Petition No.1106 of 2016

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

**Date of Order: 01.02.2017**

**PRESENT:**

1. Hon’ble Sri Desh Deepak Verma, Chairman
2. Hon’ble Sri Suresh Kumar Agarwal, Member

**IN THE MATTEROF:** Adoption of tariff for purchase of power from M/s RKM Powergen Pvt. Ltd. obtained through process of case-1 bidding in accordance with the guidelines issued by the Central Government

AND

IN THE MATTER OF

Uttar Pradesh Power Corporation Ltd.

(through its Chairman),

7th Floor, Shakti Bhawan,

14, Ashok Marg,

Lucknow

**--------------- Petitioner**

The following were present:

1. ShriA. H. Khan, CE (planning) , UPPCL
2. Shri R. K. Sharma, ED (planning), UPPCL
3. ShriDeepakRaizada, SE (planning), UPPCL
4. ShriMohitGoyal, Consultant, RKM Powergen
5. ShriS. C. Rai, Advocate, RKM Powergen

**ORDER**

**(Date of Hearing 16thJanuary, 2017)**

**Background**

1. UPPCL initiated Case-1 bidding process for procurement of 6000 MW base load power on long term on July 23, 2012. Subsequently financial bids were opened on December 17, 2012 and were presented before the Bid Evaluation committee on January 18, 2013.
2. Based on the recommendation of Bid Evaluation Committee and the Energy Task Force, the following seven successful bidders, as tabulated below in the order of their ranking were issued the letter of Intent by UPPCL:

|  |  |  |  |
| --- | --- | --- | --- |
| **Rank** | **Name of the Bidder** | **Bid Capacity (in MW)** | **Levelised Tariff (in Rs./kWh)** |
| 1 | NSL Nagapatnam Power &Infratechpvt. Ltd. | 300 | 4.486 |
| 2 | PTC (TRN Energy Ltd.) | 390 | 4.886 |
| 3 | Lanco Power (Babandh Project) | 423.9 | 5.074 |
| 4 | RKM Powergen Pvt. Ltd. | 350 | 5.088 |
| 5 | KSK Mahanadi Power Company Ltd. | 1000 | 5.588 |
| 6 | PTC-MB Power (Madhya Pradesh) Ltd. | 361 | 5.73 |
| 7 | Krishnapatnam Power Corporation Ltd. | 800 | 5.849 |

1. Along with other successful bidders, LoI was issued to RKM PowergenPvt. Ltd. (subsequently referred as RKM Powergen) on May 22, 2013, which was accepted by it, but later it was cancelled by UPPCL on December 19, 2013, due to non responsiveness of RKM Powergen in submission of Contract Performance Guarantee and execution of PPA.
2. Subsequently on December 20, 2013, RKM Powergen requested the Petitioner for restoration of LoI. Later the Commission vide its Order dated June 24, 2014, adopted the tariff for L-2, L-3, L-5 and L-6.
3. The Commission in Petition No. 964 of 2014, passed the following Order on November 17, 2014:

***“Stage 1: Taking additional quantum from the bidders whose tariffs have been approved by the Commission.***

*Before initiating this process, UPPCL shall first take final decision on the pending bids of L1 and L4. If the decision is in favour of L1 and/or L4 then additional quantum may be taken from all successful bidders i.e. L2, L3, L5,L6& L1 and/or L4. In case the decision is not in favour of L1 and L4 then additional quantum may be taken from L2, L3, L5 and L6, the existing successful bidders. This additional quantum may be taken at their quoted tariff or at their quoted tariff with some discount for additional quantity. Such a discount is permissible in view of Hon’bleAptel order dated 6.5.2010 in appeal no. 44 of 2010 (MPPTCL Vs MPERC) and for this negotiations can be done bythe procurer in the larger interest of consumers.*

***Stage 2: Snap bid among the responsive bidders.***

*If the entire requisitioned capacity still can not be obtained through the process of Stage 1 then only Stage 2 may be considered. In this stage, UPPCL may invite bids through open bid process including the responsive bidders L-7 to L-13 on same terms and conditions of RFP. In this process, the bidders L-7 to L-13 would require to file only the fresh financial reduced bids.*

*On completion of the process as above, UPPCL would bring the results of the process to the Commission before issuing LoI. UPPCL vide application dated 30.10.2014 has revised their plea for extension of time for completion of bid process and have now been requested upto 28th February, 2015. The Commission allows the same.*

*It may be clarified that the above process has been suggested in view of UPPCL’s averments regarding problems of procurement through new case 1 bidding guidelines and non-receipt of clarifications sought by them from GoI. In the meanwhile, if the clarifications are received, UPPCL would be free to proceed as per the new guidelines.”*

1. GoUP vide its letter dated July 16, 2015, communicated to restore LoI of RKM Powergen keeping in view the interest of consumers and commercial interest of UPPCL subject to the decision made by the Commission in Petition filed in UPERC.
2. Subsequently after the decision of GoUP to restore the LOI M/S.RKM Powergenrequested the commission to allow withdrawal of its Petition 946 of 2014, which was allowed by the commission vide Order dated September 28, 2015.
3. Also RKM Powergen vide their letter dated November 5, 2015, gave an undertaking to supply its quoted quantum of 350 MW from the same generation source and at the same tariff specified in its Bid and as per the terms and conditions specified in the RFP documents. Based on this undertaking furnished by RKM Powergen, UPPCLvide its letter dated December 8, 2015, restored the LoI subject to its approval by the Commission.
4. On 14.1.2016 UPPCL filed a petition no. 1078 of 2016 for restoration of LOI of RKM Powergen. After considering the facts the Commission vide its Order dated February 11, 2016 in Petition No. 1078 of 2015, approved the restoration of LoI to RKM Powergen by UPPCL on firm commitment of supply of power from the same generation source at the quoted levelised tariff of Rs. 5.088/kWh for 25 years from October 30, 2016and no extension or exception would be allowed in future. Later RKM Powergen signed PPA with UPPCL on March 15, 2016.
5. UPPCL filed the present petition (Petition No. 1106 of 2016) with prayers to take this petition on record and to adopt tariff of M/s RKM Powergen under Section 63 of the Electricity Act, 2003.
6. The Commission convened public hearing, considering the fact that the electricity is being procured through bidding process under Section 63 of the Electricity Act, 2003, which states that the Commission shall adopt the Tariff if such Tariff has been determined through transparent process of bidding. The Public Hearing ensures opportunity to all the stakeholders and to the public at large.
7. RKM Powergen in its submission dated November 29, 2016, has stated that in its letter dated March 15, 2016 and April 18, 2016,it has requested UPPCL for a permission to supply electricity from a date earlier than what was agreed to i.e. 30.10.2016. RKM Powergen also submitted that it has fully complied with the obligations imposed upon it and thereafter the Tariff may be approved by the Commission under Section 63. RKM Powergen also enclosed the agreement for Long Term Open Access (LTOA) and Medium Term Open Access (MTOA) between RKM Powergenand PGCIL for 200 MW northern region (under long term) and 150 MW (medium term). It further submitted letter dated 04.11.2016 and 18.11.2016 of PGCIL confirming operationization of LTOA and MTOA respectively.
8. During the Public Hearing held on November 29, 2016, Sri Avadhesh Kumar Verma, Chairman, UP RajyaVidyutUpbhoktaParishad, raised objection that since the new Case-I bidding process has been initiated by UPPCL which has discovered lower Tariffs, the prayer of UPPCL for adoption of levelised Tariff of Rs. 5.08 / kWh should not be considered. He further stated that cost of the power available through this PPA should also be compared with the cost of power available through the power exchange.
9. The Commission vide its order dated 22.12.2016 desired to know from UPPCL about the present position of power supply from the generators whose tariffs have been earlier adopted by the Commission namely L2, L3, L5& L6 bidders. The Commission further desired to know the reasonability of the Tariff of Rs. 5.088 / kWh in view of the existing prices for long term power procurement. UPPCL was directed to make submission on these points.
10. Shri Rama Shankar Awasthi, Consumer filed written objections on October 13, 2016 and December 07, 2016. The Commission considered that since, as a public representative, Shri R. S. Awasthi has made written objections on October 13, 2016 and December 07, 2016, it would be necessary that UPPCL and M/s RKM Powergen should reply on the points raised. Hence,the Commission directed that the objections of ShriR.S.Awasthibe sent to UPPCL and RKM Powergento submit their replies, which are captured in next section of this Order.
11. To the written objections of Shri Rama Shankar Awasthi, Public Representative, filed written objections on October 13, 2016 and December 07, 2016, the replies have been filed by RKM Powergen on January 3, 2017 and by UPPCL on January 9, 2017, which have been mentioned in the next section of this order.

**VIEWS / COMMENTS / SUGGESTIONS / OBJECTIONS**

1. Shri Rama Shankar Awasthi’s Objection dated October 13, 2016, and its replies filed by RKM Powergen and UPPCL
2. At the stage no Order was passed by the Commission on September 28, 2015, in respect of the status of LoI issued to RKM Powergen on dated May 22, 2015, by the UPPCL and same stand cancelled by UPPCL on dated December 19, 2013 and as such it stood terminated on the date of passing of the Order dated September 28, 2015, in Petition No. 946 of 2014 by the Commission and still stands terminated till date.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, denied the contention made by Shri R. S. Awasthi and submitted that UPPCL has restored the LoI dated May 22, 2013, vide letter no. 2025/Plg/UMPP/6000 MW dated May 8, 2015, and the Commission has approved the restoration of LoI vide Order dated February 11, 2016, in Petition No. 1078 of 2015.

**RKM Powergen’s Reply:** RKM Powergen also vide its submission dated January 3, 2017, denied the contention made by Shri R. S. Awasthi and submitted that UPPCL has restored the LoI dated May 22, 2013, vide letter no. 2025/Plg/UMPP/6000 MW dated May 8, 2015, and the Commission has approved the restoration of LoI vide Order dated February 11, 2016, in Petition No. 1078 of 2015.

1. It is a cardinal principle of law and settled view of Hon’ble Apex court that if any Status / Regulations / Rules / Bylaws / guidelines, etc. provides for an act to be performed in a certain manner then that act shall be performed in that manner only and not otherwise. That it is submitted that after cancellation of LoI, UPPCL ought to have acted in the manner as prescribed in Clause 2.5 of SBG, and the same has not been complied with, therefore, the petition for adoption of Tariff is liable to be rejected.

**UPPCL’s Reply:**UPPCL vide its submission dated January 9, 2017, denied the contention made by Shri R. S. Awasthi and submitted that it has followed the procedure as prescribed in RFP Clause no. 2.5(b) under which subsequent to cancellation of a LoI UPPCL can “Take any such measure as may deem fit in the sole discretion of the Procurer/Authorized Representative, as applicable.” The restoration of LoI has been done in accordance with the legal opinion tendered by the Hon’ble Attorney General of U.P. and was subsequently approved by the Energy Task Force and GoUP keeping in view the interest of consumers of the State of U.P. and the commercial interest of UPPCL.

**RKM Powergen’s Reply:** RKM Powergen also vide its submission dated January 3, 2017, denied the contention made by Shri R. S. Awasthi and submitted that the UPPCL has acted in conformity Clause no. 2.5(b) of RFP and also pointed out that the restoration of LoI has been done in accordance with the legal opinion tendered by the Hon’ble Attorney General of U.P. and was subsequently approved by the Energy Task Force and GoUP keeping in view the interest of consumers of the State of U.P. and the commercial interest of UPPCL and Procurer Discoms.

1. The Petition No. 1008 of 2015, filed by UPPCL for extension of Bid process timelines of case-1 bidding process for a combined procurement of 6000 MW power on February 19, 2015, was dismissed by the Commission vide Order dated January 7, 2016, taking note of UPPCL’s submission. Hence it is clear that the Commission also rejected the restoration of LoI by UPPCL to RKM Powergen.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, denied the contention made by Shri R. S. Awasthi and submitted that the Commission dismissed the Petition No. 1008 of 2015, for extension of timelines vide Order dated January 7, 2016, however, the request of UPPCL for restoration of LoI of RKM Powergen was taken into due cognizance by the Commission. Further UPPCL submitted that subsequently the Commission by its Order dated February 11, 2016, approved the restoration of LoI issued to RKM Powergen.

**RKM Powergen’s Reply:** RKM Powergen also vide its submission dated January 3, 2017, denied the contention made by Shri R. S. Awasthi and submitted that the UPPCL sought closure to the 6000 MW Case-1 bidding process except to the extent of restoration of LoI of RKM Powergen, which was also taken due cognizance by the Commission vide Order dated January 7, 2016. Subsequently the UPERC by its Order dated dated February 11, 2016, approved the restoration of LoI issued to RKM Powergen.

1. It is submitted that UPPCL sought the dismissal of Petition No. 1008 of 2015 on the ground of fresh bid process for procurement of 3800 MW power under new bidding guidelines. He further submitted that PPA entered between Procures and RKM on earlier bid process is neither transparent nor in accordance with the SBG.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, denied the contention made by Shri R. S. Awasthi and submitted that the extension of timelines of Case-1 6000 MW bidding process was sought by UPPCL in Petition No. 964 of 2014, as the requisitioned capacity of 6000 MW was not fully met by L2, L3, L5 and L6 which aggregated 2175 MW only.

**RKM Powergen’s Reply:** RKM Powergen also vide its submission dated January 3, 2017, denied the contention made by Shri R. S. Awasthi and submitted that the matter of restoration of LoI of RKM Powergen was isolated by UPPCL in Petition No. 1008 of 2015 and which was also reaffirmed and the restoration of LoI was approved by the Commission vide its Order dated February 11, 2016, in Petition No. 1078 of 2015.

1. The entity which cancelled the LoI of RKM Powergen i.e. UPPCL, has himself filed a Petition for restoration of LoI whereas, the RKM Powergen, which filed Petition against cancellation of LoI, subsequently withdrew its petition

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that appropriate procedure has been followed by UPPCL towards extension of bid process for restoration of LoI, which has also been approved by the Commission.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that the whole process for cancellation of LoI, its restoration and subsequent execution of PPA has been done in a transparent manner and in accordance with the framework of the SBG and RFP, which were also approved by the Commission in various Orders.

1. In the fresh bidding process initiated by UPPCL for 3800 MW capacity, the levelised Tariff quoted by RKM is Rs. 4.635 / kWh, whereas in earlier process for 6000 MW capacity, the levelised Tariff quoted by RKM is Rs. 5.088 / kWh. He further submitted that according to SBG, in the power procurement process through competitive bidding, the Government has no role to play. If it has any, then also the finding given by GoUP is perverse as the levelised tariff is lower in the subsequent fresh process initiated by UPPCL for 3800 MW capacity.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that both the bid process are based on different set of Standard Bidding Documents (SBD). The previous SBD was based on the concept of levelised tariff, whereas in the new SBD there is no such concept.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that both the bidding process are completely distinct as they are for different tenure of supply, they have distinct tariff streams, different method of applicability of escalation indices, etc.

1. The Commission ought to have enquired from UPPCL for their contradictory stand in the matter of power procurement. He submitted that the whole process of power procurement by UPPCL is neither transparent nor in accordance with SBG.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that the procurers have followed the provisions of transparency as per Standard Bidding Guidelines (SBG) and as per the Directives of UPERC in its order with respect to initiation of the bid process, approval of RFP documents and adoption of tariff of signed PPAs.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted thatthe entire case-1 bidding process for the power procurement by UPPCL has been done in a transparent manner and in accordance with law and applicable SBG and RFP provisions.

1. Shri Rama Shankar Awasthi’s Objection dated December 07, 2016, and its replies filed by RKM Powergen and UPPCL
2. If at all Tariff has to be adopted then it can be adopted only on the terms and conditions as stated in RFP documents in the bid process for procurement of 6000MW.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that the instant Petition filed for adoption of tariff for purchase of tariff for purchase of power from RKM Powergen is in strict compliance with the SBG and the RFP issued by it.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that the entire case-1 bidding process for the power procurement by UPPCL has been done in a transparent manner and in accordance with law and applicable SBG and RFP provisions.

1. It is submitted that standard bidding guidelines does not specify anything regarding the restoration of LoI and neither there was anything regarding RFP & RFQ documents, thereby the Commission’s Order dated 11.02.2016 in Petition no. 1078 of 2015 is out of jurisdiction.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that it has acted in conformity with the provision of RFP Clause no. 2.5(b)in the matter of restoration of LoI of RKM Powergenand in accordance with the legal opinion tendered by Hon’ble Attorney of UP, which was approved by ETF and GoUP and the contention of the objector is wrong and denied.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that the UPPCL has acted in conformity with the SBG ad the RFP issued for Case-1 bidding process. Also LoI was restored based upon the legal opinion of Advocate General of Uttar Pradesh and was subsequently approved by the Board of Directors of UPPCL and the Energy Task Force and GoUP keeping in view the interest of consumers of State of Uttar Pradesh and the commercial interest of UPPCL and procurer Discoms.

1. GoUPcommunicated the decision to restore the LoI subject to the decision of the Commission only in petition No. 946 of 2014 instead of the decision in any other petition. Therefore the petition No. 1078 of 2015 and 1016 of 2016 are not maintainable.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted thatGoUP has taken a clear and unambiguous decision to restore the LoI of M/s RKM Powergen. The reference of the petition No. 946 of 2014 against cancellation of LoI, was taken in cognizance of a sub judice matter.

**RKM Powergen’s Reply:** RKM Powergenvide its submission dated January 3, 2017, submitted that GoUP had taken an unambiguous and unequivocal decision towards restoration of the LoI. The petition No. 946 of 2014 was withdrawn by RKM Powergen on the request of the UPPCL, so that the approval of GoUP can be given effect to.

1. Change in source of coal was not in the RFP documents and in the SBD documents, thenunder what clause the Commission approved the same in its Order dated 11.02.2016 in Petition No. 1078 of 2015. Also bidders are required to maintain qualification till the completion of bidding process including the signing of the PPA and adoption of tariff while RKM Powergen had qualified solely on the basis of captive coal block of fatehpur East, which got de-allocated by Supreme Court Order in 2014

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted thatthrough various orders of the Commission it can be seen that keeping in view the change of sourceof fuel, due procedure and transparency has been followed by UPPCL for restoration of LoI, keeping in view the interest of consumers, interest of State of Uttar Pradesh and the commercial interest of the procurers.

**RKM Powergen’s Reply:** RKM Powergenvide its submission dated January 3, 2017, submitted that the UPPCL has acted in conformity with the SBG and RFP issued for Case-1 bidding process.

1. Absence of clarity on escalation factors to be used for payment purpose, a difference of around Rs. 7800 Crore can be observed during the PPA terms for 25 years.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that it is clear from the undertaking given by RKM Powergen, which is a part ofPPA that the escalation factors for payment that are applicable on captive block, as issued by CERC periodically, would be applicable.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that they have given undertaking which is a part of PPA, which clearly says that the escalation factors for payment that are applicable as per the quoted tariff would be applicable.

1. Total number of 10 bidders have quoted lower tariff than RKM Powergenin Case-1 bidding process initiated by UPPCL for procurement of 3800 MW, hence there is no need to adopt the bid of RKM Powergen which will result in higher tariff to the consumers and loss to Discoms.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that the comparison of financial quotes of two different bidding process carried over at different point of times with different set of bidding documents for procurement is not judicious.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that the two bidding process cannot be compared as they are for different tenure of supply and bidding guidelines.

1. Favorable treatment to RKM Powergen by not en-cashing the bid bond as per RFP documents

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that the contention of the objector are denied as with the cancellation of LoI on December 19,2013, the same day the Bid Bond was sent for invocation to the concerned branch of Punjab National Bank, Chennai. But RKM Powergen vide letter dated December 20, 2013, agreed to supply at the quoted tariff of the PPA, hence the decision of not en-cashing Bid Bond was taken which was with due approval of the Board of Directors and Energy Task Force.

**RKM Powergen’s Reply:** RKM Powergenvide its submission dated January 3, 2017, submitted that it was not able to furnish the contract performance guarantee initially due to reason beyond its control. But subsequently after knowing the step taken by UPPCL to cancel the LoI, it made a submission to supply power at the quoted tariff in PPA and also submitted BG of Rs. 5.00 Crores as a mark of their commitment to supply.

1. In-ordinate delay in completion of bidding process for RKM Powergen

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that the extension of the bid process was necessitated to fulfill the requisition capacity and all the matter to the extension of the bid process timeline were adjudicated and approved by the Commission.

**RKM Powergen’s Reply:** RKM Powergenvide its submission dated January 3, 2017, submitted that there was no delay on the part of it.

1. Other bidders which were disqualified in all previous case1 bid of UPPCL must be provided again with similar opportunities.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that the objector’s contentions are beyond the scope of the instant petition and does not merit any response.

**RKM Powergen’s Reply:** RKM Powergenvide its submission dated January 3, 2017, submitted that the contention are hypothetical and do not pertain to RKM Powergen and do not require any response.

1. UPPCL has already signed PPA of around 19000 MW excluding must run power capacity of approximately 4500 MW against actual peak demand of 16000 MW. Most of the coal based plants remain idle or are shutdown by UPPCL. In such a situation new long term PPA should only be allowed when there is clear economical advantage and requirement in State.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that out of 6000 MW of power to be procured only 2175 MW has been tied up and further added that the supply of power shall be in accordance with the Merit Order Dispatch principles.

**RKM Powergen’s Reply:** RKM Powergen vide its submission dated January 3, 2017, submitted that after the increased supply hours from 29.10.2016, it is erroneous to take reference of peak demand of 16000 MW.

1. Shri R. S. Awasthi submitted that the Commission may conduct an enquiry in the entire process of power procurement from RKM Powergen.

**UPPCL’s Reply:** UPPCL vide its submission dated January 9, 2017, submitted that transparent and due procedure in accordance with the SBG has been followed by the procurers and all the developments have been approved by the Commission through its various Orders.

**RKM Powergen’s Reply:** RKM Powergenvide its submission dated January 3, 2017, submitted that all the requirement of law have been complied and all the developments have been ratified by the Commission through its various Orders.

1. UPPCL filed its reply on January 9, 2017, to the Commission’s Order dated December 22, 2016, wherein they have submitted as follows:
2. Out of the contracted capacity of 2175 MW **932 MW** (PTC India-150 MW out of 390 MW, Lanco- 0 MW out of 423.9 MW, KSK Mahanadi- 505 MW out of 1000 MW and PTC India- 277 MW out of 361 MW) is operational which is to the extent of LTOA / MTOA sanctioned.
3. Regarding reasonability of tariff, UPPCL has submitted that the levelised tariff of Rs. 5.088/kWh, is lower than the tariff of L-5 and L-6, whose tariff has been adopted by the Commission.
4. The tariff has been duly evaluated by bid evaluation committee which had Member CEA as representative.
5. On January 16, 2017, the representative of UPPCL and RKM PowergenPvt Ltd appeared before the Commission and submitted that both the parties have filed the information desired by the Commission.

**Commission’s Observations**

1. We may now proceed to examine several objections raised by ShriAwasthi and ShriVerma:
2. The first objection raised by Shri R. S.Awasthirelates to validity of bid of RKM Powergen. The objector’s view is that after the cancellation of LOI and withdrawl of petition No. 946 of 2014 the bid of RKM Powergen should not be considered for adoption of tariff. After considering the facts on record the Commission is of the view that Clause 2.5(b) of the RFP clearly provides that after cancellation of LOI the procurer can can take such measures as it deems fit in the sole discretion of Procurer/Authorised Representative, as applicable. Further the Commission noted that the LOI was cancelled primarily due to the reason that RKM Powergen had offered supply of power at a levelised tariff of Rs. 5.088 per unit and had given two alternative fuel sources; one from the captive coal block and the other from the linkage coal. Subsequently the captive coal block was cancelled and RKM Powergen did not agree to supply power from linkage coal on the same terms and conditions which were applicable for supply from captive coal block. Since they did not submit the required bank guarantee and did not sign the PPA the LOI was cancelled on 19.12.2013. But RKM Powergen applied for restoration of their LOI on 20th December, 2013 and agreed to accept the same conditions which were applicable for supply from captive coal block. RKM Powergen also filed a petition NO. 946 of 2014 on 10.4.2014requesting for restoration of LOI and non-encashment of bid bond. Before the petition no. 946 could be decided by the Commission, UPPCL took the opinion of Advocate General of UP and with the approval of the State Govt. agreed to restore the LOI subject to approval of the Commission. The State Govt. issued an order dated 16.7.2015 in which concurrence of the State Govt. was conveyed on the restoration of LOI subject to approval of the Commission. After the order of the State Govt. was issued, RKM Powergen withdrew its petition no. 946 of 2014 on 20.08.2015 as their grievance against cancellation was settled.Further UPPCL filed a petition no. 1078 of 2015 in January 2016 for approval of the Commission for restoration of LOI. The Commission approved the restoration of LOI on 11.02.2016. On 27.4.2016 UPPCL filed a petition for adoption of tariff of RKM Powergen which is at present under consideration. The sequence of events indicates that restoration of LOI of RKM Powergen has been critically examined by the UPPCL and they have even taken the opinion of Advocate General of UP. The Commission has also examined the entire process of restoration of LOI and did not find any illegality in this. The withdrawl of Petition No. 946 of 2014 does not render the process of restoration illegal because the procurer within its right under the RFP has conceded to the request of RKM Powergen and after the grievance was settled the Petitioner chose to withdraw the petition filed before the Commission.
3. ShriAwasthihas mentioned that the apex court has laid down that if any Status/Regulations/ Rules/ Bylaws/ guidelines etc. provides for an act to be performed in a certain manner then that act shall be performed in that manner only and not otherwise.According to him after cancellation of LOI, UPPCL ought to have acted in the manner as prescribed in Clause 2.5 of SBG, and the same has not been complied therefore the petition for adoption of tariff is liable to be rejected. On this issue UPPCL has categorically stressed that they have followed the procedure as prescribed in RFP Clause 2.5(b) under which subsequent to cancellation of LOI UPPCL can “ Take any such measure as may deem fit in the sole discretion of the Procurer/Authorised Representative, as applicable”. UPPCL has taken the opinion of Advocate General of UP also in support of action that they have taken for restoration of LOI. In our opinion UPPCL has acted within the provisions of RFP which lays down the bidding process.
4. ShriAwasthi has raised an issue that the Commission had dismissed the petition No.1008 of 2015 of UPPCL seeking extension of timelines for procurement of 6000 MW of power on January 7, 2016 therefore the Commission also rejected the restoration of LOI by UPPCL to RKM Powergen. On this issue The Commission had declined to extend the bid process for procurement of 6000 MW power beyond June 30, 2015 but UPPCL made further submissions on July 6, 2015 in which besides other submissions made the following submission regarding the pending bid of RKM Powergen, which is recorded in the Commission’s order dated January 7, 2016.

*“The Energy Task Force in its meeting held on 16.03.2015 has recommended to Hon’ble Cabinet, GoUP to restore the LoI, predominantly in public interest and that restoration of LoI should be done by UPPCL by effectively ensuring that RKM Powergen is committed to supply at its quoted tariff (i.e. its year on year tariff stream as well asall other applicable parameters taken collectively for the purpose of evaluation on the basis of which it has been evaluated as L4 bidder) and then take other suitable actions as may be required for maintaining sanctity of bid process, adherence to such commitment as well as requirements associated with regulatory oversight. The decision of Hon’ble Cabinet in this matterisawaited.*

*…………. Thus, the issue of restoration of the cancelled LoI of L4 bidder shall remain insulated from the decision of closure of the ongoing bid process.”*

The UPPCL along with the above submission informed the Commission that new case-1 bidding guidelines have been issued and they intend to procure 3800 MW power under the new bidding guidelines. The Commission took note of the averments of UPPCL regarding pending bid of RKM Powergen and did not disallow the process of restoration of LOI of RKM Powergen.With the decision of the Govt. to restore the LOI of RKM Powergen in July 2015,the matter of restoration of LoIof RKM Powergen is excluded from the Commission’s order on 07.01.2016.The decision of the Commission to close the bidding process did not clearly debar consideration of restoration of LOI of RKM Powergen.

1. ShriAwasthi has also raised the point that UPPCL which cancelled the LOI applied for restoration of LOI of RKM Powergen but RKM Powergen subsequently withdrew its petition. The Commission is of the view that since UPPCL had agreed to consider restoration of LOI , RKM Powergen applied for withdrawal of petition No. 946 of 2014. Withdrawal of petiton no. 946 of 2014 by RKM Powergen does not extinguish the right of RKM Powergento get its grievance redressed by UPPCL.
2. In another point ShriAwasthi has mentioned that RKM Powergen quoted Rs. 4.635 per unit as the first year tariff in the new bid process for 3800 MW as against the levelised tariff of Rs. 5.088 in the bidding for 6000 MW power. He also stated that the State Govt. has no role to play in the Case-1 bidding process as per the SBG. On this issue the replies of UPPCL and RKM Powergen clearly state that both the bidding processes were quite distinct and the tariff quoted in two separate processes are not comparable. Going through the two separate SBGs proves this point. Second bid process is still at the level of UPPCL and its findings have not been communicated to the Commission. The power supply from RKM Powergen,who has got LTOA and MTOA, is to start immediately and UPPCL has not been able to get the full supply against the earlier finalized bids. Therefore merely on the basis of some offers under the new bid process being under consideration the objector cannot demand to restrain a decision on an earlier proposal under which supply can be received immediately. Even if we presume that the rates under the new bid process are lower than RKM Powergen but whether the new bidders have LTOA or MTOA is not clear. Mere an offer does not guarantee the supply of power at a time when the Utility needs it.As far as the role of the State Govt. is concerned, it is noteworthy that UPPCL and the 5 Discoms for which the power is being arranged are the State owned Companies and the State Govt. has a right to oversee the procurement process.
3. In his objections dated 7.12.2016 ShriAwasthi has stated that the tariff can be adopted on the terms and conditions as stated in the RFP document in the bid process for 6000 MW power. The Commission agrees with this submission and has examined the issues accordingly.
4. ShriAwasthi has mentioned that Standard Bidding Guidelines do not specify anything regarding restoration of LOI and there is nothing on this issue in RFP and RFQ. This is true that the SBG and RFP/RFQ does not clearly say anything about the restoration of LOI but this situation is not a normal one. But Clause 2.5(b) of RFP gives right to the Procurer/ Authorised Representative to deal with such situation .UPPCL has stated that they have acted according to Clause 2.5(b) of RFP. We do not find any contradiction on this point.
5. ShriAwasthi has also raised a technical point thatGoUP communicated the decision to restore the LOI subject to the decision of the Commission in **Petition No.946 of 2014**onlyand the same decision can not be taken in any petition**.** Therefore the petition No. 1078 of 2015 and 1016 of 2016 are not maintainable. The Commission perused the order of the State Govt. on restoration of LOIwhich is reproduced below:

“Eks0 vkj0ds0,e0 ikojtsu izk0fy0 dksfnukad22.05.2013dksfuxZr ,y0vks0vkbZ0 ftlsfnukad 19.12.2013 dksfujLrfd;kx;kFkk] dksfcMj }kjknhx;hizfrc)rk dh os 4x360 esxkokVftyktatxhjpaikNRrhlx<rkih; ifj;kstuklsdSIfVodksVekbu ¼Qrsgiqj bZLV½ ¶;wylkslZls 350 esxkokVÅtkZgsrq muds m}fjrVSfjQ ¼ysoykbt VSfjQ :0 5-088@;wfuV½ ds vk/kkjijtujs”kulkslZlsghoSdfYiddksyfyadst ¶;wylkslZ ds ek/;e lsviuh vkj0,Q0ih0 esam)fjrVSfjQij vkj0,Q0ih0 dh “krksaZ ds vuqlkjghfo|qrvkiwfrZdjsaxs] ds n`f’VxrmRrjizns”k ds miHkksDRkkvksa ds fgrrFkk m0 iz0 ikojdkjiksjs”ku fy0 ds okf.kT;dfgr ds n`f’Vxr m0 iz0 fo|qrfu;kedvk;ksxesa ;ksftr ;kfpdkesaifjrfu.kZ; ds vk/khufjLVksj@fjbULVsVfd;stkusdkfu.kZ; fy;kx;kgSA”

From above it is amply clear that the State Govt. took decision in the interest of consumers of State and also in the commercial interest of UPPCL subject to approval of Commission. The petition No. 946 of 2014 was withdrawn by RKM Powergen in view of the above decision of GoUP and subsequently Petition No. 1078 of 2015 was filed by UPPCL for approval of the Commission for restoration of LOI. The Commission approved restoration of LOI vide order dated 11.02.2016. Subsequently UPPCL filed this Petition for adoption of tariff of RKM Powergen. Surely adoption of tariff has to be considered on merit and whether it is done on the petition of RKM Powergen or on the Petition of UPPCL is really not very releant.

1. ShriAwasthi has further stated that change in source of coal was not in the RFP document and in the SBD documents then under what clause the Commission approved the same in its order dated 11.02.2016 in Petition No. 1078 of 2015.He is of the view that the bidders are required to maintain qualification till the completion of bidding process including the signing of PPA and adoption of tariff while RKM Powergen had qualified solely on the basis of captive coal block which got de-allocated by the Hon’ble Supreme Court. The omission examined this issue and found that RKM Powergen, at the time of bidding had offered two sources of coal; first from captive coal block and second from linkage which they had. They had qualified for RFQ stage taking into account both the sources. There was no bar on a bidder offering alternative sources of coal in the bidding. Since their coal block was cancelled they agreed to supply power from linkage coal on the same conditions which are applicable for supply of coal from captive coal block as a fuel source. Since RKM Powergen had very clearly mentioned the two alternative fuel sources at the time of bidding there appears no anomaly in accepting the bid from second fuel source but off course at the price at which the bid has been evaluated.
2. ShriAwasthi has mentioned that absence of clarity on escalation factors to be used for payment purpose. A difference of around Rs. 7800 crore can be observed during the PPA term of 25 years. The Commission has examined this issue and found that the LOI has been restored on the condition that the escalation factor will be taken as that which would have been applicable had the supply been made from captive coal block. RKM Powergen has accepted this condition. Therefore the issue of any loss on this account does not arise.
3. ShriAwasthi has stated that 10 bidders have quoted lower tariff than RKM Powergen in Case-1 bidding process initiated by UPPCL for procurement of 3800 MW power hence there is no need to adopt the bid of RKM Powergen which will result in higher tariff to the consumers and loss to Discoms. On this issue we have already stated that the bidding process for procurement of 3800 MW power is still at the level of UPPCL and we can not comment on the rates and feasibility of getting power immediately under the new bid. Further we have mentioned earlier also that the bidding process of 6000 MW power and 3800 MW power are based on two different SBDs. The pricing structure, term of PPA and other parameters are different. Further UPPCL has not been able to get 2175 MW power from the 4 bidders with whom the PPAs were signed. Getting LTOA or MTOA is difficult due to interstate transmission constraint. UPPCL has maintained that they are in need of power therefore there is no reason for us to stop the adoption of tariff of a bidder who is in a position to start the supply immediately. Besides price of power timely availability is also a crucial factor which cannot be ignored.
4. ShriAwasthi has alleged a favorable treatment to RKM Powergen by not encashing the bid bond of RKM Powergen as per RFP document. On this issue UPPCL in their reply dated 9.01.2017 have denied the allegation and have stated that the LOI of RKM Powergen was cancelled on December 19,2013 and on the same day the bid bond was sent for invocation to the concerned branch of Punjab National Bank, Chennai. But RKM Powergen agreed to supply power at the quoted tariff vide their letter dated 20.12.2013 therefore UPPCL decided not to encash the bid bond.
5. ShriAwasthi in his preliminary objections had also stated that ShriS.K.Agarwal the Member of the Commission has been a member of the Bid Evaluation Committee when he was working as Director (finance) of UPPCL therefore this case may not be put up before him for hearing. Here it must be understood that while considering any person for appointment as Member of the Commission the Selection Committee takes into account the aspect of conflict of interest that may arise if such person is appointed the member of the Commission. In case of ShriAgarwal also the Selection Committee and the State Govt. must have satisfied itself on this count and therefore there is no occasion for the Commission to comment on this. The Commission, which is only a two member Commission presently, the third member position being vacant, can not stop discharging its statutory responsibilities and deciding the matter involving public interest.
6. After considering the objections of the public representatives, the replies of UPPCL and RKM Powergen we are of the view that restoration of LOI of RKM Powergen has been legally examined by UPPCL with the concurrence of the State Govt. UPPCL is in need of power and RKM Powergen is in a position to immediately supply 350 MW power as they have LTOA and MTOA in place therefore in the interest of consumers that they do not suffer due to shortage of power, it will be in the interest of State that a decision is taken on the issue of adoption of tariff of RKM Powergen bid.
7. After going through various documents, objections and replies of parties the Commission adopts the levelised tariff of Rs. 5.088 per unit as quoted and agreed by RKM Powergen for supply of 350 MW power as per the requirement of UPPCL.

(Suresh Kumar Agarwal) (Desh Deepak Verma)

Member Chairman

Place: Lucknow

Dated: 01.02.2017