

Petition No 414/2006

BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

Present:

1. Shri Vijoy Kumar, Chairman
2. Shri P.N. Pathak, Member
3. Shri R.D. Gupta, Member

IN THE MATTER OF:

Uninterrupted supply of bulk power required by Noida Power Company Limited (Petitioner) from U.P. Power Corporation Limited (UPPCL) for supply to NPCL's consumers.

AND

IN THE MATTER OF:

M/s Noida Power Company Limited, Commercial Complex, H- Block, Sector Alpha-II, Greater Noida – 201 308

Petitioner

AND

Uttar Pradesh Power Corporation Limited, Shakti Bhawan,14- Ashok marg,
Lucknow.

Respondent

Order

M/s Noida Power Company Limited, Noida (herein after referred to as petitioner) has filed a petition under section 86 of the Electricity Act 2003 read with section 34 of the Uttar Pradesh Electricity Reforms Act-1999, in view of perceptible threat that UPPCL (respondents) may disrupt/restrict the power supply to its area of operation. Accordingly, the petitioner has requested the Commission to issue orders/directions restraining UPPCL (respondents) from taking any coercive action in terms of disconnecting/restricting the power being supplied to it.

The undisputed facts related to the case and having bearing on the controversy are being detailed below to put things into perspective. The petitioner was granted a license by the Government of Uttar Pradesh, U/S 3(1) of the Indian Electricity Act- 1910 on 30.8.1993 for the distribution of the electricity in the area of Greater Noida with a view to promote private sector participation in the distribution business. Accordingly, it has been supplying power in its area of operation since 15 December 1993. NPCL continues to be a deemed distribution licensee in this area under first proviso of section 14 of Electricity Act, 2003. The petitioner has since been sourcing its entire power requirement from erstwhile UPSEB and thereafter from UP Power Corporation Limited (UPPCL). However, in view of transmission constrains, UPPCL had been allowing NPCL to draw power load up to 45 MW only. Due to rapid industrialization / urbanization the power demand in the area of supply of NPCL however exceeded 45 MW, as allowed by the UPPCL. Pitted with the shortage of power, the petitioner filed a petition before the Commission to allow it to draw its additional load requirement through open access. The Commission vide its order dated 15 December, 2005, in view of favorable weather conditions, directed UPPCL to supply additional power of 5 MW on the existing network itself and thereafter another 10 MW after commissioning of the 400 KV Pali sub-station. Respondents were also directed to commission the above sub-station positively by March 2006.

As per information of the Commission, additional 10 MW power was allowed by UPPCL after the Commissioning of 400 KV Pali sub station at marginal cost. The petitioner was asked by the respondents to open a LC of Rs. 4 crore in their favour to provisionally settle the bill of additional power. Accordingly, M/s NPCL opened a LC of Rs. 4 Crs in the month of May 2006 and UPPCL started supplying additional power to the petitioner from May 2006 itself.

Subsequent to it, Executive Engineer, EUDD-II, Noida, vide its letter dated 20.9.2006, raised a demand note of Rs. 10.7 Crs. (Rs. 14.7 Crs. – Rs 4 Crs already paid by NPCL) for the additional power supplied to NPCL during the period May 2006 to August 2006., Calculations of the marginal cost however were not provided to the petitioner even after repeated request. The aforesaid amount of Rs. 14.7 Cr. was subsequently revised to Rs. 11.6 Cr. vide letter of Executive Engineer dated 4th November 2006. The letter dated 4th November 2006, contained billing details and marginal cost for the months May 2006 to August 2006. Marginal cost during above period varied between astronomically high Rs. 8.56 to Rs. 9.43. Finally, the petitioner was served upon a notice that if the payments are not made in accordance with the aforesaid demand raised vide letter dated 4th November 2006, then UPPCL will restrict/reduce the supply to NPCL to 45 MVA on 21st November 2006.

In view of exigency of the matter, the Commission through a notice dated 17th November, 2006 fixed the matter for hearing on 20th November 2006 at 3:00 P.M., which was the maximum time the Commission could have allowed to the respondents in view of their notice to reduce the supply on 21st November, 2006. Further, a copy of the petition was also served to the respondents on 16th November, 2006. The counsel of the respondents was also informed telephonically on 17th November, 2006 regarding the scheduled hearing of the matter on 20th November, 2006. As the notice of curtailment of supply is for 21st November, 2006, the Commission therefore was constrained to take up the matter in view of larger consumer interest of Noida Power Company Limited area.

On the date of hearing i.e. 20.11.2006 Sri R. C. Agarwal Chief Executive Officer, NPCL and Sri Gautam Ghosh, Deputy General Manager, NPCL from the petitioner side and Sri S.K. Agarwal, Director (Finance), UPPCL, Sri Amarjeet Singh Rakhra, Advocate (Counsel for the respondent) along-with other officers of UPPCL, from the respondent side, appeared before the Commission.

Based on the hearing dated 20.11.2006 and facts placed before it, the Commission finds that the UPPCL has not been transparent in its dealings with M/s NPCL and the arrangement of providing additional supply on marginal cost prima-facie appears to be arbitrary, unreasonable, inequitable and bad in the eyes of the law, as the same has been done without any kind of approval of the commission. In fact, for power procurement rate of a licensee within the State, the Commission has an exclusive jurisdiction (it is the Commission and Commission alone, which is authorized to determine tariff: WBERC V/s CESE, SCC) therefore, any agreement with respect to

fixation of rate outside the ambit of the Commission is contrary to the provisions of EA-2003. However, before taking a final view on the aforesaid arrangement, the Commission would also like to point out that M/s NPCL on its part has also not complied with the requirement of law, as at no point of time it intimated the Commission about entering into such an arrangement of procuring power at marginal cost.

Director (Finance), UPPCL, argued strenuously before the Commission that as they have and they are procuring high cost power for supplying to NPCL, in pursuance of a commitment made by NPCL therefore there is no occasion for NPCL now to back out. Director (Finance) further, offered that if NPCL finds the power to be unaffordable it may give up the additional power immediately. Whereas, the petitioner argued that how such a high power procurement price can be imposed on it in the name of marginal cost when it is already transferring all its efficiency to UPPCL. Further, sudden withdrawal of additional power would result in to serious hardship for the consumers as any alternative arrangement will take at least couple of months.

The Commission agrees that UPPCL, may have paid a higher cost for the additional power of NPCL but as the agreement, which has been so heavily relied upon by the respondents, is contrary to the provisions of Electricity Act-2003, therefore consumers of NPCL can not be held hostage to sudden abrogation of agreement in form of withdrawal of power. This is a complex situation before the Commission as the Commission, even in interim, can not issue an order, which is not capturing the interest of consumers, financial viability of the private licensee and the commercial interest of UPPCL. In this context, it would be useful to reproduce the statement of Objects and Facts of the Uttar Pradesh Electricity Reforms Act 1999, which is saved in the schedule and which was the legislation under which the power sector reform activities in the State were initiated –

“Regulation by an independent electricity regulatory Commission of the electricity industry in the State including the purchase, distribution supply and utilization of electricity, the quality of service, tariff and other charges keeping in view the interest of the consumer and utilities, creation of environment which will attract participation of private sector entrepreneurs in the electricity industry in the State and generally for taking measures conducive to the development and management of the electricity industry in the State in an efficient economical and competitive manner”

Further, section 10 (k) and 10(d) of the Electricity Reforms Act 1999, enjoins upon the Commission following responsibilities:-

Section-10 (k) - to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to consumers.

Section 10 (d) – To promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act.

It is abundantly clear from the above that the Commission has been mandated to protect consumer interest within legal frame work while still safeguarding the interest of utilities so as efficiency and economy is achieved in the electricity industry at the State level. In the present context, the Commission has to look after the consumer interest while balancing the commercial interest of both NPCL & UPPCL keeping in view the efficiencies achieved by NPCL and its transfer to UPPCL in form of bulk supply tariff and also the fact that NPCL is successful example of private sector participation in the State.

Accordingly, the Commission in the interim directs UPPCL, in the consumer interest, not to restrict the power supply of NPCL and restore it to the previous level, if already reduced, till further orders of the Commission. However, keeping in view the financial interest of UPPCL and also the fact that NPCL can not be allowed to accept and reject the same transaction completely, even if the same may not be a legally valid transaction, as it was their responsibility also to examine the repercussion of such an open ended commitment apart from submitting it before the Commission. The Commission accordingly directs NPCL to make a provisional payment of Rs. 5.00 Crs. immediately against the supply of additional power. NPCL is also directed to discuss the issue of additional power with Director (Finance) UPPCL, to find out an amicable solution of the problem within 3 weeks of this order under intimation to this Commission. In case, such a solution is not arrived at then the case will be taken up for hearing after 3 weeks through a separate notice. Further, in view of the commitment of Director (Finance) UPPCL that we are ready to provide immediate open access to NPCL for requisite quantity of power the Petitioner is directed to arrange for alternative source for additional power latest by 31st January, 2007 failing which, we are afraid that even in consumer interest we can not force UPPCL to supply additional power to the petitioner. The petitioner is also being directed to get an ABT compliant meter installed at the interface point as early as possible to facilitate proper accounting of import of power.

However, before leaving the issue the Commission would like to appreciate the passion with which Director (Finance) UPPCL, was protecting the commercial interest of UPPCL

in the matter, which, in fact, at times harbored in the zone of contempt. His repeated utterances to the effect that he is not obliged to follow the order of the Commission if it goes against him would not be taken lightly in future even if the same is for protection of UPPCL's commercial interest. The Commission expects a more dignified court room behavior from such a senior officer. Further, the Commission would also like to note that it would have appreciated if the Director (Finance) had shown same kind of passion in implementing the fuel adjustment surcharge order, and other directions of the Commission, which have much larger impact than the impact of this additional power supply.

The Commission would also like to discuss, in the end, the structural issues, which are germane for understanding this contentious issue and also the fact that how UPPCL not only by avoiding the mandated structural arrangements under Electricity Act- 2003, is creating rigidities in the entire supply chain but also the manner in which it is abusing its dominant market position thereby adversely affecting the power sector, which is contrary to the requirement of Section-60 of EA-2003. While discussing the rigidities created by UPPCL in the supply chain, it needs to be underlined that in spite of repeated reminders and directions of the Commission, the Government and UPPCL has failed to allocate the power purchase agreements (PPAs), which is violative of mandate of Electricity Act 2003 and Tariff Policy notified by the Government of India. Section 8.4(2) of Tariff Policy provides that retail tariffs across Discoms would vary capturing relative efficiencies of distribution companies once the existing PPA's have been suitably assigned to distribution companies. Therefore, in absence of such allocation, the petitioner is being denied an opportunity to economize its operating cost and increase its gain on account of better efficiency, which it could share with its consumers in form of reduced tariffs. Secondly when petitioner approached UPPCL for open access, in face of supply shortage, then the same was refused on accounts of transmission constraint, which is not a tenable excuse in view of undivided responsibilities entrusted on STU for the development of efficient and coordinated intra- state transmission system. And finally, it appears ridiculous that all high cost generating stations would be booked on the petitioner, in the name of marginal cost in a highly inequitable manner with least transparency, while the increased demand of other Discoms (successor entities of UPPCL) is not being given the same treatment.

The interim direction of the Commission in the matter is being reiterated for convenience:-

The Commission in the interim directs UPPCL, in the consumer interest, not to restrict the power supply of NPCL and restore it to the previous level, if already reduced, till further orders of the Commission. The Commission accordingly directs NPCL to make a provisional payment of Rs. 5.00 Crs. immediately against the supply of additional power. NPCL is also directed to discuss the issue of additional power with Director (Finance) UPPCL, to find out an amicable solution of the problem within 3 weeks of this order under intimation to this Commission. In case, such a solution is not arrived at then the case will be taken up for hearing after 3 weeks through a separate notice. Petitioner is further, directed to arrange for alternative source for additional power latest by 31st January, 2007. The petitioner is also being directed to get an ABT compliant meter installed at the interface point as early as possible to facilitate proper accounting of import of power.

(R.D. Gupta)
Member

(P.N. Pathak)
Member

(Vijoy Kumar)
Chairman

Lucknow

Dated: 21st November 2006