that the said reasons are not properly provided. The Appellant also contended that based on the MRI data of the main meter installed at the Sarju-III, the State Commission has determined slot-wise voltage (namely 30 minutes integration) to see if it was within the prescribed limit of -6% and 9%, but the said MRI data was provided for the purpose of billing the quantum of electricity supplied and the same cannot be used for the computation of the period of voltage fluctuation and grid failure, because the voltage fluctuation and grid failure is always available on real time basis for every minute and evacuation being restricted is clearly verifiable from the log books to be maintained by UPCL/STU. There is no justification in the impugned order for denying the deemed generation when the evacuation being restricted based on MRI data.

18. The State Commission in the impugned order has wrongly considered the falling of trees as force majeure event, when the State Commission itself had not considered the falling of trees as force

majeure in the Statement of Reasons for RE Regulations, 2013. Falling of trees is an event, which can be foreseen and it is the obligation of UPCL to act prudently and maintain the line without being affected by falling trees, therefore, the same would not constitute as an event of force majeure. The Appellant further submitted that the Appellant based on its records had raised the regular bills on UPCL including for deemed generation, which was neither disputed nor denied at the relevant time, though Clause 5.7 of the PPA requires an objection to be raised within 30 days. Also, no claim for force majeure was also raised by UPCL at the above stage or even in the meetings held on 09.10.2017 and 23.03.2018.

19. The State Commission has erroneously denied the late payment surcharge on the deemed generation claim allowed holding that there is failure on the part of the Appellant for reconciliation, in spite of the fact that the Appellant had submitted the bills and the UPCL had not raised any objection at the relevant time. The said denial is contrary to settled principles of law and Regulation 23 of the RE Regulations, 2013.

20. Learned counsel for the Respondent No.3 the UERC has based his arguments on the following two major issues:

i) On Interpretation of Regulation 47 of the RE Regulations 2013 as to whether the “non-availability” of the evacuation system contemplates a situation that the existing evacuation system not being able to evacuate power due to voltage fluctuations or tripping’ etc. or a situation when the existing capacity of the existing evacuation system is not sufficient to evacuate the required power. According to the Appellant,

Regulation 47 contemplates the second situation, however the Commission has held that it contemplates the first situation.

ii) On the effect of the earlier Orders of the Commission, and whether the Commission has taken a view contrary to what was taken earlier.

21. For issue No.1, Respondent No 3, UERC submitted that Regulation 47 uses the expression "non-availability of the evacuation system". The evacuation system could be a Distribution System or a Transmission System. Any meaning given to the expression "non-availability" would have to apply equally to whether the evacuation system is a Distribution Line/system or a Transmission line/system. In the instant case, factually, the evacuation system is a Distribution system. However, in the context of a "Transmission line", Regulation 2(9) of the MYT Tariff Regulations 2015 (as also of 2018 and 2011 before that), defines "availability" of a Transmission line as ""*Availability" in relation to a transmission system for a given period means the time in hours during that period in which the transmission system is capable of transmitting electricity at its rated voltage to the delivery point and shall be expressed in percentage of total hours in the given period".* The expression "Transmission system" is only the existing Transmission system and not a system which doesn't exist. Therefore, under the Tariff Regulations, the "availability" or the converse thereof, i.e. "non-availability" can only be considered with reference to the capacity of the existing transmission system and not to system which ought to have been in existence.

22. The Respondent No 3, UERC also submitted that Regulation 3(2) of the RE Regulations 2013 contemplates that *"Save as aforesaid and unless repugnant to the context or if the subject matter otherwise requires, words and expressions used in these regulations and not defined, but defined in the Act, or the UERC (State Grid Code) Regulations or the Commission's Regulations on determination of Tariff shall have the meanings assigned to them respectively in the Act or the State Grid Code or the Commission's Regulations on determination of Tariff".* Hence, the expression "non-availability" is to be understood as defined in the Tariff Regulations. Therefore, the expression "non-availability" in Regulation 47 ought to be considered with reference to the transmission (or evacuation) system as existing and not with reference to an evacuation system that does not exist. Regulation 47 does not indicate anything other than the existing evacuation system not being able to evacuate power for the reasons mentioned therein. Even, all the clauses of Regulation 47 deal only with a situation where the existing evacuation system is unable to evacuate because of voltage fluctuations, trippings etc. The deemed generation amount was computed only with respect to the voltage fluctuations and trippings etc., in the existing line/system as per Regulation 47. Moreover, the Statement of Objects and Reasons of the Amendment in 2012 to the RE Regulations 2010, which introduced the Deemed Generation provision, clearly indicated the intention of the Commission to limit Deemed Generation to a situation where the existing evacuation system is unable to evacuate power due to voltage fluctuations, trippings etc. and nothing else.

23. As regards the issue that the State Commission has taken a contrary view than the one taken in the earlier Orders of the State Commission on the interpretation of Regulation 47, it was submitted that though the Petition No. 36 of 2016 was dismissed by order dated 08.12.2016 for various reasons, the interpretation of Regulation 47 remains the same as what the Commission now says, therefore, it was unnecessary to consider any Relaxation. Further, an Order can be an authority only for what it decides and not for what may logically flow from it. Respondent No 3 also submitted that the Petition No. 36 of 2016 was dismissed on some other grounds, therefore, such contentions of the Appellant ought not to be accepted on any principle of law or precedent.

24. The Respondent No 1 UPCL submitted that initially the Appellant had planned a capacity of only 2 MW from Sarju III and PPA was signed in 2002 and thereafter vide implementation agreement dated 03.06.2011, capacity of SHP was enhanced to 10.5 MW and revised PPA was signed on 13.10.2011. Similarly, the capacity of other upcoming project namely Sarju II was also enhanced from 3 MW to 12.6 MW for which supplementary PPA was signed on 26.02.2015. So the Respondent No 1 was not aware of the enhancement of generating capacity of the Appellant and only in 2014 had approved for conversion of 33kV line Kapkote to Bageshwar from Racoon Conductor to DOG conductor. Further, since this line was being used for evacuation of power from Appellants generation project they allowed shut down of line for carrying out this strengthening work when their generation was not affected. Respondent No 1 also submitted that the Appellant was in agreement for restriction of the capacity as evident from MOM dated 22.05.2014 & 25.02.2016 based on actual existing position of the

distribution system. The Appellant is thus not entitled to deemed generation as they were not in a position to generate to full capacity due to their own constraints for the period they are asking deemed generation due to restriction in the capacity. The Respondent No.1 claimed that the Appellant has not complied with regulation 47 (3) of UERC RE Regulations, 2013 which requires both the parities to mandatorily reconcile on monthly basis the loss of generation towards deemed generation. There was no question of denial of the outages or voltage claims sent with the invoices; in fact the Appellant should have raised the invoices only after reconciliation, and the responsibility of reconciliation equally lies upon the Appellant as well. The Respondent No.1 submitted that it had already apprised the Appellant regarding there being no capacity restriction hence the question of raising invoices for power restriction is not only against Regulations but also not maintainable in the light of the facts.

Analysis and Discussion

25. We have heard the learned Counsel for the parties extensively and have gone through the impugned order, records of the case and written submissions filed by the learned Counsel and following consideration emerges. But before going into the same, we would like to clarify that present order shall be limited to Deemed Generation claim for the year 2016-17 and 2017-18 as considered in the impugned order of UERC dated 11.03.2020:

a) Is the Appellant entitled for deemed generation claim, due to restriction of the capacity of Sarju III pending strengthening of Kapkote-Bageshwar 33 KV line as well as construction of new 33

KV Kapkote-Bageshwar Panther conductor Line as per UERC RE regulation 2013.

b) Other deemed generation claims on account of Voltage fluctuations, Grid outages as well as Late payment surcharge .

26. In the PPA signed between Appellant and Respondent No 1 UPCL on 13.10.2011, UPCL has agreed to purchase entire 10.5 MW power generated from Sarju III SHP of Appellant. The PPA was approved by the UERC vide its order dated 14.10.2015 with a direction to include provision of deemed generation in accordance with Regulation 47 of RE Regulations, 2013 and accordingly, supplementary PPA was signed on 24.02.2016. Let us reproduce some definitions from the PPA dated 13.10.2011, which shall be used in subsequent discussion:

> " ***1.1' Bill Meter'*** *means Import and Export meter on the basis of which energy bills shall be raised by the Generating Company/UPCL.*
>
> ***1.4 'Export Meter'*** *Export Meter' means Bill Meter installed at interconnection point for measurement of Active Energy, Maximum demand and Power factor for Energy exported to the Generating Company's Hydro power plant from UPCI. 33/11 KV Grid connecting Sub-Station, Kapkote, District- Bageshwar, Uttarakhand.*
>
> ***1.7 'Import Meter'*** *means Bill Meter installed at interconnection point for Measurement of Active Energy, Maximum demand and Power factor for Energy imported from the Generating Company's Hydro power plant to UPCL 33/11 KV Grid connecting Sub-Station, Kapkote, District Bageshwar, Uttarakhand.*
>
> ***1.15 'Interconnection point'*** *means the interface point of Renewable energy generating facility with the transmission system or the distribution system, as the case may be,*
>
> *i) In relation to wind energy projects and solar photovoltaic projects, interconnection point shall be line isolator on outgoing feeder on HV side of the pooling substation;*
>
> *ii) In relation to small hydro, biomass power and non fossil fuel based cogeneration power projects and solar thermal power projects, the*

interconnection point shall be line isolator on outgoing evacuation line from such generating station."

27. The Appellant has established a generating station with a dedicated 33 KV transmission line upto Kapkote, which was commissioned on 10.07.2014. UPCL has committed to acquire the entire 10.5 MW of power generated beyond the interconnection point. Pursuant to Clause 42 of the Electricity Act 2003, Respondent No 1, UPCL, the distribution licensee has the duty to the following effect:

" *to develop and maintain an efficient coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this act."*

28. In this context, we would like to refer to earlier order of UERC where non-availability of sufficient evacuation system for evacuation of entire power from Sarju III, and other upstream projects has been deliberated/decided.

29. **Order dated September 11, 2015 under suo-moto proceedings**

The following is the view of the Commission:

"4. In light of the above, it is ordered that

(1) UPCI shall:

(a) Submit a comprehensive Action Plan under affidavit for evacuation of existing and proposed generation in Kapkote region including three generating stations (Sarju-1, Sarju-II & Sarju-III) of M/s UBHP latest by 30.09.2015.

(b) Ensure timely completion of ongoing works including replacement of Raccoon conductor by Dog conductor between its 33 kV S/s Kapkote and 33 KV S/s Bageshwar, additional panther conductor circuit between the aforesaid sub-stations etc, so as to ensure that generation of Sarju-III & Sarju-ll and other upcoming generators in the vicinity of Kapkote region does not get bottled-up. Progress achieved be reported within 15 days of close of each quarter."

30. **The State Commission's Order dated October 28, 2016** for adjudication of dispute under 86 (1)(f) between Uttar Bharat Hydro Power (P) Ltd and Uttarakhand Power Corporation Ltd in respect of 10.5 Sarju III Small Hydro Power Project. Though the Petition was with regard to dispute for deemed generation claim of 2014-15 and 2015-16, but issue is same regarding deemed generation claim due to restriction in capacity.

At para 3.10 of the said Order, UPCL has submitted as under:

"provision of deemed generation assumes the existence of proper evacuation system and permits deemed generation only in cases where it is the fault of the licensee. However in the present situation the system was always available but due to the enhancement in the capacity of Petitioner the existing system became in sufficient'.

In the said order UERC has made the following observation:

Commission's Views & Decisions

"4.2 The Respondent contended that the provision of deemed generation assumes the existence of proper evacuation system and permits deemed generation only due to the fault of licensee, however, in the present situation the system was always available but due to the enhancement in the capacity of the Petitioner's plants, the existing

system became insufficient. In this regard, Regulation 47(1) of the RE Regulations, 2013 provides that

"(1) After the COD of the Project, loss of generation at the Station on account of reasons attributed to the following, or any one of the following,

shall count towards Deemed Generation:

Now availability of evacuation system beyond the Interconnection Point and

...."

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

generating stations as a result of which it not only loses energy but is also unable to meet its RPO target. The Commission expresses displeasure over lackadaisical approach and vague excuses of the licensee (Respondent) and warns it to refrain from such callousness in future".

31. The State Commission in the Order dated December 8, 2016 in Petition No.36 of 2016 in the matter of Relaxation in RE Regulations 2013 in respect to restriction in evacuation of power from Sarju II and Sarju III SHP of M/s UPHP Ltd, has observed that:

"30. On examination of the petition and replies by the Petitioner (UPCL) & Respondent (M/s UBHP) in the matter the Commission has observed that:-

(i). No new fact has been brought out by UPCL in support of its request for disallowance of deemed generation claim by M/s UBHP for Sarju-III project. Further, it is observed that the Commission had already dealt the matter of deemed generation pertaining to Sarju-III project vide its Order dated 08.06.2016 and October 28, 2016 and the Commission finds that no new fact of compelling nature has been brought out by UPCL which can lay the basis for disallowance of deemed generation claimed for Sarju-III project. Moreover, UPCL in its petition at Para (xii) has itself agreed that the claim of deemed generation for Sarju – III SHP is maintainable as per present regulation.

(ii). UPCL in its petition submitted that due to limitation in evacuation facility in the region generation from one SHP will effect generation from another SHP. UPCL submitted that while calculating deemed generation for Sarju-III SHP reason attributable to other generating SHP should be considered, however, this would complicate the matter in determination of exact impact of other SHPs. In this regard,

the Commission is of the view that every project is unique in terms its generation and responsibility of evacuation facility as provided in the regulations. Impact of generation from other generating facilities in no way provides relaxations to UPCL for deemed generation loss caused to Sarju-II SHP.

(iv) Further, relaxation in regulations, if any, is carried out keeping in view interest of all the stakeholders at large and not for the purpose of promoting inaction or procrastination of performing duties/responsibilities entrusted under the Act & Regulations.

(v) Accordingly, UPCL's prayer vide petition no. 36 of 2016 seeking relaxation is disallowed."

32. From the above, it is clear that the onus of evacuation of power is on Respondent No 1 i.e. UPCL, both in terms of PPA as well as Electricity Act 2003, which has also been stated by UERC in its various orders, as referred to above. Respondent No 1, UPCL as early as in October 2011 (or even earlier during process of finalising & signing the PPA), was aware of its liability and responsibility of evacuation of entire 10.5 MW from Sarju III when it signed the PPA. Respondent No.1 could not show a Clause in PPA that such evacuation of 10.5 MW shall be subject to strengthening of existing Kapkote–Bageshwar line and completion of New transmission line on Panther conductor between Kapkote and Bageshwar, which could absolve them of liability of payment of deemed energy charges in case they fail to take entire 10.5 MW of power from Sarju III. The Sarju III project was commissioned on 11.07.2014, with a gap of almost three years giving UPCL sufficient time to provide requisite evacuation facility. Respondent No 3, UERC in their above referred orders have pointed out the short coming on the part of UPCL in not providing the requisite evacuation facilities for evacuation of power from Sarju III and other hydro projects. In the above referred

orders of the UERC, they have never negated the claim of deemed generation due to restriction in capacity. In fact, UPCL itself has admitted *that the "provision of deemed generation assumes the existence of proper evacuation system and permits deemed generation only in cases where it is the fault of the licensee. However in the present situation the system was always available but due to the enhancement in the capacity of Petitioner the existing system became in sufficient".*

33. Thus, though recognising the deemed generation claim for restriction in the evacuation from the project, the main contention was that system became insufficient due to enhancement in capacity. While we see that the Respondent No. 1 was aware about the evacuation responsibility of 10.5 MW from Sarju III project as early as 2011 when PPA was signed and the project was commissioned only in 2014 so it is incorrect to say that such restriction occurred because of enhancement in capacity.

34. Before going into the meaning of deemed generation under UERC RE Regulations 2013, let us look at the meaning/intent understood by the Respondent while filing Petition No. 36 of 2016. In the said petition, UPCL itself has claimed relaxation in RE regulations 2013 on account of restrain in evacuation system caused due to allowance of evacuation of power from Sarju III till the under construction 33 KV line between Bageshwar and Kapkote on Panther conductor is completed. If the deemed generation claim is understood to be limited to only non-availability of existing system on account of voltage fluctuations etc, as submitted by UPCL now, then such a Petition was not warranted by them. Thus we feel that Respondent No.1 UPCL has also understood

that putting evacuation constraints for evacuation of power from Sarju III due to pending strengthening works for Kapkote–Bageshwar Line as well implementation of new Kapkote-Bageshwar line with panther conductor shall make them liable for payment of deemed charges in line with the UERC Regulations 2013. In fact, such a relaxation was dismissed by UERC vide order dated December 08, 2016 with a direction to UPCL to complete panther conductor line between Kapkote and Bageshwar latest by February 2017. Further, deemed generation claim for Sarju II was admissible after February 2017 subject to completion of construction of dedicated line, which was the responsibility of generator. Thus, we are of the view that both Respondent No. 1 and Respondent No.3 have understood the applicability of deemed generation in the event of restriction in capacity in line with Regulation 47 of UERC RE Regulations 2013.

35. Now, let us examine Regulation 47 of the UERC Renewable Energy Regulations 2013.

" 47. Deemed Generation

(Applicable only in case of Small Hydro Generating Plants & Solar PV & Solar Thermal Projects)

(1) After the COD of the Project, loss of generation at the Station on account of reasons attributed to the following, or any one of the following, shall count towards Deemed Generation:
Non availability of evacuation system beyond the Interconnection Point; and – Receipt of backing down instructions from the SLDC.

Provided that the following shall not count towards Deemed Generation:

(i) the loss of generation at the Station on account of aforesaid factor(s) but attributed to the Force Majeure event(s);

(ii) the loss of generation at the Station due to the interruptions/outages attributed to the aforesaid factor(s) during the period in which the total duration of such outages/ interruptions, other than that excluded under above, is within the limit of:

– 48 hours in a month in case of small hydro project, and

– 60 hours in a month in case of solar PV and Solar Thermal Project.

– Provided further that for working out the ceiling of 60 Hrs. in a month, the interruptions/outages occurring during 18.00 hours in the evening to 6.00 hours in the morning shall not be counted.

(2) The distribution licensee shall be required to maintain the voltages at the point of interconnection with the project within the limits stipulated hereunder, with reference to declared voltage:

– In the case of High Voltage, +6% and -9%; and,

– In the case of Extra High Voltage, +10% and -12.5%.

With effect from 01.04.2013, any loss in generation due to variations in the voltage beyond the limits specified above shall be reckoned as deemed generation provided such loss of generation results in reduction of more than 25% of capacity output.

(6) The deemed generation conditions stipulated above shall be applicable only on those small hydro projects and solar PV and solar Thermal projects who have signed a long term PPA with the distribution licensee. Further, the deemed generation conditions shall be applicable only on the small hydro projects and solar PV and solar Thermal projects where the evacuation line is connected to 11 kV or higher voltage Grid Sub-station."

36. From the above Clause, it is stipulated that deemed generation shall be applicable in the event of **"Non-availability of evacuation system beyond interconnection point".** The Respondent has argued

that non-availability implies when the existing system is out due to voltage fluctuation, grid failure etc. and not to evacuation constraints on account of non-availability of adequate system. To support this argument, they have referred to the statement of reasons and the definition of 'Availability' as given in Tariff Regulation, provision 1 (ii).

37. The definition of 'Availability' of a transmission line in MYT Tariff Regulations 2015 (as also of 2018 and 2011 before that), as submitted by the Respondents is as follows:

> *""Availability" in relation to a transmission system for a given period means the time in hours during that period in which the transmission system is capable of transmitting electricity at its rated voltage to the delivery point and shall be expressed in percentage of total hours in the given period";*

38. All definitions given in an interpretation clause are normally enacted subject to the qualification 'unless there is anything repugnant in the subject or context', or 'unless the context otherwise requires'. Repugnancy of a definition arises when the definition does not agree with the subject or context. When the application of the definition to a term in a provision containing that term makes it unworkable and otiose, it can be said that the definition is not applicable to that provision because of contrary context. **(Sri Balaji Flour Mills v. Commercial Tax Officer, 2010 SCC OnLine AP 1187; Justice G. P. Singh in his Treatise "Principles of Statutory Interpretation" (11th Edition, 2008)).** All statutory definitions must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that, even where the definition is exhaustive in as much as the

word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in the different Sections of the Act depending upon the subject or the context. That is why all definitions in Statutes, generally, begin with the qualifying words, namely, "unless there is anything repugnant in the subject or context". **(The Vanguard Fire and General Insurance Co. Ltd. Madras v. Fraser & Ross, AIR 1960 SC 971).** There may be Sections in the Act where the meaning may have to be departed from, on account of the subject or context in which the word has been used, and that will be giving effect to the opening sentence in the definition section, namely, "unless there is anything repugnant in the subject or context". A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give precision and certainty to a word or phrase which would otherwise be vague and uncertain but not to contradict it or supplant it altogether. **(Hotel and Catering Industry Training Board v. Automobile Proprietary Ltd, [1968] 1 WLR 1526; and A. Rajappa, (1978) 2 SCC213; Subramanian Swamy v. State of Uttarakhand, 2020 SCC OnLine Utt 329).If the context and effect of the relevant provisions is repugnant to the application of the said rule of construction, assistance of the said section cannot be invoked. (State of Bihar v. D.N. Ganguly, 1958 SCC OnLine SC 48; Venkatrayapuram Industrial Area Township v. Govt. of A.P., 2014 SCC OnLine Hyd 707).** The definition of '*Availability'* as given in the MYT Regulations 2015 is used for the purpose of calculating availability of existing transmission system for paying Normative Tariff and incentives or disincentives and can not therefore used in regulation 47 of RE regulations 2013.

39. Further, the provision must be construed according to the natural meaning of the language used. **(Tirupati Chemicals v. DCTO, (2010 SCC OnLine AP 1189); Southern Petrochemical Industries Co. Ltd. ((2007) 5 SCC 447); ((2008) 10 RC 426), Union of India v. Mohindra Supply Co. (AIR 1962 SC 256), Bank of England v. Vagliano Brothers ((1891AC 107), Commissioner of Income-tax v. Anjum M. H. Ghaswala ((2001) 252 ITR 1 (SC)) ; ((2002) 1 SCC 633) and J. Srinivasa Rao v. Govt. of A. P. ((2006) 12 SCC 607)**. The plain reading of the term 'non-availability' would mean that certain object is not available and thus it will include both the situations i.e. generation restriction where the sufficient evacuation system is not available due to pending strengthening/ non-construction as well as generation loss due to voltage fluctuations and grid failure.

40. As is evident, the deemed generation clause was specially added in RE Regulation 2013 so as to protect *Small Hydro Generating Plants & Solar PV & Solar Thermal Projects* when their power could not be evacuated. In case the deemed generation under Regulation 47 applies only when existing system is out would lead to a irrational situation that when no evacuation system is constructed and entire evacuation from a small Hydro Project is restricted (even after its commissioning) then deemed generation would not be applicable, while on the other hand, if part evacuation is permitted, say X MW and then any loss from this X MW due to voltage fluctuation or otherwise trippings/grid failure shall be permitted to be claimed under deemed generation. By this interpretation of Regulation 47, there would be no incentive (or rather disincentive) or urgency on the part of the distribution licensee to facilitate evacuation of power from small hydro projects, as

their liability of deemed generation would arise only when commissioned system is not available for evacuation. This may lead to a situation, which is not in the interest of only Small hydro projects, but overall grid performance, consumers as well in meeting of Renewable Power Obligation of Distribution Licensee. In fact, PPA was amended to include deemed generation clause as per RE Regulation 2013. Regarding reliance on Objects and Reasons of RE Regulations 2013, it is a settled law that the primary rule of construction is a literal interpretation of the Statute/Regulation. The intention of the legislature (Regulation making authority) must be found in the words used in the Legislation (Regulation) itself. **(Unique Butyle Tube Industries P. Ltd. v. U. P. Financial Corporation: (2003) 2 SCC 455).** The need for interpretation arises only when the words used in the statute (Regulation) are, on their own terms, ambivalent. **(ITC Ltd VS CCE: (2004) 7 SCC 591).**

41. Thus, we are of the opinion that the deemed generation claim is allowed in case of restriction in evacuation of power from Small hydro project on account of non-availability of evacuation system including outages due to voltage fluctuations and grid failures etc as per UERC RE Regulations 2013. We also find merit in the contention of the Appellant that mere agreeing for restriction in their evacuation capacity in the referred meetings dated 22.05.2014 and 25.02.2016 would not constitute relinquishing of their right for deemed generation. We would like to place reliance on **2016 SCC online SC 1436 (Para 44).**

> ***"44. Shri Sibal argued that the moment Article 6.3.4 of the PPA is attracted, this would necessarily mean that the appellants have waived the requirement of 95% of the contracted capacity as***

existing on the effective date mentioned in Article 6.3.1(b). According to him, this would mean that scheduled power would have to be supplied, which in turn can only be done if there is waiver of the aforesaid requirement. It is difficult to agree. The case of the appellants has throughout been, starting from 12-4-2013, onwards, that it has never consented to Schedule 5 of the PPA and Article 6.3.1(b) parameters being lowered. It is true that Article 6.3.4 would not apply for the reason that it would come into effect only after the last recent performance test mentioned in Article 6.3.3 has been conducted. And for Article 6.3.3 to apply, a performance test must first indicate that from a unit's COD an increased tested capacity over and above that provided in Article 6.3.1(b) must first occur. Admittedly on facts this has not happened. What is important to note therefore is that the appellants desperately wanted power at a cheaper rate, and were willing to go to any extent to get such power, including invoking Article 6.3.4, which would not apply, and stating that anything over and above 101.38 MW ought to be treated as infirm power. It is clear under the Regulations, however, that infirm power can never be supplied to the appellants themselves but can only be supplied to the grid. This being the case, the question that is still posed is whether the two emails read together would amount to a waiver of the right mentioned in Article 6.3.1. Waiver is, as has been pointed out above, an intentional relinquishment of a known right. Waiver must be spelled out with crystal clarity for there must be a clear intention to give up a known right. There is no such clear intention that can be spelled out on a reading of the two emails. All that can be spelled out is that the first email of 31-3-2013 categorically states that the test result is not as per Article 6.3.1, and is not acceptable. The last sentence of this very email then refers to Article 6.3.4 and to a derated capacity of 101.38 MW. Thereafter, the email of 2-4-2013 expands on the aforesaid last sentence of the earlier email by referring to Article 6.3.4 and Article 11 proviso.

This is akin to a "without prejudice" acceptance of derated power, being a non-acceptance of the test certificate dated 30-3-2013 coupled with a desperate attempt to somehow get whatever power is available. But this does not amount to a clear and unequivocal intention to relinquish a known right".

Thus, we are of the view that UERC has erred in denying the deemed generation claim on account of restriction in evacuation of power from Sarju III due to inadequate evacuation system.

42. The Appellant had also contended that deemed generation claim due to outage of dedicated line from generation project to Kapkote substation should be permitted as they have only constructed the line and no operation and maintenance charges are provided to them and interconnection point is the generating station.

43. We, agree with the views of UERC that the Appellant is the owner of asset and recovering its tariff under project cost and thus the responsibility of its operation and maintenance would automatically lie with the Appellant. The Appellant could not place any document indicating express delegation/agreement with Respondent No.1 for its maintenance, in this regard. As such, non-provision of Operation and maintenance cost of dedicated line, without assigning the responsibility of its operation and maintenance on Respondent No. 3 cannot take away the responsibility/obligation of the Appellant of its operation and Maintenance. Clause 8.1 of the PPA is reproduced below:

"8.1 Inter connection Facilities means all the facilities which shall include existing 33/11 KV Sub-Station, Kapote, District-Bageshwar, Uttarakhand owned, maintained and operated by

UPCL without limitations, switching equipment, communication, protection, control, meters and metering devices etc, for the incoming bay(s) for the Project Line(s) to be installed and maintained by Generating, Company/UPCL at the cost to be borne by the Generating company, to enable the evacuation of electrical output from the project in accordance with the Agreement."

44. Even the equipment installed by the Appellant at the Respondent No. 1 Kapkote sub-station for the incoming bays for the project line is to be installed and maintained at the cost to be borne by the generating company i.e. the Appellant. We are of the view that period of non-generation due to outage of dedicated line from generation Project to Kapkote, attributable to Appellant, is not to be considered for deemed generation claim. The issue of non-provision of Operation and maintenance cost of the said dedicated line is not the issue under the present appeal that may be taken up by the Appellant separately as per Law.

45. The Appellant has also appealed against the use of MRI data of the main meter installed at Sarju III for determining the slot wise voltage to see if the voltage was within the prescribed limit. As contended by the Appellant, primarily, this data is used for billing purpose, and as such, real time data of the grid is available with Respondent No.1. It has also been contended by the Appellant that meter data proceeds on a 30 Minutes integration basis while the outage can be of shorter duration. We find merit in the argument of the Appellant as Regulation 47 of RE Regulations 2013 provide for deemed generation, in case of voltage fluctuation is beyond specified limit with no restriction on minimum duration of outage. Further, as mentioned in the above referred

definitions in PPA dated 13.10.2011, the Bill meter is to be used for the purpose of measurement of active energy, maximum demand and power factor etc. Use of this meter data provided at generating station for working out voltage fluctuations has not been specified. Though commission in the impugned order has considered MRI data from the generating station for working out deemed generation claim on account of voltage fluctuation, rational behind using the same has not been dealt by them. The Commission may consider whether use of MRI data is the general practice for working out voltage fluctuations at interconnection point and/ or specify the rational of using it in the instant case.

46. The Appellant has contended that for allowing deemed generation claim under Grid failure, felling of trees and other force Majeure events has been excluded and a consolidated data has been provided while no force majeure notice was provided by the Respondent No.1, and as such, invoices raised by the Appellant were not disputed as required under PPA. Clause 25.2 of the PPA signed between the Appellant and the Respondent No.1, dated 13.10.2011 is reproduced below:

> *"The party invoking this clause shall satisfy the other party of the occurrence of such an event and give written notice explaining the circumstances, within seven days to the other party and take all possible steps to revert to normal conditions at the earliest."*

However, no consideration is reflected and findings on this aspect have not been recorded in the impugned order.

47. In view of the aforesaid observation and findings, We, find it appropriate to set aside the Impugned Order and remand the matter to Respondent No.3 UERC directing it to pass an order afresh in the light

of the observations recorded in the foregoing paragraphs and after considering all the contentions raised by the Appellant in Petition No. 09 of 2019.

48. The appeal is disposed of in above terms. There shall be no order as to costs. All the pending IAs, if any, shall stand disposed of.

Pronounced in the open court on this the 12th February, 2024.

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member(Electricity)	**Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

ts/dk