



Petition No 871 of 2013

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order : 23.05.2013

PRESENT:

1. Hon'ble Shri Shree Ram, Member
2. Hon'ble Smt. Meenakshi Singh, Member

IN THE MATTER OF: Petition under section 86 (1) (f) of the Electricity Act, 2003 read with regulation 156 of the UPERC (Conduct of Business) Regulations, 2004 for recovery of outstanding dues under the Power Purchase Agreement dated 12.11.2006.

AND

IN THE MATTER OF

M/s Lanco Anpara Power Limited
411/9, Riverside Apartments,
New Hyderabad, Lucknow

-----**Petitioner**

1. The Chairman, U.P. Power Corporation Ltd., 7th Floor, Shakti Bhawan,14, Ashok Marg, Lucknow
2. The Managing Director, Poorvanchal Vidyut Vitran Nigam Ltd.,132KV Substation, Bhikharipur, Vidyut Nagar,Varanasi.
3. The Managing Director, Paschimanchal Vidyut Vitran Nigam Ltd., Victoria Park Meerut.
4. The Managing Director, Madhyanchal Vidyut Vitran Nigam Ltd., 4A, Gokhale Marg, Lucknow.
5. The Managing Director, Dakchinanchal Vidyut Vitran Nigam Ltd., Urja Bhawan, Agra Mathura By Pass Road, Agra 282 007.

-----**Respondent**

The following were present:

1. Sri S.P.Pandey, C.E.(PPA), UPPCL
2. Sri Sanjay Kumar Singh, Director (Comm.),UPPCL
3. Sri Kallan Prasad, E.E (PPA), UPPCL
4. Sri S.K. Kalia, Advocate, UPPCL
5. Sri Sameer Kalia, Advocate, UPPCL
6. Sri Ranjan Kumar , G.M. Lanco Anpara Power Ltd.
7. Sri Raj Kumar Roy, Director, Lanco Anpara Power Ltd.
8. Sri Prabhat Kumar, A.G.M., Lanco Anpara Power Ltd.
9. Sri S.K. Bhatia, Director (Legal), Lanco Anpara Power Ltd.
10. Sri Akhil Sibal, Advocate, Lanco Anpara Power Ltd.



Order

(Date of Hearing 14.05.2013)

1. The petition has been filed by M/s Lanco Anpara Power Limited under section 86 (1) (f) of the Electricity Act, 2003 read with regulation 156 of the UPERC (Conduct of Business) Regulations, 2004 for recovery of outstanding dues under the Power Purchase Agreement dated 12.11.2006. Additional submissions have been made by the Petitioner on 11.3.13, 3.4.2013 and 3.5.2013. Besides the issue of non-payment of dues, the Petitioner has also brought to the notice of the Commission, the issue of short supply of coal under FSA, non-availability of adequate payment security mechanism, notices of termination of PPA and its probable consequences and prayed for determination of new tariff in those consequences. When the petition was filed the outstanding dues were Rs. 431 Cr. which has now been reduced to Rs. 117 Crs. as submitted by UPPCL.
2. In the hearing on 4.4.2013, UPPCL sought time to file their reply which was allowed by the Commission vide order dated 16.4.2013. UPPCL has filed its reply on 8.5.2013 requesting the dismissal of petition on grounds of maintainability.
3. Earlier in petition no 808 of 2012 filed by the Petitioner on fuel issues, the Commission vide order dated 12.09.2012 has observed as below:

“The Commission, considering the uncertainty of coal supply in the present scenario, expressed its concern about the actual figures on the cost of coal received from other sources to meet the gap created due to short supply with respect to the FSA. The Commission directed to submit the details of actual month wise data of coal costs and variable costs incurred under FSA and that incurred when coal is procured from other sources for consideration of the Commission. The issue of frequency i.e. quarterly or annually, for making submission before the Commission for approval of cost of coal purchased from other sources, was also discussed. The Commission further directed the parties to submit a mutually agreed proposal containing the projected coal cost for FY 2012-13 for coal procured from the sources other than the FSA with NCL based on historical data.”

In the hearing on 4.4.2013, parties had requested for some more time to file their reply on this issue. The mutually agreed proposal has not been filed yet.

4. In its order dated 16.4.2013 in subject petition, the Commission observed as below:

“In this petition, primarily the issue of outstanding dues of Rs. 431 Cr. has been raked up. The Petitioner has submitted that due to shortage of funds, they are unable to meet both ends and hence immediate payment of their dues is necessary. They have also submitted that due to shortage of fuel, by one reason or other, they could hardly run the plant at about average 40 % Plant Load Factor (PLF). As they have not been paid the dues of even that 40% generation, they have been facing a lot of problems in procurement of fuel and operation & maintenance of the plant. The position has further worsened with the shortage in supply of fuel under the FSA by Coal India Ltd. Apart from the issue of non-payment of dues, the Petitioner has also brought to the notice of the Commission, issues arisen or may arise as a consequence to such a situation.”

5. In the meanwhile, on 6.5.2013, UPPCL has filed an interim application requesting direction to the Petitioner to avoid any willful curtailment of capacity and to restore full generation in view of the power crises in the State till final disposal of the petition by the Commission. Lanco has filed rejoinder in subject petition and reply of interim relief application on 14.5.2013.
6. During the hearing, arguments were made before the Commission for and against the maintainability of the case under section 86 (1) (f). The Commission directed the parties to submit those arguments in writing. The written arguments on maintainability were submitted by the parties on 20.5.2013.
7. Henceforth, the Commission considers to take up the matter in sequence. First it is necessary to conclude the matter in petition no. 808 of 2012 having the impact in subject petition so it is directed to the parties to file mutually agreed proposal within one week.
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8. Next in this subject petition, the foremost issue, which is to be decided by the Commission at this stage, is the maintainability. The Petitioner has filed this petition under section 86 (1) (f) of the Electricity Act, 2003 read with regulation 156 of the UPERC (Conduct of Business) Regulations, 2004 for recovery of outstanding dues under the Power Purchase Agreement dated 12.11.2006. UPPCL has opposed the maintainability and requested for dismissal of the petition. As directed by the Commission during hearing on 14.5.2013, both the parties have submitted their written arguments on the issue of maintainability. On the issue of interim relief, Lanco has contested that without deciding the maintainability, the issue of interim relief may not be addressed. Therefore, the Commission considers to decide the issue of maintainability first.

9. UPPCL has protested the maintainability on the ground that when the recourse of dispute is available in the PPA itself, the Petitioner may not approach to the Commission for specific relief without exhausting the provisions of PPA. The Petitioner has defended the maintainability under section 86 (1) (f) citing the Hon'ble Supreme Court of India order in case of Gujrat Urja Vikas Nigam Limited vs. Essar Power Ltd. 2008 ELR (SC) 0001. In this order Hon'ble Supreme Court of India has observed that section 86(1) (f) of the Act of 2003 is a special provision for adjudication of dispute between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or persons to whom it is referred for arbitration. UPPCL has put forth their observation in the same order stating that the question before the Hon'ble Supreme Court of India was whether application under section 11 of the Arbitration Act, 1996 was maintainable in view of statutory specific provisions contained in the Electricity Act, 2003. UPPCL has further added that the only question before the Hon'ble Supreme Court of India was whether the High Court had the power under section 11 to appoint the arbitrator in such a situation or not.



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10. In addition to above, while determining the maintainability, the Commission has to consider that the preamble to the Electricity Act, 2003 provides that the said Act is to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, constitution of Regulatory Commissions, protecting interest of consumers and supply of electricity to all areas,. Under the Electricity Act, 2003 the State Regulatory Commission has been entrusted with the responsibility of developing the power sector and making it strong so that the electricity is available to all in the State. Section 86 (1) (f) of the Electricity Act, 2003 casts responsibility on the State Commission to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. The Act also provides that in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy.
11. The Petitioner company has been selected for supply of power to the State licensees through competitive bidding as mandated by the Tariff Policy, 2006 under clause 5.1 as quoted below:

“All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer.”

The company is supplying power to State licensees under PPA dated 12.11.2006 at tariff discovered through competitive bidding. Under the PPA, the dispute has arisen between the parties. Therefore, on the basis of preliminary examination and the mandate given under the Electricity Act, 2003, and the Tariff Policy, the Commission considers that the petition is maintainable.



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12. UPPCL has sought relief under interim application requesting direction to the Petitioner to avoid any willful curtailment of capacity and to restore full generation till final disposal of the petition by the Commission. In view of the power crises in the State, the Commission considers it essential to mention that there must not be any willful curtailment of capacity by generating company so that the power crises may not worsen. In tandem, UPPCL is required to ensure timely payments to Lanco for the supplied power as per the PPA. With this the application on interim relief is disposed of.
13. UPPCL has also filed a petition no 891 of 2013 on 21.5.2013 challenging the Lanco's notices dated 24.1.2013 and 11.2.2013. As this petition is in continuation of subject petition, the Commission considers to club this petition with the subject petition.
14. The hearing in the matter shall be held on 27.5.2013 at 11.30 hrs.

(Meenakshi Singh)
Member

(Shree Ram)
Member

Place : Lucknow
Dated: 23.05.2013