

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA**

Petition No: 19 of 2021

Instituted on: 25.03.2021

Heard on: 01.02.2022

Clarification taken on: 10.03.2022

Decided on: **24.03.2022**

In the matter of:-

M/s Harisons Hydel Const. Co.Pvt. Ltd.,

Akhara Bazar Kullu. HP-175101

(through Sh. Ghansyam Sood, Director)

.....Petitioner

Versus

1. The Directorate of Energy, State Agency, HP,
Shanti Bhawan, Phase-III, Sector-VI, Shimla-09.
(through its Director)
2. The HP State Electricity Board Ltd.
Vidyut Bhawan, Shimla-171004
(through its Managing Director)
3. The Power System Operation Corporation Ltd.,
National Load Dispatch Centre,
B-9, (1st Floor), Qutab Institutional Area,
Katwaria Sarai, New Delhi-110026.
[through its Executive Director (Renewable)]
4. The Himurja (HP Energy Development Agency),
Govt. of HP, SDA Complex, Kasumpti, Shimla-171009
(through its Chief Executive Officer)

.....Respondents

Petition under Regulation 6 of HPERC (Renewable Purchase Obligation and its Compliance) Regulations, 2010 assailing the unlawful refusal to accord accreditation by the State Agency, contravention of CERC (REC) Regulations, 2010 and seeking consequential directions under Regulation 9 of the said HPERC Regulations, 2010, for the default by HPSEBL.

CORAM

DEVENDRA KUMAR SHARMA

CHAIRMAN

BHANU PRATAP SINGH

MEMBER

YASHWANT SINGH CHOGAL

MEMBER(Law)

Counsel: -

For the Petitioner:	Sh. Arijit Maitra, Advocate
For the Respondent No.1:	Sh. Shanti Swaroop, Legal Consultant
For the Respondent No.2:	Sh. Surinder Saklani, Advocate
For the Respondent No.3:	----None----
For the Respondent No.4:	Ms. Kamlesh Shandil, Advocate

ORDER

The present Petition has been filed under Regulation 6 of the Himachal Pradesh Electricity Regulatory Commission (Renewable Power Purchase Obligation and its Compliance) Regulations, 2010 (hereinafter referred as “the RPPO Regulations”) assailing the refusal to accreditation by the Directorate of Energy, State Agency, HP alleging contravention of the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation), Regulations, 2010 (hereinafter referred as the CERC (REC) Regulations, 2010) and seeking consequential directions under Regulation 9 of the RPPO Regulations, 2010.

2. M/s Harison Hydel Const. Co. Pvt. Ltd. having its office at House No. 16, HP Officer’s Colony (West End) Panthaghati, Shimla-171013 (HP)(hereinafter referred as “the Petitioner”) is operating Brahmanga 5.00 MW Small Hydro Project (SHP). The Directorate of Energy, HP (Respondent No.1) is the State Agency under Regulation 2(h) of the RPPO Regulations, 2010 designated by the HP Electricity Regulatory Commission (HPERC or Commission for short) to act as the agency for accreditation and recommending renewable energy projects for registration and monitoring the compliance of the Renewable Power Purchase Obligations of the obligated entities. Respondent No. 2 i.e. the Himachal Pradesh State Electricity Board Ltd. (HPSEBL for short) is the obligated entity under Regulation 2(f) of the RPPO Regulations, 2010 which is mandated to fulfill the RPPO under the said Regulations. The Power System Operation Corporation Ltd., National Load Dispatch Centre, (Respondent No.3) is the Central Agency under Regulation 2(b) of the RPPO Regulations, 2010 designated by the Central

Electricity Regulatory Commission (CERC) under the CERC (REC) Regulations, 2010. The HIMURJA (Respondent No.4), is the State Nodal Agency for energy development in Himachal Pradesh for Small Hydro Projects (SHPs for short) upto 5 MW.

Factual summary

3. The Petitioner is operating Brahmnganga (5.00MW) Hydro Electric Project (HEP) in relation to which it has executed the Implementation Agreement (IA) dated 02.08.2001 with the Government of Himachal Pradesh (GoHP for Short) and the Power Purchase Agreement (PPA) dated 08.06.2004 with the Respondent No.2 HPSEBL for 40 years. The PPA was signed as per Model PPA, approved by the Commission on 24.03.2003 on the basis of notification dated 06.05.2000 issued by the Govt. of HP (Annexure A-3). Clause 6.2 of the PPA provided the firm and fixed tariff of Rs.2.50 per unit for sale of entire power to the HPSEBL for 40 years. The Commission vide Order dated 18.12.2007 (Annexure A-5) on Small Hydro Power Projects Tariff and other issues has increased the tariff of SHPs upto 5 MW from Rs. 2.50 per unit to Rs.2.87 and subsequently vide order dated 09.02.2010 has increased the tariff to Rs. 2.95 per unit. The order dated 18.12.2007 was made applicable to such PPAs which have already been approved by the Commission with a specific clause that *“Tariff and other terms and conditions of PPA shall be subject to the provisions of HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007”*.

3.1 The CERC (REC) Regulations, 2010, which were notified on 18.01.2010, specified the conditions for the Distribution Licensees to meet their RPPO and the Generating Companies (GENCOs for short) to avail the benefit of the Renewable Energy Certificates (RECs for short) and subsequently amended to allow the Distribution Licensees to get the benefit, if it purchases Renewable Energy in excess of the RPPO. The CERC (REC) Regulations (ibid) were subsequently amended to allow the benefit of the RECs to the Distribution Licensees on the

purchase of renewable energy in excess of the RPPO requirement. On 26.05.2010 the HPERC notified HPERC RPPO Regulations.

3.2 The project of the Petitioner was commissioned on 02.04.2008 and ever since the Respondent No.2 is purchasing entire power generated from the project as per PPA dated 08.06.2004 at the rate of Rs. 2.50 per unit.

3.3 The Petitioner made an application to the State Agency (the Respondent No.1), on the prescribed format for accreditation for RECs on 15.03.2019 (Annexure A-6), which was turned down by the Respondent No.1 on 15.05.2019 (Annexure A-7) on the ground that the Petitioner had entered into a Long Term Agreement with HPSEBL.

3.4 It is averred that Respondent No.2 is meeting its Renewable Purchase Obligation (RPO for short) under PPA dated 08.06.2004 which does not specify that it is for the purpose of meeting the RPO.

3.5 Also averred that the PPA dated 08.06.2004 is a pre Electricity Act 2003 (Act for short) as the HPERC approval dated 20.04.2005 is based on the Model PPA and Govt. of HP notified tariff and the PPAs approved prior to RE Regulations, 2007 were debarred from the benefit of tariff under the Regulations framed by HPERC. According to the Petitioner, the power sale or purchase being not on a tariff neither determined under Section 62 nor adopted under Section 63 of the Act does not entitle the HPSEBL to fulfill its RPO with the green component from the power generator from the power plant of the Petitioner which itself conclusively establishes that it is a pure electricity component brown power and without any green component. Further, the Respondent No.2 has misrepresented in affidavits that it is purchasing the power from Petitioner at a Tariff determined under Section 62 of the Act and obtained clarifications from HPERC towards procurement of Renewable Energy under Clause 5(1A)(a) of the CERC (REC) Regulations, 2010.

3.6 As per the Petitioner, the Commission has not verified while approving the claim of the HPSEBL that there was no tariff of Rs. 2.75 per unit ever determined by the Commission under Section 62 of the Act as claimed by the HPSEBL. As

per the Petitioner, the benefit of REC/RPO is wrongly accruing in favour of Respondent No.2 and the Respondent No.2 has got such approval on misrepresentation and thereby made financial gains by selling the RECs in the market. It is claimed that the letter dated 15.05.2019 (Annexure A-7) issued by the Respondent No.1 refusing the request of the Petitioner for accreditation is violative and in contravention of Clause 5(1) of the CERC (REC) Regulations, 2010 because the conditions under Clause 5(1)(b) and 5(1)(c) are mutually exclusive and not coextensive. It is claimed that both the conditions are in alternative and not to be met together.

3.7 It is further claimed that the Respondent No.1 has misinterpreted the eligibility condition of the Petitioner of not selling power at average power purchase cost to the Respondent No.2, as there was no APPC/Pooled Cost of purchase when notification of the tariff of Rs.2.50 per unit was issued by Govt. of HP and that the PPA dated 08.06.2004 is not for selling power at average pooled power purchase cost to the Respondent No.2 since such condition was not prevalent at the time of execution of the PPA and also that it is impossible for the Petitioner to sell power generated at APPC which is dynamic and changes every year, whereas the PPA dated 08.06.2004 is on a fixed tariff of Rs.2.50 per unit for fixed tenure. As such, the condition to sell power at APPC is in the alternative and mutually exclusive. Even otherwise, the Clause 5(1)(b) of the CERC (REC) Regulations, 2010 makes the Petitioner eligible to apply for registration for issuance of RECs as the Petitioner does not have any PPA for the capacity related to such generation to sell electricity to Respondent No.2 for the purpose of meeting HPSEBL's RPO at a tariff determined under Section 62 of the Act or adopted under Section 63 of the Act by the Commission. Further, the Petitioner does not have the PPA with Respondent No.2 for selling electricity for the purpose of meeting the RPO of HPSEBL and also that the RPO was introduced by the Commission only in the year 2012 whereas the PPA dates back to 08.06.2004. Hence, the Respondent No.2 could not have been meeting its RPO out of the power supplied by the Petitioner. According to the Petitioner, the denial

of the compensation for green component to the Petitioner is unlawful as neither the Petitioner is given a green tariff under Sections 62 and 63 of the Act nor allowed to trade in REC to get compensated for green component on the power generated and it is even worse that the HPSEBL is fulfilling its RPO on the power sold by the Petitioner under the PPA 08.06.2004 and denying the benefit to the Petitioner. Thus, the HPSEBL is liable to pay compensation the Petitioner for unlawfully fulfilling its RPO from the power generated by the Petitioner. It is claimed that the preferential tariffs determined under Section 62 of the Act by the Commission over the years for SHPs below 5 MW is higher than the one being paid to the Petitioner.

3.8 Also averred that APPC of the distribution licensee is dynamic and changes from year to year and has varied between to Rs.2.09 per unit in the year 2012-13 to Rs. 2.50 per unit in year 2019-20. Thus, the HPSEBL has availed significant gains. Not only this, the HPSEBL has sold REC on much higher rate when the rates in the market had shot up close to Rs.2.00 per unit. Further, the Respondent No.2 is also utilizing the power received from the Petitioner towards meeting its non-solar RPO targets and continuing to avail this benefit over the years and that there cannot be any undue benefit taken by Respondent No.2 by depriving the Petitioner from the applicability of REC benefits. As per the Petitioner, it is only in December, 2018 that the Petitioner learnt that the HPSEBL has been claiming RPO compliance on the energy supplied by the Petitioner to HPSEBL.

3.9 Also claimed that the Petitioner was eligible for accreditation and could have been allowed to REC but was not given the benefit. Resultantly, the Petitioner has sustained huge loss. Hence, the Petition.

Response to the Petition

4. The Petition has been resisted by the Respondents No.1, 2 and 4 by filing separate replies.

4.1 The Respondent No.1, the Directorate of Energy, has not denied in their reply the receipt of the application (Annexure A-6) from the Petitioner but

averred that said application was under APPC plus open access mode the application was examined point-wise in line with the Model Procedure/Guidelines laid down by the Central Electricity Regulatory Commission (CERC) for Accreditation of Renewable Energy Generation Projects or Distribution Licensees and during scrutiny, it was noticed that the PPA dated 08.06.2004 has been executed between the Petitioner and the Respondent No.2 for supply of power for 40 years (Long Term) at a mutually agreed price of Rs. 2.50 per unit and was not on the basis of the APPC. Further, as per declaration made by the Petitioner in the application (**Annexure A-6**), a request was made to accredit the said project in the APPC mode under the REC Mechanism and under points iii, iv & v of the declaration, the Petitioner had mentioned as under:-

- “iii. Date of pre-mature termination of PPA: No*
- iv. I/we have prematurely terminated our PPA with obligated entity on mutual consent/due to material breach of terms and condition of said PPA by the obligated entity for which necessary documentary evidence are also submitted by me/us in hard copy to the State Agency.*
- v. I/We hereby also confirm that the electricity generated from the proposed Renewable Energy generating station shall be sold to the distribution licensee at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission.”*

The said declaration was incorrect and contrary to the PPA dated 08.06.2004 as the PPA was not signed under the APPC mode, and thus, the application of the Petitioner was rejected vide letter dated 15.05.2019 (Annexure A-7).

4.2 It is averred that the replying Respondent i.e. the State Agency had regularly remained in contact with the Himachal Pradesh State Electricity Board Ltd. and the Himachal Pradesh Electricity Regulatory Commission. Further, the HPSEBL vide letter dated 14.10.2019 (Annexure A-7) had intimated the replying Respondent in response to letter dated 13.08.2019 (Annexure R-1/A) that the IPP cannot exit from its commitments on account of the Long Term PPA and the

accreditation of the firm (Petitioner) will adversely affect the commercial interests of HPSEBL (Respondent No.2).

4.3 It is averred that the decision regarding rejection of accreditation by the replying Respondent is legally valid as per the CERC Procedure and guidelines and the PPA entered upon between Petitioner and Respondent No.2 i.e. HPSEBL. It is averred that the application was not rejected merely on type and tenure of PPA but also taking into consideration that PPA was not signed under APPC mode under Renewable Energy Certificate Mechanism. It is also averred that in the PPA there is no clause for availing the benefit of green/brown components and claim of the Petitioner is merely on assumption.

5. The Respondent No.2, HPSEBL in its reply has averred that the Govt. of HP vide Notification dated 06.05.2000 and subsequent amendment dated 16.12.2000 announced the incentives for the Private/ Joint Sector participation in the Hydel Power Projects (upto 5 MW). The said notification mandated the HPSEBL to purchase power from these Hydel Power Stations at the tariff of Rs.2.50 per kWh to incentivise the renewable energy sector. This tariff has been fixed by the State Government after exhaustive discussions with IPPs, Chamber of Commerce and Industry, HPSEBL and other stakeholders. It is averred that in order to promote Renewable Power Projects, Section 86(1)(e) of the Act enables the Appropriate Commission to fix a minimum percentage for purchase of energy from renewable sources by the Distribution Licensee in its area of supply and in pursuant to above, the Commission has notified the RPPO Regulations, 2010 on 26.05.2010, whereby the Commission has specified a minimum percentage of Renewable Energy to be procured from Solar Energy Sources and Non-solar Sources to meet Solar RPPO and Non-solar RPPO respectively by an obligated entity as under:

<i>Year</i>	<i>Minimum Quantum of purchase (in %) from renewable sources (in terms of energy in kWh) of total consumption</i>		
	<i>Total</i>	<i>Non –Solar</i>	<i>Solar</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
<i>2010-11</i>	10.0%	10 %	0%

2011-12	11.1%	11%	0.1%
2012-13	12.1%	12%	0.1%

The aforementioned minimum percentage of RPPO was worked out on total consumption including transmission and distribution losses, within the area of the distribution licensee during the year. The Commission amended the aforesaid RPPO Regulations, 2010 on 03.10.2011 whereby the Commission has specified the long term RPPO trajectory upto FY 2021-22 as follows:-

Year	Minimum Quantum of Purchase (in%) from renewable sources (in terms of energy in kWh) of total consumption.	
	Total RPPO %age.	Minimum Solar RPPO %age of the total purchase
2011-12	10.01	0.01
2012-13	10.25	0.25
2013-14	10.25	0.25
2014-15	10.25	0.25
2015-16	11.25	0.25
2016-17	12.25	0.25
2017-18	13.50	0.50
2018-19	14.75	0.75
2019-20	16.00	1.00
2020-21	17.50	2.00
2021-22	19.00	3.00

It was also provided by way of the amendment that such obligation to purchase renewable energy shall not include the power purchased at APPC cost as specified in the CERC (RE) Regulations, 2010.

5.1 It is averred that the HPSEBL filed a Petition for authentication of renewable energy purchased (Solar and Non- solar) for FY 11, FY 12 and FY 13 against RPPO duly considering the purchase/generation from aforementioned sources excluding purchase from projects having short term PPA with the HPSEBL at the APPC tariff. In terms of the RPPO Regulations, 2010, "Certificate" means the renewable energy certificate issued by the Central Agency in accordance with the procedure prescribed by it and under the provisions specified in the CERC (REC) Regulations, 2010. The CERC (REC) Regulations, 2010 has defined the criteria for the Renewable Energy Generator against its eligibility for the registration before NLDC i.e. the Central Agency for issuance of and dealing in the Renewable Energy Certificate. However, till 2013,

there was no provision available for the Distribution Company (DISCOM for short) to get RECs against the surplus purchase of R.E. power beyond its RPPO targets as specified by the Appropriate Commission. Thus, the HPSEBL has not availed any incentives on the surplus purchase of 148.85 MUs, 431.62 MUs and 533.10 MUs beyond RPPO during FY 2010-11, FY 2011-12 and FY 2012-13 respectively, due to the absence of provisions in the prevalent Regulations for availing of the RECs by the DISCOM. The provision for availing REC by the DISCOM was introduced by the Central Electricity Regulatory Commission (CERC for short) inserting Sub-regulation (IA) in Regulation 5 of the CERC (REC) Regulations, 2010 in the year 2013 through amendment in the Regulations (ibid). Thus, the Distribution Licensee is eligible for registration with the Central Agency for issuance of and dealing in RECs if it has procured renewable energy at a tariff determined under Section 62 or adopted under Section 63 of the Act (ibid) in excess of the RPPO as may be specified by the Appropriate Commission and has obtained a certification from the Appropriate Commission towards procurement of renewable energy. Therefore, the HPSEBL filed Petitions for authentication of the RE power purchased as well as its eligibility for availing of RECs against R.E. Power procured beyond its RPPO during FY 2013-14 and FY 2014-15 by considering the purchase/ generation of power from the following sources:

- (i) R.E. power procured from IPP owned projects:
 - (a) having PPA with the HPSEBL at the Govt. notified tariff of Rs. 2.25 or Rs. 2.50 per unit.
 - (b) having PPA with the HPSEBL at tariff determined by the HPERC under RE Regulations 2007 and 2012.
- (ii) RE power generated from the HPSEBL's own projects having capacity upto 25 MW.
- (iii) R.E. power procured from the GoHP against its entitlement of free power.

5.2 It is averred that during FY 2013-14 and FY 2014-15, Non-solar RPPO targets for the HPSEBL were 859.90 MUs and 883.16 MUs respectively, against

which the HPSEBL had purchased Non-solar RE power of 1400.99 MUs and 1065.93 MUs. As such, the HPSEBL had surplus purchase of Non-solar RE Power of 541.09 MUs and 182.77 MUs respectively for aforementioned years and had accordingly requested the HPERC to authenticate the same and issue requisite format under REC Procedure so that the HPSEBL would get REC issued under prevalent Regulations from the NLDC i.e. the Central Agency. Upon such request, the HPERC has authenticated the said RE purchase by the HPSEBL and issued certificate on format 3.1.1 devised by the CERC under its Procedure notified for issuance of and dealing in RECs and accordingly, the Non-solar RECs against aforesaid surplus purchase beyond the RPPO targets had been procured from the Central Agency i.e. the NLDC. The power procured by the HPSEBL from SHPs having PPA signed with HPSEBL on the Govt. Tariff i.e. Rs.2.25/2.50 per unit has been used by the HPSEBL to meet its RPP obligations only on merit basis as the generation from these SHPs is around 400 MUs whereas the RPPO target for the HPSEBL for FY 2013-14 and FY 2014-15 was around 860-900 MUs. Thus, the surplus power of 541.00 MUs and 182.77 MUs beyond the RPPO generated by the HPSEBL from its own projects upto 25 MW, procured from the GoHP against its entitlement of the free power and procured from SHPs owned by the IPPs against which the HPSEBL has signed PPA on generic levelled tariff determined by the HPERC under the provisions of Section 62 of the Act and RE Regulations 2007 and 2012. Therefore, the HPSEBL has a legitimate claim on Non-Solar REC issued against aforementioned surplus purchase which is under Section 62 or adopted under Section 63 of the Act. For FY 2015-16, the HPSEBL has Non-solar RPPO target of 968.04 MUs against which the HPSEBL could meet only 803.44 MUs and thus, had a shortfall of 164.60 MUs.

5.3 As per Petitioner, the HPERC vide notification dated 24.03.2017 i.e. the HPERC (Renewable Power Purchase Obligation and its Compliance)(Third Amendment) Regulations, 2017 has revised the percentage of RPPO for FY 2016-17, FY 2017-18 and FY 2018-19 and these Regulations also provide that

the RPPO will be total consumption of electricity by an obligated entity, excluding consumption met from hydro-electric sources of power in accordance with the provisions provided in the National Tariff Policy, 2016. Accordingly, the HPSEBL has worked out its RPPO compliance on this revised methodology and had filed a Petition for authentication of R.E. purchased before the HPERC for FY 2016-17 to FY 2019-20. Out of which, the Petition filed for FY 2016-17 has been approved by the HPERC.

5.4 As far as the claim of RE benefit on power procured from the Project is concerned, the Project is a Renewable Energy Project for which the HPSEBL have signed the PPA with the Petitioner on 08.06.2004 at the Govt. notified tariff of Rs.2.50 per kWh with prior approval of the HPERC. Since the Project is a renewable energy project, the energy procured from this project has been considered by the HPSEBL to meet its Non- solar RPPO targets as per the criteria provided by the HPERC in the RPPO Regulations, 2010 wherein it has explicitly been provided to consider the purchase from generating station based on the renewable energy source. The HPSEBL has not got any REC issued against the power procured from the Project since the quantum of power procured from the project has been utilized by the HPSEBL to meet its RPPO. Further, the CERC (REC) Regulations, 2010, inter-alia, provide that a generating company engaged in the generation of electricity from renewable energy sources shall be eligible to apply for the Certificates if it fulfills the conditions laid down in Regulation 5 of the CERC (REC) Regulations,2010. It is averred that the PPA dated 08.06.2004 signed between Petitioner and the HPSEBL in respect of the Project is for a tariff of Rs.2.50 per kWh, which is not an APPC rate, since it has not been determined under the methodology specified by the HPERC for determination of the APPC tariff. In fact, as stated earlier, the tariff of Rs. 2.50 per kWh is an incentivized tariff given by the GoHP with exhaustive discussions with the stakeholders. Further, the APPC rates determined by the HPERC for FY 12, 13, 14, 15, 16, 17, 18, 19 and 20 are Rs.2.23, 2.20, 2.17, 2.24, 2.31, 2.50, 2.43, 2.25 and 2.49 respectively. The APPC rates determined by HPERC for FY 2021-22 are Rs.2.35

and Rs.2.49 respectively. Hence, it may be clearly seen that the tariff of Rs.2.50 per kWh provided to the Petitioner Company in respect of the Project has always remained higher than the APPC rate. Therefore, the tariff of Rs.2.50 per kWh is not being at the APPC rate, the Petitioner had not met the eligibility criteria.

5.5 It is averred that the (RPPO) Regulations, 2010 and CERC (REC) Regulations, 2010 came into being in the year 2010 subsequent to the signing of the PPA and the (RPPO) Regulations, 2010, provide that the power purchases under the PPA from renewable energy sources already entered into by the distribution licensees, will continue to be made till their present validity, even if the total purchases under such agreements exceed the percentage as specified hereinbefore, and, thus, the consideration of R.E power of the Project by the of the Petitioner HPSEBL against its Non-solar RPPO is strictly within the provisions of the RPPO Regulations, 2010 which has been authenticated by the HPERC in various Petitions. It is claimed that all the charges/levies/taxes/cess etc. as per Clause 8 of the PPA have been met with by the HPSEBL and the return of the Project of the Petitioner has not been impacted in any manner. Furthermore, the benefits drawn by the HPSEBL has further been passed on to the consumers of the State.

5.6 It is averred that the Petitioner's request being misconceived was rightly rejected by the Respondent No.1. Further, the Petitioner has misinterpreted the conditions of clauses (b) and (c) of Sub-regulation (1) of Regulation 5 of the CERC(REC) Regulations, 2010. It is denied that power being supplied to the HPSEBL was without green attribute.

5.7 According to the HPSEBL, the RPPO Regulations, 2010 read with its subsequent amendments, *interalia*, provide that the RPPO specified therein shall be inclusive of:-

- a. *purchases from generating stations, based on renewable energy sources;*
- b. *purchases from any other distribution licensee, which would arise from renewable energy sources; and*

- c. *the energy generated from its own renewable sources, if any, by the obligated entity:*

5.8 It is vehemently denied that the HPSEBL has taken undue benefit by depriving the Petitioner of applicability of REC under CERC (REC) Regulations, 2010 read with the RPPO Regulations 2010, and the allegations have been made to prejudice the mind of this Commission with vested interest. It is also denied that HPSEBL has wrongly fulfilled RPPO obligations which is as per law and RPPO Regulations, 2010 and CERC (REC) Regulations, 2010. It is denied the Respondent No.1 has played into hands of the HPSEBL to protect its commercial interest. Hence, the Petition is liable to be rejected.

5.9 The Respondent No. 4 in its reply has not denied the signing of Implementation Agreement, allotment of the Project on certain terms and conditions, issuance of Govt. Policy and date of commencement of Project. Rest of the averments have been denied for want of knowledge. As per them, the claim of the Petitioner was examined as per existing Regulations but was found meritless.

Rejoinder to the Replies

6. In separate rejoinders to the replies filed by the Respondent Nos. 1 and 2 and 4, the Petitioner has denied the contents of the replies reasserting the averments made in the Petition.

Submission of Ld. Counsel for the parties

7. We have heard Sh. Arijit Maitra, Ld. Counsel for the Petitioner, Sh. Shanti Swaroop Bhatti, Ld. Legal Consultant for the Respondent No.1, Sh. Surinder Saklani, Ld. Counsel for Respondent No. 2 and Ms. Kamlesh Shandil, Ld. Counsel for Respondent No.4. Written submissions have also been filed on behalf of the Petitioner.

7.1 Sh. Arijit Maitra Ld. Counsel for the Petitioner has submitted that the Petitioner is eligible for accreditation and issuance of Renewable Energy Certificates as it fulfills the condition under Clause 5.1(b) of the CERC (REC)

Regulations, 2010. Inviting attention of the Commission to its Order dated 24.3.2003 in Petition No.1 of 2002 (Revised No.2 of 2002), he submits that the tariff of Rs.2.50 per unit is not a “tariff determined under Section 62 of the Electricity Act, 2003 and that the Commission has simply saved the bilaterally settled tariff between the parties. He further submits that the PPA does not provide that the supply of power by the Petitioner to HPSEBL is for the purpose of meeting the Renewable Purchase Obligations of HPSEBL. He has also submitted that the Petitioner has executed the PPA dated 08.06.2004 as per order of the Commission which was passed on the basis of the GoHP Notification dated 06.05.2000 and when the tariff of Rs.2.50 per unit was fixed, the Electricity Act, 2003 had not been enacted by the Parliament containing Section 86(1)(e) requiring promotional measures and promotional tariff/preferential tariff to be granted to the renewable energy generators. Therefore, the Petitioner has not been granted a tariff under Section 62 of the Act. According to him, the CERC in its Regulations called the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation)(First Amendment) Regulations, 2010 has used the words “*Preferential Tariff*”. Later on, the CERC (REC) Regulations were enacted (amended) in the year 2010, which allowed the RE generator to sell the brown component at the average cost of power and allowed the RE generator to be compensated for the green component by way of REC. As per him, in the case of the Petitioner, neither any tariff has been determined under Section 62 nor any preferential tariff has been given to the Petitioner and so much so, even the Petitioner has been kept out of the HPERC generic tariff order dated 18.12.2007 fixing the rate of Rs.2.87 per unit which was later on revised vide order dated 09.02.2010 increasing the tariff to Rs.2.95 per unit and had the Petitioner been granted the revised enhanced tariff, the Petitioner’s tariff would have been a tariff determined under Section 62 of the Act. He has also submitted that on the date of issuance of the GoHP Notification dated 06.05.2000 as well as on the date of execution of the PPA dated 08.06.2004, there was neither any APPC rate nor any

REC mechanism hence, the question of selling power by the Petitioner to the HPSEB at APPC rate did not arise and thus the condition to sell the power at APPC rate under clause 5.1(c) of the CERC (REC) Regulations, 2010 cannot be enforced on the Petitioner so as to make the Petitioner ineligible for REC accreditation. Elaborating further, he submits that the condition under clause 5.1(c) is not co-terminus with the condition under clause 5.1(b) of the CERC (REC) Regulations, 2010 and both the conditions under clause 5.1(b) and the clause 5.1(c) are mutually exclusive and neither legally both must be fulfilled nor factually it is possible for the Petitioner to fulfill both of them. According to him, the action of Respondent No.1 refusing accreditation is illegal and unsustainable as neither the Petitioner has exited from PPA nor has stated so nor intends to exit. He has also submitted that the accreditation cannot be rejected merely on the basis of the contents of the Application filed by the Petitioner for accreditation and in case the eligibility is made out based on the provisions of clause 5.1(b) of the CERC (REC) Regulations, 2010, the application filed by the Petitioner will not come in the way for defeating the eligibility. Further the question of the sale of power at the APPC rate by the Petitioner to the HPSEBL cannot arise as the APPC rate came only in the year 2012 whereas the PPA dates back to the year 2004. Last but not the least, he has submitted that the Respondent No.1 has tried to protect the interest of Respondent No.2 by not granting accreditation to the Petitioner for REC on the plea of the Respondent No.2 that such accreditation will adversely affect the commercial interest of HPSEBL and the commercial interests of the HPSEBL cannot be a ground for depriving the rights and entitlements of the Petitioner. He has relied upon the law laid down in the case title as **Tata Power Company Ltd. v/s Reliance Energy Ltd. &Ors. (2009) 16 SCC 659**

8. Sh. Surinder Saklani, the Learned Counsel, representing the Respondent No.2, on the other hand has controverted the arguments of the Petitioner that the Petitioner has failed to fulfill the eligibility conditions as provided in clauses

5.1(b) and 5.1(c) of the CERC (REC) Regulations, 2010 as amended from time to time and the application of the Petitioner has rightly been rejected by the Respondent No.1. He has also submitted that HPSEBL has not claimed any REC issued against the power procured from the Project of the Petitioner and only the quantum of the power procured from the Project of the Petitioner has been utilized by the HPSEBL to meet its RPPO. He has also submitted that there was no bar in PPA that the obligated entity shall not be entitled to claim the benefits out of the power procured from the project of the Petitioner for any means as the tariff of the Petitioner has not been affected in any manner. Also submitted that the tariff of Rs.2.50 per unit given to Petitioner is an incentivized tariff and, therefore, the Respondent No.2 can gainfully utilize the same for meeting any obligations. He has also submitted that even the APPC rate as determined by the HPERC was lower than the tariff being paid to the Petitioner and the Petitioner has not been discriminated in any manner.

8.1 Sh. Shanti Swaroop Bhatti, Ld. Legal Consultant, appearing for the Respondent No.1 and Ms. Kamlesh Shandil, Ld. Counsel for Respondent No.4 have submitted that the claim of the Petitioner was examined in proper perspective as per existing Regulations but was rejected having been contrary to the Regulations and procedure. Sh. Shanti Swaroop Bhatti, Ld. Legal Consultant has also submitted that no undue favour has been granted to the Respondent No.2 while refusing the claim of the Petitioner.

9. We have carefully gone through the record and the submissions made by the Ld. Counsel for the parties. We have also gone through the written submissions filed by the Petitioner. The following issues arise for determination in the present case.-

- (1) Whether the Petitioner was eligible for accreditation and entitled to avail the REC in lieu of the power supplied by it to the HPSEBL (Respondent No. 2) under the PPA executed between the Petitioner and Respondent No. 2?

- (2) Whether the HPSEBL (Respondent No. 2) without meeting the RPPO has illegally availed the benefits of RPPO and RECs and consequently the Petitioner has suffered loss of revenue?

Analysis of the Commission

11. Both these issues being interlinked and interconnected are being taken up together for adjudication.

12. The whole controversy in the matter revolves around the fact of the eligibility of the Petitioner for participation in the REC mechanism. The REC mechanism was introduced by way of CERC(REC) Regulations, 2010 and the State Agency has essentially to act in line with such Regulations and procedure for the fulfillment of eligibility conditions for participating in REC mechanism while considering the application. As per the CERC(REC) Regulations, 2010 the generator while making an application to the State Agency for accreditation, must fulfill the conditions as laid in clauses (b), (c) and (d) of the Sub-regulation (1) of Regulation 5 of the CERC (REC) Regulations 2010, which read as under -

“ 5.1 (b) It does not have any power purchase agreement for the capacity related to such generation to sell electricity, with the obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under Section 62 or adopted under Section 63 of the Act by the Appropriate Commission:

5.1 (c) It sells the electricity generated either (i) to be distribution licensee of the area in which the eligible entity is located, at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.

Explanation: *For the purpose of these Regulations ‘Pooled Cost of Purchase’ means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.*

[Provided that such a generating company having entered into a power purchase agreement for sale of electricity, with the obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under Section 62 or adopted under section 63 of the Act by the Appropriate Commission shall not, in case of pre-mature termination of the agreement, be eligible for participating in the Renewable Energy Certificate (REC) scheme for a period of three years from the date of termination of such agreement or till the scheduled date of expiry of power purchase agreement whichever is earlier ,if any order or ruling is found to have been

passed by an Appropriate Commission or a competent court against the generating company for material breach of the terms and conditions of the said power purchase agreement:

[] 4

~~*Provided further that a renewable energy generator selling electricity component to third party through open access shall be eligible for the entire energy generated from such plant for participating in the REC scheme subject to the condition that such generator does not avail or does not propose to avail any benefit in the form of concessional/promotional transmission or wheeling charges or banking facility benefit:*~~

~~*Provided also that if such a renewable energy generator forgoes on its own, the benefits of concessional/promotional transmission or wheeling charges or banking facility benefit, it shall become eligible for participating in the REC scheme only after the date of forgoing such benefits:*~~

~~*Provided also that the above mentioned condition for renewable energy generator selling electricity component to third party through open access for participating in the REC scheme shall not apply if the benefits given to such renewable energy generator in the form of concessional transmission or wheeling charges and/or banking facility benefit are withdrawn by the concerned State Electricity Regulatory Commission and/or the State Government:*~~

~~*Provided also that if any dispute arises as to whether a renewable energy generator has availed such concessional/promotional benefits, the same shall be referred to the Appropriate Commission for decision.*~~

~~*Explanation: For the purpose of this Regulation, the expression "banking facility benefit" shall mean only such banking facility whereby any renewable energy generator gets the benefit of utilizing the banked energy at any time (including peak hours) even when it has injected into grid during off peak hours."*~~

~~*5.1(d) It does not sell electricity generated from the plant, either directly or through trader, to an obligated entity for compliance of the renewable purchase obligation by such entity."*~~

14. The claim of the Petitioner is that since the Tariff of Rs. 2.50 per unit as per the executed PPA dated 08.06.2004 was neither determined under Section 62 nor adopted under Section 63 of the Act, the project of the Petitioner is eligible for accreditation for registration for issuance of and dealing in Renewable Energy Certificates under CERC (REC) Regulations, 2010. The Petitioner has also claimed that the conditions under clauses 1(b) and 1(c) of Regulation 5 of the CERC (REC) Regulations, 2010 are in alternative and mutually exclusive and neither both must be fulfilled legally nor it is factually possible to fulfill both. It is

also the claim of the Petitioner that the conditions at clauses 1(b) and 1(c) of Regulations 5 of CERC (REC) Regulations, 2010 being mutually exclusive the Project of the Petitioner would be eligible for accreditation of registration for REC even if any one of the conditions i.e. clause 5.1 (b) is met.

15. The application of the Petitioner for accreditation has been rejected on the ground that the Petitioner failed to fulfill the conditions at clause 1 of Regulation 5 of CERC (REC) Regulations, 2010. Therefore, before going into the detail of the question as to whether, or not, the tariff under the PPA entered into by Petitioner with the HPSEBL can be considered to have been determined by the commission under Section 62 or Section 63 of the Act (ibid), it would be appropriate to examine, in the first instance, the question as to whether the conditions contained in clause 1 of Regulation 5 (ibid), as extracted hereinbefore, have been met by the Petitioner. The need for going into the question as to whether the tariff rate was determined by this Commission under Section 62 or Section 63 of the Act would arise only if the conditions at clauses 1(b), (c) and (d) of Regulation 5 (ibid) are considered to have been met.

16. We have carefully gone through the clauses 1(b), 1(c) and 1(d) of Regulation 5 of CERC(REC) Regulations, 2010 and after careful reading of the same, it is clear that the conditions are not mutually exclusive and co-terminus and in order to be eligible for participation in REC mechanism, the RE Generator not only has to meet condition at clause 1(b) of Regulation 5 (ibid) but shall also have to meet the eligibility conditions as provided under clauses 1(c) and 1 (d) of Regulation 5 (ibid).

17. While examining clause 1 of Regulation 5 of CERC (REC) Regulations, 2010, apparently the Petitioner has long term PPA for supplying power at fixed rate of Rs. 2.50 per unit for 40 years with Respondent No. 2. As per the Condition at clause 1 (c) of Regulation 5 of CERC (REC) Regulations, 2010, a RE Generator would be eligible for participation in REC mechanism if he sells power to the Distribution Licensee of the area in which it is located at the APPC rate

determined by the Commission. In addition, in order to claim the benefit of RECs, one more condition at clause 1(d) of Regulation 5 (ibid) is also required to be met with. Apparently, the petitioner does not meet the conditions at clauses 1(c) and (d) of Regulation 5 (ibid) as it is selling the power to Distribution Licensee, an obligated entity. We specifically requested Sh. Arijit Maitra, Ld. Counsel to clarify as to how all the conditions of clause 1 of Regulation 5 of CERC (REC) Regulations 2010 are not required to be met with together in order to claim the benefit of RECs. Sh. Maitra, Ld. Counsel states that the PPA dates back prior to the CERC (REC) Regulations, 2010 and the determination of the APPC rate and, therefore, it is not possible to supply power under APPC rate and, thus, the conditions being independent of each other can't be met with together and meeting any one of these conditions would make the Petitioner entitled for accreditation to register for RECs. He has further submitted that while interpreting both the conditions at clause 1 (b) and 1 (c) of Regulation 5 (ibid), it is clear that both the conditions have no relation with each other and thus, giving harmonious interpretation, the Petitioner had established the eligibility and the application of the Petitioner for accreditation was wrongly rejected.

18. In the instant case, the PPA envisages sale/purchase of power at a mutually agreed rate in line with the Government Policy and there is no agreement between the parties for sale/purchase of power at the APPC rate in view of the long term PPA. The determination of APPC rate will not affect the status of the Petitioner in any manner as claimed by the Petitioner for the reasons that as per long term PPA, the Petitioner was paid firm and fixed rate of Rs.2.50 per unit even when the APPC rate was less than Rs.2.50 per unit. Therefore, even if the APPC rate goes up more than Rs. 2.50 per unit, the Petitioner can't avail said higher rate in view of the long term PPA. Also the question of selling power to a party, other than the DISCOM of the area in which the project is located, through Open Access arrangement, simply does not arise as power is being sold by the Petitioner to the HPSEBL under a long term PPA. After careful perusal of the

above said conditions of eligibility, we are not in agreement with the submissions of Sh. Arijit Maitra, Ld. Counsel that meeting any one of the conditions is enough or that the conditions are mutually exclusive. Even the Petitioner in application for accreditation made two different statements of selling power firstly: APPC and open access mode and secondly: mutually agreed price (Annexure to additional affidavit). This clearly suggests that either the Petitioner was not clear about REC mechanism or made such contradictory statements to claim the undue advantage. Thus, the Petitioner has not been able to substantiate the plea made in this regard that it had met the eligibility. In fact, in order to be eligible for participation in REC mechanism, the RE Generator shall have to meet with all the eligibility conditions of clause 1 of Regulation 5 of CERC (REC) Regulations, 2010.

19. Therefore, the plea made by petitioner in this regard is grossly incorrect. Furthermore, the Renewable Project shall be eligible, if it does not sell electricity generated from the plant, either directly or through trader, to an obligated entity for compliance of the Renewable Power Purchase Obligation (RPPO) by such entity. In this case, the power is being sold by the Petitioner to the Respondent Board (Respondent No. 2) under a long-term PPA and as observed above, there is no restriction in the PPA, and in fact it could not have been there, about the manner in which the power shall be used by the purchaser. Therefore, the distribution licensee is eligible to use the power purchased by it from the Petitioner's plant for meeting its RPP obligations. As such, condition at clause 1(d) of Regulation 5 (ibid) has also not been met by the petitioner.

20. The tariff being paid to the Petitioner is based on the approved rate on the basis of policy of the Govt. of HP. Said tariff is an incentivized tariff as the Petitioner is not required to pay any duty/levies etc. on the tariff and such duty/levy etc. are being borne by the HPSEBL as per PPA. Said rate of power as agreed has not been impacted in any manner and the Petitioner is getting firm and fixed rate of Rs. 2.50 per unit ever since the execution of PPA.

21. Though the Ld. Counsel for the Petitioner has relied upon the law laid down by the Hon'ble APTEL in **Appeal No. 193 of 2014 M/s Him Urja Pvt. Ltd. v/s Uttrakhand Electricity Regulatory Commission and others 2016 ELR(APTEL) 0027** and Hon'ble Supreme Court in **Tata Power Company Ltd. Vs. Reliance Energy Ltd. and other (2009) 16 SCC 659** but the law laid down therein has no applicability to the facts and circumstances of the present case.

22. In view of the foregoing discussion, the Petitioner has failed to establish that it has met with all the conditions required for accreditation to register for REC and the application of the Petitioner was not considered by Respondent No.1 as per the CERC (REC) Regulations, 2010. On the contrary, it is established that the Petitioner's application was examined as per the procedure and guidelines under the Regulations in force but for want of fulfillment of eligibility conditions, said application has been rejected. Therefore, no fault can be found with issuance of letter dated 15.05.2019 which was issued after careful consideration of the matter.

23. The second issue for consideration is whether the HPSEBL has illegally availed the benefits of RPPO and REC and consequently the Petitioner has suffered loss of revenue. The case of the Petitioner is that the Respondent No.2 cannot and could not have met the RPO out of the power being purchased from the Petitioner when the benefit thereof has been denied to the Petitioner and by denying the benefit to the Petitioner, the Petitioner has suffered huge loss and is required to be compensated for the same by the Respondent No.2.

24. In accordance with the RPPO Regulations, the distribution licensee (HPSEBL) is an obligated entity and is required to procure (through purchase or self-generation) specified quantum of electricity from the renewable energy sources. The Petitioner is not an obligated entity under RPPO Regulations and only the Consumers and Distribution Licensee are the obligated entities. There is no condition about the tariff at which Renewable Energy has to be

procured/generated for meeting the RPPOs. The only exception is that the power, if any, procured by it under the APPC mechanism will not be counted towards fulfillment of its RPP obligations. The CERC (REC) Regulations also do not debar the distribution licensee to meet its RPPOs out of the electricity procured/generated by it from the renewable power projects even if tariff for such procurement has not been determined by the Commission under Section 62 or Section 63 of the Act. In this case, the power is being procured by the HPSEBL under the long term PPA signed by it with Petitioner at the mutually agreed rate under the incentivised scheme of the Government of HP without any conditions, whatsoever, and in fact, no conditions could not have been there, about the manner in which the power can be used by the HPSEBL. As such, the distribution licensee (HPSEBL) was fully eligible to use the power for meeting its RPP obligations or for that matter even for further selling it as renewable power to some other entity.

25. As per the eligibility conditions specified by the CERC, to be met by the distribution licensee for availing RECs, the distribution licensee shall be eligible for the RECs if it has procured (whether through purchase or self-generation) renewable power in excess of its RPPO at the rates determined by the Commission under Section 62 or adopted under Section 63 of the Act. The distribution licensee may not be eligible to get RECs for such part of Renewable energy (after meeting RPPOs) for which the procurement rate has not been determined by the Commission. The Respondent Board has claimed that power procured by it from the Project of the Petitioner has been used by it for meeting the RPPO in accordance with the HPERC (RPPO) Regulations, 2010 and has not got any REC issued against said quantum. As such, even if the Respondent No.2 is not eligible for renewable energy certificates against the RE Power procured by it from the Petitioner, there is no bar, whatsoever, for Respondent No.2 to use this RE Power for meeting RPPO. These are obviously two difference aspects. In case HPSEBL has obtained REC against the RE Power from other sources or own

