



Interim Relief Application in Petition No. 1101 of 2016

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order: 19.08.2016

IN THE MATTER OF: Interim Relief Application

IN THE MATTER OF

M/s Lalitpur Power Generation Co.
B-10, Sector -3,
Jamnalal Bajaj Marg,
Noida-201301(U.P)

-----Petitioner

UP Power Corporation Limited
(Through its CMD)
7th Floor, Shakti Bhawan
14 - Ashok Marg, Lucknow.

----- Respondent

Following were presents:

1. Shri SNM Tripathi, Director, LPGCL
2. Shri Anant Swaroop, Sr. VP(L), LPGCL
3. Shri Amrendra Mani Tripathi, Manager, BEPL
4. Shri Dhruv Mathur, Advocate, LPGCL
5. Shri Vinod Asthana, S.E., UPPCL, UPPCL
6. Shri Sanjay Garg, Sr. Manager, BEPL
7. Shri V.P. Srivastava, CE (PPA), UPPCL
8. Shri Vivek Dikshit, E.E., UPPCL
9. Shri Dwarkesh Sharma, President, LPGCL
10. Sri Rajiv Srivastava, Advocate, UPPCL



Order

(Date of Hearing 16.08.2016)

1. In furtherance to the GoUP Energy Policy 2009, Uttar Pradesh Power Corporation Limited (UPPCL) (the state nominated agency) identified a site in District Lalitpur (U.P) for setting up of 3 X 660 MW Super Critical Thermal Power project under a SPV namely M/s Lalitpur Power Generation Company Limited (LPGCL), the state Government and M/s Bajaj Hindustan Limited (lead member of consortium) signed a MOU on 22.04.2010 for setting up of the said power project.
2. The Commission approved the Power Purchase Agreement (PPA) with the list of deviations from the standard documents forming part of the PPA, vide its order dated November 18, 2010 read with order dated November 18, 2010 read with order dated December 07, 2010.
3. The Petitioner had filed a Petition under Section 86(1) f of the Electricity Act 2003 on 01.03.2016 to set aside the conditions stipulated under paras 16 and 17 of some agreement dated 4.11.2015. After the exchange of pleadings the Petition was taken up for hearing and the last hearing in the matter took place on 06.06.2016 wherein vide order dated 20.6.2016, the Commission passed the following Order:

“.....The Commission decides to allow them some time to apprise the Commission that whether they could reach a mutually agreed solution of the problem”
4. Subsequently the Petitioner filed an interim application for relief under Section 94(2) of the Electricity Act, 2003 praying

“that subject to the Petitioner agreeing to the conditions mentioned in paragraph 13 this Hon’ble Commission may be pleased to allow the Petitioner to purchase coal for generation of electricity under the prevalent policy of the Government of India for supply of coal to power generators,



which may be treated as sufficient compliance of the condition provided under Article 3.1.2 (ii) of the approved PPA”

5. LPGCL has filed interim relief application stating that their MoU for fuel supply has expired on 30.06.2016. For further period they have been allowed coal supply through special forward E-auction (G.O. dated 13.04.2016). LPGCL has further submitted that they would charge UPPCL based on notified price of CIL and will not charge the difference between the notified price and reserved price. LPGCL has requested to allow this provision and to treat it as sufficient compliance of the condition provided under 3.1.2(ii) of the approved PPA which states “the seller shall have obtained coal linkage from standing linkage Committee (Long Term), Gol and provided the copies of the same to the procurer”.
6. UPPCL in its reply has submitted that the prayer, as it is, is not liable to be granted by this Hon’ble Commission for the coal being procured by the petitioner/applicant under the present exigent arrangement, even if the proposal as contained in paragraph 13(i) and (ii) were not to be objected by UPPCL, may not be substituted for what is required to be fulfilled under Article 3.1.2(ii) of PPA as approved by this Hon’ble Commission. It is prayed that this Hon’ble Commission, in the facts and circumstances of the case, may be pleased to pass an order whereby the issue is resolved within the framework of the law and even if Hon’ble Commission prefers to pass any interim order in the matter, It should be co-terminus with the consumer interest keeping in view of interplay of present policy dispensation and framework of PPA.
7. In the Hearing on this matter, the representative of the Petitioner submitted that in compliance to the directions of the Commission the parties in spite of being at variance, engaged themselves with all earnestness in a dialogue with a view to reconcile their differences with each other and that the negotiations between the parties are still in progress.



8. The Representative of the Petitioner submitted that since the signing of the PPA, it was not possible to procure coal through Long Term Coal Linkage as envisaged in the PPA thus rendering the said condition impossible to be performed. The Representative of the Petitioner further submitted that under the present policy only option to procure coal is through forward e-auction therefore it would be in the interest of justice if the Hon'ble Commission may treat the procurement of coal by the Petitioner under the prevalent policy of the Govt. of India as sufficient compliance of the conditions provided under Article 3.1.2 (ii) of the approved PPA.
9. The Representative of the Petitioner submitted that passing of interim order was necessary for the survival of the Petitioner till the time the negotiations are completed between the parties. He further submitted that in case of acceptance of the interim application submitted by the Petitioner, the respondent corporation and the consumer of the State will not be burdened with any additional cost as a result of absorbing the additional cost by the Petitioner.
10. The Representative of the respondent corporation, UPPCL, submitted that it had written to the Govt. of India, Ministry of Coal on 8.7.2016 on the subject of "Coal Linkage by Standing Linkage Committee for M/s Lalitpur Power Generation Co. Ltd. (3x660MW) and the Govt. of India has informed UPPCL vide their letter dated 18.7.2016 that coal is not being supplied on MoU basis but present mechanism of making coal available was through special forward e-auction and that policy on future linkages was being finalized and linkages shall be provided as and when the policy was finalized.
11. The Representative of the UPPCL submitted that the conditions subsequent as contained in the Article 3.1.2(ii) of the PPA was incorporated by factoring in the coal linkage policy on the date of the PPA i.e on 10.12.2010 and that the Petitioner should not have agreed to the condition subsequent as contained in the Article 3.1.2 (ii) of the PPA. He further submitted that the Petitioner had 18 months' time to seek the waiver of the condition stipulated under Article 3.1.2 (ii) of the PPA under Article

3.1.2 (ii) itself. Therefore the avenue of 'impossibility of performance' so late in the day is not available to the Petitioner/ applicant to wriggle out of the condition subsequent in Article 3.1.2(ii) of the PPA.

12. During the hearing UPPCL also made an additional written submission having following points:

- i. LPGCL has been given third time extension for accomplishing conditions subsequent upto 30th September 2016 on the basis of agreement dated 4.11.2015. CoD of first unit has also been allowed in view of agreement dated 4.11.2015. Besides this, a negotiation process between LPGCL and UPPCL is also on for amicable solution of issues. Therefore, the prayer should be decided in the overall backdrop of events.
- ii. If any departure from agreement dated 4.11.2015 is carved out, outgoes the agreement along with the third time extension as well as CoD of first Unit. As an outcome the PPA would be deemed to be expired with second extension i.e. 30.03.2015. UPPCL has emphasized that survival of PPA , as on date, is directly attached to the existence of agreement dated 4.11.2015.
- iii. The developer was well aware about the status of coal linkage policy at the time of signing of PPA i.e.10.12.2010.
- iv. No interim arrangement can be judged as rational, purely on consideration of consumer interest, if it allows return on equity to developer.
- v. While granting third time extension, it has been decided by the cabinet that transportation charges will be allowed as only the rail fare between the present coal mine i.e. Amrapali mine and Lalitpur Railway Station. Therefore, in the consumer interest the transportation charges should be restricted to the lower of actual or the rail fare between Amrapali coal mine and Lalitpur Railway Station.

13. The Representative of the UPPCL submitted that the coal made available to LPGCL with certain conditions is to meet an exigent situation and is a stop gap arrangement till the finalization of coal linkage policy and such an arrangement cannot substitute



what is mandated under Article 3.1.2(ii) of the PPA. He further submitted that the Petitioner may continue to procure the coal under the present arrangement till the finalization of the coal linkage policy by absorbing, in its own resources, the differential cost of procurement of coal under the present arrangement and that which would have been applicable under the coal linkage from the GoI. He further submitted that Petitioner should also forego return on equity and the differential transportation charges related to coal procured through e-auction till the time it fulfils the conditions of the PPA for its proposal to be considered.

14. The representative of the Petitioner submitted that till such time the policy on coal linkages is finalized by the Govt. of India the Petitioner may be allowed to procure coal as per the conditions specified in its interim application. He further submitted that the differential cost of transportation of coal under the e-auction mechanism and that which would have been applicable under the long term coal linkage from the GoI can be absorbed in its own resources by the Petitioner. The petitioner further stated that in a way UPPCL is avoiding the liabilities which may occur under ABT mechanism.
15. The Commission after hearing the submissions directed LPGCL to submit its reply on the points raised in the counter affidavit and written statement of UPPCL i.e. surrendering RoE, absorbing the differential cost of transportation of coal and other issues within seven days of this hearing and the UPPCL to reply on the same within fifteen days of receipt of the reply of UPPCL.
16. The next date of hearing shall be 9.9.2016 at 11:30 Hrs.

(S.K. Agarwal)
Member

(Desh Deepak Verma)
Chairman

Place: Lucknow
Dated: 19.08.2016