



THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Petition No.1258/2017, 1259/2017, 1260/2017, 1261/2017 & 1262/2017

PRESENT:

Hon'ble Sri Suresh Kumar Agarwal, Chairman

IN THE MATTER OF : Petition under section 86 (1) (f) and other relevant provisions of the Electricity Act 2003 read with the provisions of Power Purchase Agreements dated 10.12.2010 and other relevant regulations

Petitioner:

M/s Bajaj Energy Limited
(Formerly Bajaj Energy Private Limited)
Registered Office
B-10, Sector-3
Noida-201302

Respondents:

1. U.P. Power Corporation Ltd.
Shakti Bhawan,
14, Ashok Marg,
Lucknow-226 001 (U.P.)
Through its Managing Director
2. Pashchimancal Vidyut Vitran Nigam Ltd.,
Hydle Inspection House, Hydle Colony
Victoria Park, Meerut
Through its Managing Director
3. Poorvancahl Vidyut Vitran Nigam Ltd
DLW, Bhikapur, Varanasi
Through its Managing Director

4. Madhyanchal Vidyut Vitran Nigam Ltd.
4-A, Gokhale Marg, Lucknow
Through its Managing Director
5. Dakshinanchal Vidyut Vitran Nigam Ltd.
Urja Bhawan, 220KV U.P. Sansthan
Bypass Road, Agra
Through its Managing Director

In the presence of:

1. Sri Raghvendra Singh, Advocate General
2. Sri V.P. Srivastava, CE (PPA), UPPCL
3. Sri Naeem Khan, EE (PPA), UPPCL
4. Sri Sanjay Verma, SE (PPA), UPPCL
5. Sri D.R. Bandh, AE (PPA), UPPCL
6. Sri S.N.M. Tripathi, Director, Bajaj Energy Ltd.
7. Sri Amrendra Tripathi, Sr. Manager, BEPL
8. Sri Upendra Prasad, Advocate, BEL
9. Sri Anand Singh, President, BEL
10. Sri Amit Kr Pandey, Asst. Officer, BEL
11. Sri Amarjeet Singh Rakhra, Advocate, Counsel for UPPCL/Discoms
12. Sri Aroon Aslam, EE, UPPCL
13. Sri Altaf Mansoor, Advocate, UPPCL
14. Govind Maheshwari, Vice President, F&A, BEPL

ORDER

(Date of hearing 02.01.2018)

M/s Bajaj Energy Limited has filed petition no.1258/2017, 1259/2017, 1260/2017, 1261/2017 & 1262/2017 under Section 86 (1) (f) of Electricity Act, 2003 read with the provisions of Power Purchase Agreement against exit notice dated 8.7.2017 and the notice dated 15.7.2017.

2. The brief of the proceedings of the case are as under:

The Petitioner, M/s Bajaj Energy Limited (BEL) had signed five Power Purchase Agreements with UPPCL, the Respondent No.1 to set up five Thermal Power Plants of 90MW each at 5 locations in the State of Uttar Pradesh for supplying power to State owned distribution companies for 25 years. These PPAs were signed on 10.12.2010.

Initially an MOU was signed in reference to the Energy Policy 2009 of the Govt. of U.P. and PPAs were executed in follow up of the MOUs. These Power Plants became operational during March-April 2012 and UPPCL on behalf of the Distribution Companies was purchasing power from these plants. The tariff for these power stations was determined by this Hon'ble Commission as per the provisions of the Section 62 of the Electricity Act 2003. On 08.07.2017, UPPCL issued an exit notice stating that the State Government has signed "Power for All" document with Govt. of India to provide 24x7 affordable power to all consumers. To make the power affordable, key action point under the PFA document is to bring down the power purchase cost of Uttar Pradesh. On scrutiny of power purchase cost from different sources in 2016-2017 to meet the electricity demand of the State it has been observed that the average rate of power from the aforesaid plants during FY 2016-2017 is Rs.7.63 per unit which is among the highest and is 100.791% higher as compared to average power purchase cost of Rs.3.80 per unit as approved by the Hon'ble Commission for Financial Year 2016-17. In this background UPPCL does not wish to continue with the PPAs dated 10.12.2010 in respect of the aforesaid power plants.

It has been mentioned in this notes that this will be treated as exit notice for UPPCL from PPA dated 10.12.2010 and UPPCL shall be deemed to be exited out from the aforesaid PPAs after 10 days from the date of issuance of the notice. Against this notice M/s BEPL filed a writ petition in Lucknow Bench of Hon'ble Allahabad High Court which after hearing both the parties passed an order dated 26.02.2017 relegating the Petitioner to UPERC to raise the dispute under section 86(1) (f) of Electricity Act 2003. The Hon'ble High Court asked the Petitioners that they are free to move an appropriate application for an interim relief before the Hon'ble Commission and directed the Commission that if an application is moved by the Petitioner, the Commission will proceed to decide the same in accordance with law within a period of one week from the date of its filing and would be free to pass ex-parte order if required or after affording due opportunity to the parties. It was further directed that the Commission would make endeavor to decide the

main application under Section 86(1)(f) of the Electricity Act 2003 within a period of 2 months from the date of its filing strictly in accordance to law.

M/s BEPL filed the above Petition on 03.01.2017 along with an application for interim relief. The Commission fixed the hearing for 09.11.2017. In that hearing M/s UPPCL raised a preliminary objection that the affidavits filed with the petitions are not in the prescribed format of UPERC therefore, these petitions are defective and could not be heard on 9.11.2017. The Petitioner's counsel made a request that he will file the revised affidavits on the same day but the Advocate General, UP appearing on behalf of UPPCL did not yield to the request of the Counsel of the Petitioner for hearing the matter on 9.11.2017. The Commission directed the Counsel of the Petitioner to revise the affidavits as per the regulations and listed the case for hearing on 10.11.2017. On 09.11.2017, the Petitioners counsel filed the revised affidavits and an application for taking the fresh affidavits on record and also an application to accept the correction of some typographical errors. IN hearing on 10.11.2017, the respondent's counsel asked for amendment of the petition by the petitioner; however the Commission observed that the correction of typographical error does not require filing of amended petition and heard the matter. The Respondent's counsel asked for some time for filing their written arguments. The Commission decided that the Petitioner's counsel could argue their case and the Respondents could be given time to file their written arguments including the arguments made by the Petitioners in the hearing.

The Petitioner's counsel argued that the exit notice dated 8.7.2017 is arbitrary without jurisdiction and does not have the approval of UPERC. The Petitioner also prayed that after the exit notice the plants are lying idle and the Petitioner is not able to meet its regular expenses and has come to verge of default to lenders. The Petitioner's counsel made a request to the Commission to grant stay on operation of aforesaid exit notice. The Commission asked the petitioner that when this matter was in Hon'ble High Court, on the direction of Hon'ble High Court, the Petitioner had approached UPPCL and had offered to implement a mechanism to reduce the variable cost of the projects but the matter could not be resolved between both the parties. The Commission in its order dated 10.11.2017 had recorded that besides the legal issues in this matter the Commission has to consider the public interest also and the Petitioner has to cooperate in the efforts to reduce the variable cost so that the energy from the plant could be scheduled and the average cost goes down. The Petitioner had assured that they are open to consider this option. The Commission in its order

dated 10.11.2017 had recorded that from the arguments it appeared that there is a scope for reduction in cost of power supplied from these power plants and the grievance of the respondents regarding higher tariff of these power plants could be resolved.

The case was again listed for hearing on 14.11.2017. Respondent's counsel raised certain objections on the wording of the order dated 10.11.2017 of the Commission asking for change in phrase "written arguments" with the word "written objections". The Commission allowed the Respondents to file written arguments. On 14.11.2017 the respondents filed their written arguments primarily opposing grant of any interim relief. The main arguments taken by the respondents were as under:

- (i) That after signing a policy document regarding 'Power for All' they have to bring down the power purchase cost of UPPCL, therefore considering the supervening public interest it was necessary to cancel the unviable PPAs.
- (ii) That the action of termination of PPAs has been taken in larger public interest and in exercise of the doctrine of necessity.
- (iii) That UPPCL has constituted a task force to achieve the objective of the Power for All documents and this task force has taken a decision that no scheduling of power should take place from projects whose variable cost is more than Rs.3.46 per unit. Accordingly all companies whose variable cost is more than Rs.3.46 per unit were directed not to schedule power and UPPCL has informed the state generators as well as Central Sector projects of Government of India about the decision taken by the respondents. They also mentioned that no arbitrary decision on the part of the answering respondents has been taken against the petitioner.
- (iv) That in reply to exit notice the Petitioner gave an offer vide their letter dated 11.7.2017 to the answering respondents for bringing down the cost of electricity marginally but the answering respondents have rejected the offer of the Petitioner and in letter dated 15.7.2017 the respondents have clearly pointed out that the petitioner had not availed the opportunity to bring the energy charges within the MOD stack which was in consonance to the order dated 21.6.2016 of the Hon'ble Commission.

- (v) That the Petitioner has only challenged the exit notice dated 08.07.2017 but the order dated 15.7.2017, which confirms the exit notice dated 8.7.2017, has not been challenged.
- (vi) That approval of tariff is an independent function of the Commission and approval of PPA does not bar either of the parties to exit from the PPA. They also stressed that there is no provision in the Electricity Act 2003 to seek approval of the Commission before terminating the PPA.
- (vii) That the Commission while passing the retail tariff order had directed the Respondents to reduce the Power Purchase Cost and bring it down to reasonable limits.
- (viii) That the average cost of power at national level is Rs.3.479 per unit but the Petitioner is pressing to procure power at an exorbitant high cost ranging between Rs.7/- to Rs.8/- per unit and if the request of the Petitioner is acceded to, it will defeat the policy decision of Government of India as well as the State Government.
- (ix) That the Petitioner has already received more than Rs.8000 crores since 2012 from the answering respondent against the sale of 11,414 MU of electricity and the cost has come to Rs.7.20 per unit.
- (x) That the Petitioner's application for interim relief is not maintainable therefore liable to be dismissed.
- (xi) That even after considering the offer for the lower tariff by the petitioner, the petitioner is not qualified for the scheduling of electricity.
- (xii) That the present dispute is covered by article 17 of the PPA and should have followed the procedures given in article 17 for resolution of this dispute.

3. The Petitioner's Counsel wanted time to reply the issues raised by the respondents and the time was allowed to the Petitioner and case was fixed for hearing on 20.11.2017.

4. In the meantime the Petitioner vide his application dated 15.11.2017 amended his petition and assailed the UPPCL's order dated 15.7.2017 also. The order dated 15.7.2017 of the respondents says that the proposal of tariff reduction submitted by the Petitioner vide their letter dated 15.11.17 is not acceptable therefore the exit notices are not withdrawn. The Respondents also filed an application dated 20.11.2017 in which they reiterated their stand that the respondents are not averse to purchase of electricity if the petitioner lowers the

rate of electricity to the extent that its rates fall within the merit order dispatch (MOD) stack. Further they mentioned that decision to issue exit notice was not to affect any particular company for creating restrictions to any individual company rather was to procure energy from the generators whose variable cost is not more than Rs.3.46 per unit. They also submitted a formula for computation of variable charges and fixed charges on the basis of which if the power is sold, the respondents will buy the power.

5. After hearing both the parties the application for interim relief was disallowed and UPPCL was allowed ten days time to file their reply on merits of the case. The Petitioner was granted another 7 days time to file their rejoinder and the matter was fixed for hearing on 14.12.2017.

6. UPPCL filed the detailed counter affidavit on 13.12.2017. In their counter affidavit the respondents have reiterated the arguments which they had earlier filed. They have submitted that exit from the PPAs cannot be described as an event of default and is only a consequence of introduction of new policy decision by the Government of India and the State Government as described in Power for All scheme, to which this Hon'ble Commission is also sensitive in view of Section 108 of Electricity Act 2003. They have further stated that the exit from the PPA or its termination is not adversely impacting the petitioner since the petitioner is set free to sell its electricity in the open market or in the exchange. Further, merely because the tariff is determined by the Commission under Section 61 and 62 of the Electricity Act 2003, the same does not restrict or defeat the right of either of the parties to exit from the PPA. The PPA is mere a contract executed between the parties and the parties are bound by the terms and conditions and consequences as mentioned in the agreement are to follow in case any breach or default is determined by a judicial forum. In the counter affidavit the respondents have also mentioned that if the Commission so desires it can direct the petitioner to supply electricity to the respondents in pursuance to the formula communicated to the petitioner vide letter dated 03.10.2017. In the Counter Affidavit the respondents have not quoted any provision of the PPA which entitles them to terminate the PPA or exit from the PPA as per the contractual provisions. Repeatedly they have tried to justify the exit notice on the ground of higher variable cost.

7. As per the earlier order, the Commission heard this case again on 14.12.2017 in which the Petitioner made a prayer that they want to submit a proposal to the Commission regarding reduction in variable cost and for that they

require three days time. The Commission granted time and fixed the hearing for 19.12.2017. The Petitioner filed two submissions one on 15.12.2017 and another on 18.12.2017 and the contents of both the submissions are almost the same. In these submissions the Petitioner informed that they have given a revised proposal in which they have offered some concessions which will reduce the variable cost. The Advocate General appearing on behalf of UPPCL stated that UPPCL is ready to consider the proposal and can run the plants if the proposal is acceptable to UPPCL. He asked for some time so that the Board of Directors of UPPCL could take a call on the new proposal. The Commission granted time and fixed the hearing for 28.12.2017.

8. In the submissions dated 18.12.2017, the Petitioner mentioned that for the purpose of reduction in variable cost towards resolving the issue of exit they are offering the following concessions that will result in reduction of variable cost and consequently reduction in the rate of procurement of power from the concerned five power stations. The proposal to reduce the cost is reproduced hereunder :-

“A. To solve the dispute arising out of its exit notice of UPPCL dated 08.07.2017 as well as the effect of UPPCL letter dated 15.07.2017, BEL for its power stations, namely, Barkhera, Khambarkhera, Utraula, Kundarkhi and Maqsoodpur hereby offer the following concessions that will result in reduction of variable cost & consequently reduction in the rate of procurement of power from these power stations:-

- a. Reduction in norm of Gross Station Heat Rate (GSHR) from 2890 kCal/kWh to 2840 kCal/kWh. This reduction shall be effective after three months from the date when UPPCL gives permission to operate the plants. This reduction shall be applicable for the remaining life of PPA (or extended life of PPA in the event UPPCL agrees to extend the PPA beyond the initial life of 25 years.)
- b. Reduction in the norm of Auxiliary Power Consumption (AUX) from 11.00% to 9.75%. This reduction shall be effective after three months from the date when UPPCL gives permission to operate the plants. This reduction shall be applicable for the remaining life of PPA (or extended life of PPA in the event UPPCL agrees to extend the PPA beyond the initial life of 25 years.)
- c. Reduction in norm of Specific Fuel Oil Consumption (SFOC) from 1.00ml/kWh to 0.25ml/kWh. This reduction shall be effective after

three months from the date when UPPCL gives permission to operate the plants. This reduction shall be applicable for the remaining life of PPA (or extended life of PPA in the event UPPCL agrees to extend the PPA beyond the initial life of 25 years.)

- d. Reduction in Road Transportation charges of 5 paise per Kwh on account of rationalization in future occurring from development. Shifting to alternative railway siding and/or alternative transportation arrangement. BEL is evaluating alternative offers with Indian railways/road transporters. Till any firm proposal is actualized with Indian railways/road transporter, BEL has proposed to offer a special discount of Rs.0.05 per Kwh with an undertaking that no impact of fixed charges shall accrue on UPPCL on account of development of railway sidings. This reduction shall be effective after three months from the date when UPPCL gives permission to operate the plants.
- e. BEL proposes to reduce rail freight by shifting procurement from mines located at comparatively longer distance to comparatively shorter distance. BEL has stated that they are currently procuring coal mainly from following siding of CCL viz. Charhi, Churi, Dakra and Khalari. Cost of transportation from these mins to siding at Roza is Rs.1622/- and Katra is Rs.1346/- per tone. It is proposed to procure coal from NCL from their siding located at Shakti Nagar, Bina, Jayant and Spur. It is estimated that this shall result in saving in rail freight of Rs.325/- per tonne on weighted average basis. For details please refer Appendix-1 attached hereto. BEL has offered to pass on this saving upfront. BEL shall offer a special discount of 21.49% of actual per ton freight or Rs.325/- per tonne whichever is lower on coal procured from CCL right from the date of Commission's order for revival of PPA till BEL is able to shift procurement from mines of CCL to mines of NCL.

B. BEL as part of proposal also agrees for following:

- (i) A detailed cost statement wherein it has been computed that current weighted average variable cost for BEL Stations is as Rs.3.65/kwh. BEL has also provided cost statement post concession wherein it is indicated that weighted average variable cost after concessions (as stated above) shall be Rs.3.19/kwh. Cost statement attached as Appendix 2 hereto.

(ii) Coal Procurement:- We are going to procure G 10 and G 11 coal. However grade variations would be there depending on coal availability. We have 100% coal linkage. Our power procurement cost was high earlier as we were forced to procure washery grade coal and coal from alternative sources other than linkage. We undertake that currently there is no statutory requirement or guideline of Government of India for BEL which mandates procurement of washery grade coal in full or in part (Undertaking attached as Appendix-3). M/s UPPCL had expressed apprehension that practically coal materialization of only 75% quantity of ACQ (Average Coal Quality) is currently possible through linkage and for balance coal from alternative sources. In this context we submit that BEL shall take prior permission of UPPCL before procuring washery grade coal or coal from any alternative source other than linkage. This coal shall not be procured if UPPCL refuses for the same.

(iii) Rail Transportation charges: Rail transportation charges shall be payable as stated in Para No.A(e) above.

(iv) Revision in Norms: We have proposed revised norms of GSHR, Auxiliary Consumption and SFOC. BEL is evaluating various options with OEM like TDBFP/Retrofit. BEL has already agreed to revise norms. UPPCL had expressed apprehension that UPPCL should not be made to bear capacity charges during the period the machines are under shutdown on account of TDBFP/Retrofit. No capacity charges shall be payable during the period of shutdown. UPPCL has further expressed apprehension that fixed charges should not increase on account of capital expenditure if any on account of Retrofit. BEL agrees that per unit capacity charges shall not be increased on account of additional expenditure if any arising on account of TDBFP/Retrofit.”

9. On the basis of the new proposal, the Petitioner has submitted the quantification also. According to revised proposal the variable cost which was coming to Rs.3.65 per unit will go down to Rs.3.19 per unit as per the current prices.

10. The matter was heard again on 28.12.2017 and on the same day UPPCL filed an affidavit for taking on record the approval of petitioner’s proposal dated

18.12.2017 by the Board of Directors of UPPCL with certain conditions. The Commission directed BEL to file written reply on UPPCL's affidavit by 02.01.2018 with a copy to UPPCL.

11. M/s BEL filed their written reply on 01.01.2018. In their reply they clarified that in an attempt to resolve the pending dispute they have submitted a proposal for reduction in variable cost and the Respondents have submitted their conditional approval in their affidavit dated 28.12.2017. They have mentioned that UPPCL has imposed the following two conditions while accepting the proposal of the Petitioner:

- a. That if the Commission decides to revive the PPA signed between the Petitioner and the Respondents in accordance with the specific discounts and the conditions mentioned in the proposal, the same should be revived from the date of the Commission's order in this regard so that there is no liability on UPPCL for paying the fixed charges w.e.f. 8.7.2017 till the date of revival of the PPA.
- b. That a supplementary power purchase agreement would be later on presented before the learned Commission for post facto approval.

12. The Petitioner has mentioned that the aforesaid additional conditions are not as per the law and also in the proposal dated 18.12.2017 they have mentioned that in terms of article 14.2.(1(i) the exit notices dated 8.7.2017 and 15.07.2017 tantamount to procures event of default and upon happening of such an event the provisions of article 14.4.5 (i) become operative, which provides inter alia that the respondents are liable to make payments for capacity charges based on normative availability to the seller for a period of three years. They have further stated in their reply that the exit notices were issued on account of high variable cost for which the Petitioner has already given a proposal and has been accepted by the respondents and due to this reason the PPA cannot be terminated. Further the reading of para article 14.4.5(i) clearly indicates that termination will be applicable after a lapse of period of 3 years of payment of capacity charges as mentioned in that article. That the high variable cost is entirely tariff related matter which cannot be a ground for exit from for termination of PPA. Further they have stated that if the PPAs are revived with effect from the date of the order of the Commission it will create a gap in the PPAs which is not in accordance with law

since the PPAs are continuous contracts for a period of 25 years and are not intermittent contracts. As per the petitioner the PPAs were never terminated because the respondents have issued the notice of exit dated 8.7.2017 and 15.7.2017 and which are precisely the matter for adjudication before the Commission. They have further mentioned that the board resolution passed in the 134th meeting of the Board of Directors of the respondents also does not mentioned that UPPCL is not liable for paying fixed charges for the intervening period. They have also given the reasons for allowing the fixed charges for the intervening period.

13. The matter was heard on 2nd Jan 2018. The Advocate General, UP appearing on behalf of UPPCL stated that the PPAs have been terminated and now only fresh PPAs can be executed. He stated that UPPCL is ready to accept the reduction in variable cost but fixed charges for the intervening period i.e. from the date of exit notice to the date of the order of the Commission should not be allowed. He stated that if the Petitioner has suffered any loss he can be compensated only as per the provisions of the PPA but UPPCL cannot be compelled to procure power from the Petitioner.

The Respondent's counsel has cited three Supreme Court Cases in support of their action and to emphasize that the contract is to be interpreted strictly as per the terms of the contract and also that the Govt. has a right in public interest to issue the policy directive and such directive=s will override the contracts. These cases are dealt with as under:

Export Credit Guarantee Corporation of India Ltd. Vs. Garg Sons International (2014) Supreme Court Cases 686

In this case Hon'ble Supreme Court has quoted the settled legal position about the interpretation of the contracts. The Hon'ble court has said that construing the terms of a contract of insurance, the words used therein must be given paramount importance and it is not open for the court to add, delete or substitute any words.

In the present case the Commission has followed this principle and has not deviated from the content of the contract.

Kasinka Trading and Another Vs. Union of India and other (1995 Supreme Court Cases 274)

This case relates to Doctrine of Promissory Estoppel. The Hon'ble Court has held that fundamental principles of Equity to be kept in mind by court and

applicability of doctrine of promissory estoppel does not apply on actions of the Govt. when such an action is meant for interest of general public good. In this case the custom duty exemption was granted from basic import duty on certain goods and later the exemption was withdrawn. It was held that Govt. was satisfied about the public interest in withdrawing the exemption and no unequivocal representation or promise was extended by merely specifying the period of operation of the exemption notification so as to attract the doctrine of promissory estoppel.

Regarding the findings in this case and its relevance to the present case it is well understood by the Commission that there was no promissory estoppel issue involved therefore the findings in this case are not relevant to decide the issue at hand.

Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttaranchal and Others
((2007- 8 Supreme Court Cases 418

In this case the Hon'ble Supreme Court has held that courts cannot annul a change in Govt. Policy only on the ground that the earlier policy had been altered or on the ground that the earlier policy was better and suited to the prevailing situation. In this case the Govt. of Uttaranchal made some changes in their sugar policy to allow grant of license to power driven crushers for manufacturing Rab from sugar cane. The appellant pleaded that this will affect the supply of cane to sugar mill but his contention was dismissed on the ground that the Govt. has power to frame and reframe, change and re-change adjust and re-adjust policy therefore the action of the Govt. cannot be declared illegal , arbitrary or ultra vires the provisions of the Constitution.

In the present case the Govt. has not issued any policy direction through legislative approval or within its own rights to issue a general directive that power from generators with cost above a certain level will not be purchased. Here the procurer is a Govt. Company who has exited from a PPA on the basis of higher rates. Therefore the action of the procurer cannot be covered in the garb of public interest. It is the Govt. which has the authority to issue the policy directions applicable uniformly on every body and it cannot be selective. Further public interest is to be proved more specifically. The Commission is of the view that there is a difference between the general policy of the Govt. on certain issue and the bilateral contracts. If bilateral contracts are allowed to be terminated at sweat will of the Govt. or the purchaser or seller the entire trade and industry

structure will collapse. If such an uncertainty is allowed to prevail nobody would come for investment in industry. Further this will jeopardize the position of lenders also who sometime use the public money to fund these projects.

14. Commission's View

1. After going through the facts of the case, the arguments and the counter arguments of both the parties and the contracts signed between both the parties the Commission finds that in pursuance of Energy Policy 2009 of Government of U.P., the State Government and the Petitioner had signed a MOU dated 14th January, 2010 in which an understanding was reached between the petitioner and the State Government for setting up of 5 Coal based Thermal Power plants at 5 different locations in the State. In follow up of this MOU, 5 PPAs dated 10.12.2010 were signed between UPPCL and the Petitioner. The Petitioner had filed petitions for granting provisional tariff based on the estimated cost of Rs.2564 crore and the Commission vide its order dated 22.12.2011 allowed provisional tariff at 95% of the incurred cost. The Commission decided the Multi Year Tariff for these generating plants vide its order dated 24.05.2017. The Commission has gone through the PPAs dated 10.12.2010 but did not find any provision in the PPAs which allows unilateral exit from the obligations incorporated in the PPAs by either party. The PPAs have Article 14 which deals with the 'sellers event of default' and 'procurers event of default' and the conditions for termination of PPA on such occurrences. Clause 14.2 which specifies the procurer event of default reads as under:-

"14.2 Procurer Event of Default

The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by the Seller of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting Procurer:

- i) A defaulting Procurer fails to pay (with respect to a Monthly Bill or a Supplementary Bill) an amount exceeding fifteen (15%) of the undisputed part of the most recent Monthly/Supplementary Bill for a period of ninety (90) days after the Due Date and the Seller is unable to recover the amount outstanding to the Seller through the Collateral Arrangement and Letter of Credit; or
- ii) The defaulting Procurer repudiates this Agreement and does not rectify such breach even within a period of thirty (30) days from a notice from the Seller in this regard; or
- iii) Except where due to any Seller's failure to comply with its obligations, the defaulting Procurer (s) is in material breach of any of its obligations pursuant to this Agreement and such material breach is not rectified by the defaulting Procurer within thirty (30) days of receipt of notice in this regard from the Seller to all the Procurers; or
- iv) Any representation and warranties made by any of the Procurer in Schedule 10 of this Agreement being found to be untrue or inaccurate. Provided however, prior to considering any event specified under this sub-article to be an Event of Default, the Seller shall give a notice to the concerned Procurer in writing of at least thirty (30) days; or
- v) If (a) any Procurer becomes voluntarily or involuntarily the subject of any bankruptcy or insolvency or winding up proceedings and such proceedings remain uncontested for a period of thirty (30) days, or (b) any winding up or bankruptcy or insolvency order is passed against the Procurer, or (c) the Procurer goes into liquidation or dissolution or has a receiver or any similar officer appointed to manage its affairs, pursuant to Law, except where such consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and has creditworthiness similar to such Procurer and expressly assumes all obligations of such procurer under this Agreement and is in a position to perform them; or;
- vi) Occurrence of any other event which is specified in this Agreement to be a material breach or default of the procurers.

2. Clause 14.4 specifies the conditions in case of termination for procurer event of default. Sub clause 14.4.5(i) reads as under:

14.4.5(i) After a period of seven (7) days following the expiry of the Consultation Period and unless the Parties shall have otherwise agreed to the contrary or the Procurer Event of Default giving rise to the Consultation Period shall have been remedied, the Seller shall be free to sell the then existing Allocated Contracted Capacity and associated Available Capacity of Procurer/s committing Procurer/s Event of Default to any third party of his choice. Provided such Procurer shall have the liability to make payments for Capacity Charges based on Normative Availability to the Seller for the period three (3) years from the eighth day after the expiry of the Consultation period. Provided further that in such three year period, in case the Seller is able to sell electricity to any third party at a price which is in excess of the Energy Charges, then such excess realization will reduce the Capacity charge payments due from such Procurer/s. for the avoidance of doubt, the above excess adjustment would be applied on a cumulative basis for the three year period. During such period, the Seller shall use its best effort to sell the Allocated Contracted Capacity and associate Available Capacity of such Procurer generated or capable of being generated to such third parties at the most reasonable terms available in the market at such time, having due regard to the circumstances at such time and the pricing of electricity in the market at such time. Provided further, the seller shall ensure that sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller, is not at a price less than the Tariff, without obtaining the prior written consent of such Procurer/s. Such request for consent would be responded to within a maximum period of 3 days failing which it would be deemed that the Procurer has given his consent. Provided further that at the end of the three year period, this Agreement shall automatically terminate but only with respect to such Procurer/s and thereafter, such Procurer/s shall have no further Capacity Charge liability towards the Seller. Provided further, the Seller shall have the right to terminate this Agreement with respect to such Procurer/s even before the expiry of such three year period provided on such termination, the future capacity charge liability of such Procurer/s shall cease immediately.

3. Since there is no specific provision in the PPAs for exiting from the contract by either party except in case of default, the Respondents action cannot be legally justified. They have unilaterally issued the exit notice and have stopped taking power from the Petitioner's plants. This situation is covered by section 14.2(ii) of PPA which covers the repudiation of the agreement as

a procurer's event of default if not rectified within a period of 30 days from the notice from the seller in this regard. Clause 14.4.5(i) specified that after a period of 7 days following the expiry of consultation period and in the absence of an agreement to the contrary, the seller shall be free to sell the allocated contracted capacity to any third party of his choice provided such procurer shall have the liability to make payment for capacity charge based on normative availability to the seller for the period of 3 years from the 8th day after the expiry of the consultation period. This clause contains other provisions also regarding adjustment of capacity charges etc. and states that at the end of three years period the agreement shall automatically terminate and no further capacity charge liability will be there.

4. In this case the main reason for issuing the exit notice was the higher variable cost of as compared to other projects from where the power is being procured and also the national average power purchase cost. The Respondents nowhere took a ground that they are entitled to terminate the contract under any provisions of the PPA rather throughout the hearing of the case they have been pleading that under the Power for All Scheme they have to reduce the power purchase cost so as to make it affordable. Under the Power for All Scheme every household is to be provided electricity and UPPCL has to cut down its power purchase cost in the public interest. They are of the view that the public interests over-rides the provisions of any contract and they have a right to exit from any PPA if the higher variable cost is detrimental to the interest of the consumers. In their exit notice also they have mentioned this fact. In the PPA there is a provision for consultation and resolving the issues of default by either party.
5. In this case the consultation has not happened as per the provisions of the PPA but initially on the direction of the Hon'ble High Court and later on the advice of the Commission both the parties have entered into some sort of consultation and realizing the genuine problem of the procurer the petitioner has come forward to reduce the variable cost to a level where the concerned plants could stand for scheduling as per the merit order dispatch directions of the Commission. This will reduce the power purchase price from these plants and the procurer will be able to buy more power from the Petitioner and the fixed charges liability will be allocated on larger number of units procured. Both the parties have agreed to revise the variable cost. In such a situation the procurer event of default is curable. Now the only issue is the admissibility of fixed charges from the date of exit notice to the date of order of the Commission in this matter.

6. The respondent is pleading that since there is no PPA in the intervening period, therefore, they are not liable to pay any fixed charges for this period and the Petitioner is contending that the PPAs have not been terminated and they have been declaring the capacity regularly as their plants were available for generation, therefore fixed charges for the intervening period are admissible to them.
7. From the views expressed by the Commission herein above, it is abundantly clear that the exit notices dated 8.7.17 and 15.7.17 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties. The exit notice virtually comes in the category of procurer event of default and for curing that, through mutual consultation, a solution has been found and now the procurer is ready to procure power at the reduced variable cost, therefore, the continuity of PPA is not affected but both the parties have wasted considerable time in resolving the dispute therefore both the parties should make some sacrifice on fixed charges. Since the plants have remained idle after 8.7.2017 and no power has been taken by the procurer therefore the petitioner can at best claim only that part of fixed charges which they have incurred despite closure of plants. The Commission is of the view that return on equity included in fixed charges should not be admissible for this period as it is not an operational expense. Operation and maintenance expenses are such expenses, a part of which is incurred when the plants are running and some expenses even when the plant do not run. The Petitioner in the hope of resolution of the dispute has retained the man power which was kept while the plant was running. Similarly insurance charges and other expenditure of fixed nature have also been incurred. Only the lubricants and other inputs which are used while plant is running have not been used.
8. In the tariff determined by the Commission for financial year 2017-18 a sum of Rs.129.15 crore has been allowed by the Commission in respect of 5 plants towards O&M expenses. The per unit average O&M cost for these plants is about RS. 0.38. Out of this the Commission deems it appropriate to disallowed Rs. 0.08.. Similarly the interest on working capital which is also an element of fixed cost is also not incurred in full when the plant is shut down. The Commission in its tariff order has allowed interest on working capital to the tune of about Rs.75 crore for FY 2017-18 . The per unit IWC is about RS. 0.22 out of which the Commission disallows Rs. 0.07 . The other fixed charges like depreciation, interest on loan have not changed due to closure of plants, therefore, these expenses should be admissible to the petitioner

during this intervening period. The Petitioner, in the public interest has allowed reduction in variable cost but if no fixed charges are allowed to them they will not be able to meet the interest liability and repayments of loan to the lenders and this may create a problem for them in running the plants efficiently in future.

15. In view of the above, the Commission directs as under :

- a. The five power purchase agreements related to five different plants will be treated to have existed in continuity.
- b. From the date of this order the Petitioner will be entitled to variable cost as per their offer dated 18.12.2017. the main elements of which are enumerated below:

- (i) Gross Station Heat Rate (GSHR) will be reduced from 2890 kCal/kWh to 2840 kCal/kWh. This reduction shall be effective after three months from the date when UPPCL gives permission to operate the plants and shall be applicable for the remaining life of PPA.
- (ii) The Auxiliary Power Consumption (AUX) will be reduced from 11.00% to 9.75%. This reduction shall be effective after three months from the date when UPPCL gives permission to operate the plants and shall be applicable for the remaining life of PPA.
- (iii) The Specific Fuel Oil Consumption (SFOC) will be reduced from 1.00ml/kWh to 0.25ml/kWh. This reduction shall be effective after three months from the date when UPPCL gives permission to operate the plants and this reduction shall be applicable for the remaining life of PPA
- (iv) In Road Transportation charges 5 paise per Kwh shall be deducted from the cost of coal and this deduction shall be applicable until the BEL is able to make some logistic changes in the road transportation of coal so as to ensure reduction in road transportation cost and when such an effort will result in reduction in road transportation cost to more than Rs.0.05/Kwh actual reduction in road transportation cost will be applicable. Further no additional fixed charges will be admissible

- on the cost incurred in development of railway sidings and making other alternative arrangement for reduction in road transportation cost. This reduction shall also be affective after three months from the date when UPPCL gives permission to operate the plant.
- (v) BEL shall offer a special discount of 21.49% on actual per tonne railway freight or Rs.325/- per tonne whichever is lower for coal procured from Central Coalfields Limited from the date of Commission's Order until the procurer is able to shift procurement of coal from Central Coalfield Ltd to mines of Northern Coalfield Limited. After the coal linkage is shifted to NCL, the railway freight is likely to be reduced by more than Rs.325/- per tonne on weighted average basis. On shifting of coal linkage if the reduction in railway *freight is more than the offered discount then instead of the offered discount the actual railway freight will be admissible subject to a minimum of Rs.325/tonne.*
 - (vi) The Petitioner will take prior permission of UPPCL before procuring washery grade coal or coal from any alternative source other than linkage and the petitioner will not procure such coal if UPPCL refuses for the same.
 - (vii) For meeting the revised operation norms if the petitioner opts for any change or retrofit in the plant and the plant is shut down on account of such exercise no plant availability for such period shall be admissible and any increase in fixed charge on account of such changes shall not be admissible.

16. The petitioner and the respondents shall enter into a supplementary power purchase agreement for all the five power plants to incorporate the above directions of the Commission and obtain a *post facto* approval on the supplementary agreements from the Commission but the respondents shall not wait for signing of the supplementary agreements for permitting the operation of aforesaid plants. The Petitioner will not be entitled for return of equity for the period from the date of exit notice to the date of order of the Commission. Further



the respondents will be entitled to deduct the fixed charges for the intervening period as above.

17. The Respondents are directed to resume the operation of the plants within 7 days of the receipt of this order and the Commission's order regarding merit order dispatch will be applicable. The other terms and conditions of the existing PPA will apply as they are.

18. With above directions petition no. 1258/2017, 1259/2017, 1260/2017, 1261/2017 & 1262/2017 are disposed of.

(Suresh Kumar Agarwal)
Chairman

Place: Lucknow
Dated: 03.01.2018