



Petition No 871 and 891 of 2013

**BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

Date of Order : 23.11.2015

PRESENT:

1. Hon'ble Sri Desh Deepak Verma, Chairman
2. Hon'ble Sri Indu Bhushan Pandey, Member

IN THE MATTER OF: Petition no. 871 of 2013 under section 86 (1) (f) of the Electricity Act, 2003 read with regulation 156 of the UPERC (Conduct of Business) Regulations, 2004.

AND

IN THE MATTER OF

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

-----**Petitioner**

AND

U.P. Power Corporation Ltd.,
(through its Chairman)
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow

----- **Respondent**

AND

IN THE MATTER OF: Petition no. 891 of 2013 opposing the claim of LAPL.

U.P. Power Corporation Ltd.,
(through its Chairman)
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow

-----**Petitioner**

AND

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

----- **Respondent**



The following were present:

1. Sri Ranjan Kumar , G.M. Lanco Anpara Power Ltd.
2. Sri Arun Tholia, AGM,, Lanco Anpara Power Ltd.
3. Sri Dilip Sriastava, DGM,, Lanco Anpara Power Ltd.
4. Sri K.V. Sudhir Babu, E.D., Lanco Anpara Power Ltd.
5. Sri V.P. Srivastava, CE (PPA), UPPCL
6. Shi H. Aslam, EE (PP), UPPCL
7. Sri Rama Shankar Awasthi, Consumer

(Date of Public Hearing 05.10.2015)

Detailed Order

1. M/s Lanco Anpara Power Limited (LAPL) and UPPCL entered into a Power Purchase Agreement (PPA) dated 12.11.2006 for coal based power from Anpara-C plant (2x600MW) obtained through International Competitive Bidding. The tariff was adopted by the Commission under section 63 of the Electricity Act, 2003 in petition no. 509 of 2007 vide order dated 31.12.2007.
2. M/s Lanco Anpara Power Limited filed petition no. 871 of 2013 under section 86 (1) (f) of the Electricity Act, 2003 read with regulation 156 of the UPERC (Conduct of Business) Regulations, 2004 under which following prayers were made by LAPL:
 - a) To direct Respondents to clear all outstanding dues under the PPA till date;
 - b) To Pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents till the successful completion of the buy-out of the Plant;



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- c) In the alternative, pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents, instead of a buy-out of the Plant keeping in view the viability and sustainability of the Plant after taking into account the accumulated losses of the Plant till date;
 - d) Pass any other Order which may be consequential upon prayer (a), (b) and/or (c) and any other Order as this Hon'ble Commission may deem fit.

The prayer was made by LAPL on the grounds narrated as follows:

(A) Material Deviation from the Request for Proposal (RFP) Conditions in respect of Coal. As per New Coal Distribution Policy (NCDP), NCL was no longer obligated to supply the Anpara C Plant with the promised quantity and quality of Long-term linkage coal from the Khadia mines and so LAPL was constrained to procure coal from various non-linkage sources including Imported Coal which affected their performance and financial condition.

(B) Failure of Buyers to institute requisite Payment Security Mechanism

LAPL submitted that UPPCL defaulted in making timely and complete payments and failed to institute the requisite payment security mechanism as mandated under the PPA which severely impacted them. Aggrieved by the failure of the UPPCL to remedy the same and perform their obligations under the PPA, LAPL issued a Preliminary Termination Notice to UPPCL on 10.12.2012 and termination notice dated 24.01.2013 under clauses 13.6 read with 13.3.1 of the PPA. LAPL has added that in furtherance to termination notice dated 24.1.2013, they served buy out notice to UPPCL on 11.2.2013.

3. UPPCL filed a petition no 891 of 2013 challenging the LAPL's termination and buy out notices. As this petition was in continuation of subject petition and both pertained to the same subject matter, the Commission considered clubbing both petitions vide order dated 23.5.2013.
4. Firstly the issue of maintainability of the case was taken up by the parties. The Commission decided this issue vide its order dated 23.5.2013 as below:

“Determining the maintainability of the petition, the Commission considered that the preamble to the Electricity Act, 2003 which 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. 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.”

LAPL was supplying power to State licensees under PPA dated 12.11.2006 at tariff discovered through competitive bidding. Under the PPA, the dispute arose between the parties.

The Commission also considered the reduction in quantity of coal supply from the Khadia mines which materially altered the fuel supply arrangements for the Plant in as much as there was a significant reduction in the quantity of linkage coal. As a result of which the Petitioner was constrained to source coal from non-linked sources and started relying upon non MGR modes of transportation including road transport which was not envisaged at the time of setting up of the Plant. The inadequacy / limitation of infrastructural facilities necessitated by the usage of non-linkage and imported coal at the Plant further affected the Petitioner’s performance under the PPA significantly. The Petitioner was unable to achieve the desired PLF and Availability Factor on account of a number of infrastructural, logistical and technical performance issues that arose due to the usage of non-linkage coal. The Petitioner also began witnessing equipment failure and higher maintenance cost for the newly constructed plant. These events were unforeseen and unprecedented.

In the process, the Commission also considered that the dispute, if squarely covered under the terms of the contract, could be resolved by the process as provided under the PPA but the present dispute between the parties for reliefs in respect of sustainable tariff due to the reasons of deteriorating condition and viability on account of non-availability of quantity and quality of coal and inordinate delay in clearing the dues by UPPCL, could only be resolved by the Commission as provided under



section 86(1)(f) of the Act. The taking re-course to the section 86(1)(f) was further established by the fact that the present adjudication of dispute was between UPPCL a 'deemed licensee' as provided under third proviso to section 14 of the act and the generating company LAPL. The Commission also can not loose sight of the horrendous consequences that may arise in case of any curtailment in the supply of power to the State owing to the proposed shut down of its plant by LAPL and therefore realizing its duty under the Act and powers available the Commission decides to take up the issue and reach to a logical conclusion. "

Therefore, on the basis of entire examination of the issue and the mandate given under the Electricity Act, 2003, and the Tariff Policy, the Commission decided vide its order dated 23.5.2013 that the present petition is maintainable.

5. Having settled the matter of maintainability, the Commission, after listening to both the parties at length and considering the difficulties arisen in the operation of PPA and the interest of the consumers of the State, at the outset, put forth following questions before the parties:

(i) Whether the solution within the terms of PPA can be explored with the sincere efforts of all the parties and the recourse of termination may be discussed subsequently, if required?

(ii) Whether it would be acceptable to both the parties if any "Compensatory Tariff" is allowed within the PPA?

The Commission directed both the parties to make their written submissions which must include their stand on above two questions.



6. As per the directions of the Commission, LAPL filed affidavit on 14.2.2014 reiterating the problems of constraint in coal supply and non-establishment of payment security mechanism by UPPCL and the consequences thereof as follows:

- A. Lower Availability Factor resulting in Under Recovery of Fixed charges leading to accumulated losses
- B. Losses due to higher heat rate than quoted heat rate resulting in Under Recovery of Variable Charges on account of change in fuel mix & coal characteristics
- C. Higher Interest Rate in the absence of committed Payment Security Mechanism
- D. Increased cost of Working Capital
- E. Higher O & M expenditure due to change in Coal Mix
- F. Increase in consumption of Secondary Fuel Oil
- G. Increase in Capital Cost of the Project

LAPL, in reply to the Commission's questions mentioned above, proposed that following options may be considered:

- a. To grant regulatory tariff as per CERC norms in accordance with Article 2.3.2 of the PPA read alongwith the powers vested under Section 86 (1) b of the Electricity Act.
- b. Alternatively, grant compensatory tariff to remove the difficulties mentioned above to ensure long term viability and sustainability of the Plant.

LAPL on 20.02.2014 again made an affidavit requesting the Hon'ble Commission to grant suitable compensatory tariff to remove difficulties being faced by them to ensure long term viability and sustainability of the plant.

7. Vide written submission 5.3.2014, UPPCL also requested the Commission to resolve the impediments to ensure power and to safeguard the interests of the consumers of the State. UPPCL categorically mentioned that they did not have any objection if the Commission takes the decision to provide LAPL an increased tariff due to various impediments faced by LAPL as long as the solution carved out in the matter falls within the legal frame work and it is in the general interest of the people of U.P. by providing cost effective electricity on a long term basis.

From the above, it is clear that both the parties could not find a solution to the problem within the terms of the PPA and therefore suggested a solution outside the precincts of the PPA.

8. In view of above averments in their written submission's and general agreement between both the parties, the Commission, in its order dated 28.4.2014, opined as follows:

"The hardships have been faced by LAPL and so a compensation may be considered for LAPL to make its operations viable. Now the question arises that whether the solution is in the form of new tariff beyond the boundaries of section 63 or the solution is well within the boundaries of section 63 but in the form of compensatory tariff?"

The bid tariff has been discovered through a transparent process of competitive bidding and is applicable for the 25 years term of the PPA. The tariff has been adopted by the Commission under section 63 of the Electricity Act, 2003. So, it is evident that any new tariff could be considered during extended period i.e. only after expiry of the term of 25 years. Therefore, the only viable solution seems to a 'compensatory tariff' which is acceptable to both the parties. However, whether this option is valid and within the boundaries of law, needs to be discussed further.

Here, the attention of the Commission has also been drawn by the parties towards the case of Adani Power vs Mahavitrans (MEDCL) decided by MERC and Adani Power Vs. Uttar Haryana Bijli Vitaran Nigam Ltd. & others decided by CERC. Before coming to any conclusion, the Commission considers it worthwhile to look into these cases to find out what has been held in the cases of similar disputes under other PPAs of competitive bid route in India.”

9. After hearing detailed deliberations and going through the above quoted cases and after considering the written submissions, vide order dated 28.4.2014, the Commission took following view:

“It is without doubt that due to certain decisions taken under NCDP, the coal availability to the thermal generating plant of LAPL has been adversely affected. Since LAPL is a competitive bid route project, the bidder must have designed the bid and put it up after taking into account the certainty of coal supplies. Similarly, the due payment security mechanism is also important for financial sustainability of any project. Undisputedly, these two important pillars of a reasonable bid had been shaken in this case. The Commission, therefore, recognizes the hardship faced by LAPL on these two counts as per the following:

(i) Coal Availability

Due to change in policies of NCDP, the coal availability position to lot of coal based thermal generating plants has been adversely affected in the country which includes the Anpara plant of LAPL. The availability of coal under FSA was reduced to the tune of 60% to 65% reducing the PLF of the plant by about 40% as claimed by LAPL. Under FSA the coal was to be brought by BOBRN wagons through MGR system as conceived for the Anpara plant since the bidding. LAPL has stated that

to make up the shortage, they had to buy coal from other sources and as such coal was to be carried through BOXN wagons as the Railways do not allow carriage of coal through BOBRN wagons from distant places, the arrangement of wagon tippler was required to be done. Since wagon tippler was not available, LAPL had to unload the coal by using wharf wall and trucks. Due to mixing of coals of different configurations from different sources, the performance of the plant has also affected.

(ii) Payment Security Mechanism

In absence of the due payment security mechanism, the financial condition of the plant has suffered. LAPL has stated that UPPCL has defaulted in making timely and complete payments and has also failed to institute the requisite payment security mechanism as mandated under the PPA. At the time of filing of the petition, LAPL has claimed that the dues were to the tune of Rs. 431 Crores and Letters of Credit (LCs) equal to 1.10 times of the monthly tariff payment calculated by averaging the succeeding monthly tariff payments for a 6 months period were not provided.

LAPL has initially requested that it is willing to operate the Project provided a new Tariff is worked out for the Project keeping in view the viability of the plant and also taking into account the accumulated losses incurred by the plant and if such new tariff is approved by this Hon'ble Commission. LAPL has made its claim justifying it under the wider ambit of the provisions of the Electricity Act, 2003 and on the basis of the advice given by the Attorney General to FOR. During the course of subsequent hearings, LAPL modified its prayer and now they have requested to grant suitable compensatory tariff to remove difficulties being faced by them to ensure long term viability and sustainability of the plant.



UPPCL has generally not disputed the facts of hardship stated by LAPL above and in fact, have also come forward requesting this Commission to settle the issue by providing a solution which is carved out within the legal frame work and which is in the general interest of the people of U.P. by providing cost effective electricity on a long term basis.

Therefore, at this point in time, in view of legal position discussed and in light of the orders of Hon'ble CERC and Hon'ble MERC cited above and the willingness expressed both by LAPL and UPPCL, the Commission considers that the answer to the problem may lie in allowing without affecting the terms of existing PPA a "Compensatory Tariff" as acceptable to both the parties.

The Commission also feels that the non-availability of adequate fuel linkage from Coal India Limited for the project of the LAPL may be a temporary phenomenon which is likely to be resolved in future with the joint efforts of the Governments who are determined to improve the condition of this sector. Therefore, LAPL needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensatory tariff could be variable, proportionate to the hardship that the petitioner is suffering on account of the unforeseen events and could be only for the period that the hardship continues. As and when the hardship on account of non-availability of linkage coal is removed or lessened, the compensatory tariff shall be revised or withdrawn. The Commission considers that this is the most logical way to make the PPA workable while ensuring supply of power to the consumers at competitive rates.

Similarly timely payment of the bills raised by the generating company ensures the uninterrupted supply of power. This Commission appreciates the concern of LAPL and considering the assurances given



by UPPCL in pleadings as well as during the course of hearings this Commission is optimistic that the delay in payment and non availability of adequate payment security mechanism shall be addressed by UPPCL.

In view of the above discussions, the Commission considers it appropriate to assume its responsibility by stepping in and providing for a practical solution. The subsequent pleadings more particularly the written submissions filed by LAPL dated 14.02.2014 and 20.02.2014 by the Director, LAPL asking for a compensatory tariff and also tacit agreement of UPPCL to the same, as evident from the letter dated 5.3.2014 by the Managing Director UPPCL, urging the Commission to find a solution to the problem, makes it imperative for the Commission to intervene by providing an appropriate compensatory tariff to LAPL. Allowing the suggested compensatory tariff will also be in line with the CERC order in the matters of Adani Power Ltd. in petition no. 155/MP/2012 dated 2.4.2013. Therefore, keeping in line with the above order dated 2.4.2013, this Commission decides to constitute a Committee of experts who would suggest the compensatory tariff over and above the tariff as decided under the PPA.

For working out and recommending the 'Compensatory Tariff' over and above the tariff as decided under the PPA, the Commission constitutes a committee comprising of:

- i. Sri V.S.Verma, Retired Member, CERC
- ii. Principal Secretary (Energy), GoUP & Chairman, UPPCL
- iii. Director (Finance), UPRVUNL
- iv. Sri K.B.Dubey, Ex Director (Projects), NTPC
- v. Dr. Anoop Singh, Associate Professor, I.I.T. Kanpur.



Sri V.S. Verma shall be acting as the Chairperson of the Committee. All the necessary arrangements including the honorarium, travel, stay etc. shall be made by the Chairman, UPPCL. CEO, LAPL will help the Committee by timely providing all the necessary documents, information and data authenticated by statutory auditors as and when required by the Committee.

The Expert Committee would take into consideration the issues of the change in availability of coal due to NCDP policies including change in the logistics due to shortage of coal in FSA and its effect on the performance of LAPL. The Committee shall obtain all the actual data required with due authentication from independent auditors to ascertain the actual impact in costs. The Committee shall suggest the 'Compensatory Tariff' necessary to address the problems faced / being faced by LAPL so as to ensure consistent supply of power to the State and at competitive tariff in the larger public interest. Such compensatory tariff shall be applicable for the period the hardship due to shortage under the coal linkage continues. The Committee is also at liberty to suggest any further measures which could be practicable and judicious to address the situation.

The Committee shall submit the report to the Commission within two months from the date of this order for consideration and for further directions.

10. The Expert Committee was subsequently reconstituted by the Commission vide order dated 12.5.2014. On requests of Principal Secretary (Energy), GoUP & Chairman, UPPCL, Sri A.P.Mishra, Managing Director, UPPCL was nominated in the Committee (also nominated as representative of GoUP). Sri Anoop



Singh, Associate Professor, I.I.T. Kanpur, was replaced by Dr. S.N.Singh, Professor as former expressed his inability to spare time for this job.

11. The Expert Committee submitted its report on 3.3.2015 and its addendum report on 30.06.2015. The copies of the reports were forwarded to GoUP and UPPCL for their comments. The presentations on the report were made by the Committee before the Commission and the stakeholders on 24.4.2015, 27.5.15 and 30.06.2015. The reports were uploaded on the Commission's website and the comments were invited by 29.09.2015. The Public Hearing was fixed for 5.10.2015 at 11:30 Hrs. in the office of the Commission. During the hearing, one Sri R.S.Awasthi made written submission on behalf of consumer, a copy of which was given to LAPL for reply. LAPL submitted its reply and the copy was sent to Sri R.S.Awasthi on 12.10.2015 on his request.

12. The report submitted by the Expert Committee pointed out the uniqueness of LAPL power project as follows:
 - (i) 2 x 600 MW coal based thermal power plant has been built on only 256 acres of land, which is lower than norms specified by Central Electricity Authority (CEA) for similar power projects. The CEA norms would require about 620 Acres of land for a power project of this size (excluding the ash disposal area, corridors for ash slurry, raw water and coal).
 - (ii) Mine specific coal linkage (Khadia expansion Mine of NCL) and shared logistics (MGR) for movement of coal rakes with UPRVUNL's existing power stations of Anpara A & B.
 - (iii) The project didn't envisage receipt & unloading of coal through BOXN wagons as well as road transportation through trucks.



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- (iv) The project didn't envisage raw coal storage as well as reclaiming coal for crushing. The bottom hopper in the coal yard and the connected system was not provided.
 - (v) The stacker-reclaimer was provided only one in number, in case of breakdown, the plant could face serious problem of coal supply from the storage yard in case of non- receipt of timely rakes.
 - (vi) Due to above reasons, it is later proposed by LAPL to install one no Wagon Tippler and Emergency Reclaiming facility in the coal yard.
 - (vii) LAPL had also to provide wharfwall facility to receive and build additional storage of coal for feeding to the station under emergencies of short supply of coal. The coal could be transported through road by trucks.
 - (viii) In view of the extreme shortage of land area of the power plant, it is very difficult to accommodate any additional facilities as per the best engineering practices adopted in the industry. This will include adequate redundancies etc.

LAPL sought compensation on the following accounts:

- A. Lower Availability Factor resulting in Under Recovery of Fixed charges leading to accumulated losses
- B. Losses due to higher heat rate than quoted heat rate resulting in Under Recovery of Variable Charges on account of change in fuel mix & coal characteristics



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- C. Higher Interest Rate in the absence of committed Payment Security Mechanism
 - D. Increased cost of Working Capital
 - E. Higher O & M expenditure due to change in Coal Mix
 - F. Increase in consumption of Secondary Fuel Oil
 - G. Increase in Capital Cost of the Project

Each one of these has been analyzed by the Committee with reference to the circumstances arising due to various reasons. The existing UPERC and CERC regulations as well as the various bid parameters considered by LAPL at the time of bidding were duly taken care of by the Expert Committee.

The summary of recommendations of the Committee is given in the following paragraphs:

A. One-time compensation for the past losses / under-recoveries from COD (10th December, 2011) to the date of PPA termination notice (11th February, 2013) with interest as per SBI PLR:

After assessing the capability of LAPL plant in respect of generation capacity taking into account the forced outages, partial outages, giving due consideration to the start-up times etc, the Committee concluded that the compensation could be awarded in the following manner:

This will comprise of the following three components:

- (i) Under Recovery of Fixed Charges



= [Fixed Charges payable for 80% Availability at PPA Tariff] - [Fixed Charges already paid for the period]

(ii) Under Recovery of Variable Fuel Charges due to the higher actual Heat Rate due to lower PLF resulting from inadequate coal supplies

= [Variable Fuel Charges payable at Net Heat Rate of 2732* kcal/kWh – Variable Fuel Charges already paid based on the PPA Net Heat Rate of 2511** kcal/kWh] x Scheduled Generation for the period

*As estimated by the Committee (refer para 5.3.2.3(ii)(a) of the Report)

**As per PPA

(iii) Compensation for increased Secondary Oil Consumption

After detailed study of the operation data, the Committee came to the conclusion that LAPL had to run the Units below 40% generation for almost 25% of the time i.e. when the declared availability was more than 50% and both units were required to run at lower loads. The Committee was rather stringent in awarding this compensation since a bare minimum of one oil burner at 50% turndown ratio was considered for oil support. This is a tough operating condition and the operating engineers will have to exert to affect this condition in case the oil consumption is to be minimized under this condition.

Accordingly, following compensation is arrived at:

Compensation for Secondary Oil Consumption

= 0.8 ml x Weighted Average Secondary Oil Cost for the concerned period
x Gross Generation for the period



B. Compensation after the date of PPA termination notice (i.e. from 12th February 2013 onwards):

These compensations have been mainly considered with a view to enabling LAPL to continue operating the plant with better financial conditions from considerations of sustainability etc.

This will comprise of the following components:

(i) Compensation for Higher Interest Cost

LAPL had furnished the data regarding the rise in the interest rate after COD because of which the liability for interest payment on the debt had considerably increased. The stipulations of UPERC & CERC Regulations were also studied which were primarily meant for the cost plus tariffs. The Committee concluded that these costs are in any case to be borne if the interest payment on debt were to be complied. It is also noted that the primary lender of Anpara C is none other than the REC, a Govt of India undertaking. The UPERC Regulations intended 100% compensation on this account for cost plus tariff projects. The Committee after going through the data furnished by LAPL and the various regulations in force very strongly felt that this actual burden had to be compensated fully to LAPL, in case LAPL has to comfortably operate the plant in a sustainable manner.

The following compensation is thus arrived at:

Compensation for higher interest cost:

= Outstanding debt as on beginning of a financial year x (weighted average interest rate during the year in % - weighted average interest rate based on CLA) / 100



The Committee also considers that in the interest of the UP and its consumers, it is necessary for UPPCL to fulfill their PPA obligation of providing the 3-tier payment security mechanism at the earliest, and after improvement in the plant technical and financial performance, both UPPCL and LAPL must make best efforts to get the loan refinanced so as to reduce the interest burden. Post refinancing, if the actual interest rate falls below the rate of interest as per the Common Loan Agreement, the benefit arising out of it will be passed on by LAPL to UPPCL in accordance with the provisions of UPERC regulation.

(ii) Compensation for Higher Working Capital

The RFP/PPA had envisaged the coal cost and its escalation at Rs 1045 per MT and 4% per annum respectively. However, in the actual practice, the cost has increased substantially due to deviations from the bid conditions as provided in the RFP. Accordingly, a compensation becomes due on this account. Various regulations also provide for truing-up the working capital interest cost. The Committee, therefore agreed for full compensation on this account mainly because the cost numbers etc were stipulated in the bid documents.

The compensation, thus worked out, is as under:

Compensation for Interest on Working Capital:

= [2 Months Receivables + Cost of Coal corresponding to 1.5 Months Coal Stock] calculated considering the difference between weighted average actual coal cost for the year in Rs/MT and Coal cost as per the bid escalated @ 4% till the given year x Actual Weighted Average Rate of Interest on Working Capital

Above shall be annually trued up.



(iii) Compensation for Higher O&M Expenses

LAPL had claimed that their O&M expenses have considerably increased due to the varying quality of coal received by them from different sources in India and that of imported coal. The Committee examined the information submitted by LAPL and was of the view that in case the quality of coal broadly falls within the range specified, there should not be a case for increased O&M. LAPL couldn't substantiate their claim in this regard and accordingly compensation on this account was not agreed to.

Compensation on O&M charges allowed = NIL

However, the Committee recognized that there is a deficiency in the basic plant design and engineering due to the fact the certain stipulations were provided in the RFP documents and it was mandatory for LAPL to comply with those. The Committee, therefore, strongly recommends that these deficiencies must be made good so that the Availability and reliability of plant operations could be increased. This would involve installation of a Wagon Tippler, Bottom Discharge Hopper in the coal yard to enable raw coal to be retrieved from the yard for crushing and blending for supply to the power station. Further, another stacker reclaimer is also required to deal with the situation of any outage of the only stacker reclaimer at site. This would avoid any outage of the plant for non-availability of the stacker reclaimer and under the condition of inadequate coal supplies.

The O&M charges on account of these additional facilities will obviously become due as and when these are installed. LAPL would need to approach UPERC for necessary additional tariff on this account.



(iv) Compensation for Secondary Oil Consumption

It is seen that in view of the fact that there is no absolute assurance of coal supply in adequate quantity from the source envisaged in the RFP/PPA for Anpara C project, LAPL would ultimately need to organize coal supply from different sources with due approvals. In spite of the best efforts, one could make in this direction to get uniform quality of coal supply, the variations in the quality of coal received from different sources is bound to happen as in case of other power projects in the country. The Committee has also observed that as per information furnished vide LAPL submission dated 30th December 2014, a specific oil consumption of only 0.2 ml/kWh has been indicated at the time of bid submission. In case, this is to be taken as authentic, this number is on lower side as compared to various norms in existence today for the projects based on Section 62 of Electricity Act 2003 - cost plus tariff. The current CERC norms provide for secondary oil consumption of 0.5 ml/kWh whereas UPERC norms stipulate a figure of 0.75 ml/kWh.

In view of the above, the Committee considers it appropriate if the reimbursement with regard to secondary oil consumption is allowed to the extent of 0.5 ml/kWh as envisaged in the CERC norms. This will be a rather pragmatic approach towards sustainability of the project in the long run since receipt of coal of varying quality is seen to be imminent. Accordingly, the Committee has agreed to work out compensation on this account of additional oil to the tune of 0.5 ml/kWh less 0.2 ml/kWh on sustainable basis.

Therefore, the Committee recommends compensation for secondary oil consumption

= 0.3 ml x Weighted Average Secondary Oil Cost for the period x Gross Generation



It is also recommended that LAPL shall not be entitled for any compensation on account of increased oil consumption even if the conditions arise again to necessitate the units to operate below 40% load since general increase in secondary oil consumption is being recommended over and above the bid assumption.

(v) Compensation for increase in Capital Cost

- a. The Committee felt that the issue regarding creation of additional facilities like installation of Wharfwall (already established), Wagon Tippler, additional stacker reclaimer, providing bottom hopper in the coal stockyard for feeding uncrushed coal from the yard to the crushers including the related structures, conveyors and other feeding arrangement, as required including bulldozers, pay loaders etc. shall be reimbursed in the form of appropriate tariff as & when these facilities are established by LAPL in progressive manner. The details of the expenditures on these accounts shall be furnished by LAPL to UPPCL and Hon'ble UPERC for their approvals / tariff fixation. For computation of compensation, the norms of UPERC extant Tariff Regulations will be applied.

- b. LAPL's submission regarding compensation for increase in capital cost due to delay in project COD on account of reasons stated vide UPERC earlier Order dated 9th November 2012 was examined by the Committee. The Committee came to the conclusion that this involves issues which would fall beyond the scope of the Committee and the Committee suggested LAPL to approach the Hon'ble UPERC for appropriate orders.

(vi) Compensation for higher heat rate



No compensation on this account is agreed for normal operation since the heat rate primarily depends on the machine loading as well as the steam parameters and not a function of coal supplies.

Compensation for Higher Heat Rate = NIL

Payment and Payment Security Mechanism:

The Committee recommends that payment and payment security mechanism as mandated under the RFP/PPA should be implemented by UPPCL. In case of non-compliance of the same by UPPCL within a definite time frame, the Committee recommends that Hon'ble UPERC to allow LAPL for 3rd Party sale of power and issue standing directions to grant open access, as required.

Other Recommendations:

- (i) Committee feels that the turndown ratio provided for the Fuel Oil burners of boilers as 1:2 is on the lower side resulting into higher oil consumption even at the minimum turndown. Accordingly, it is recommended that action should be initiated urgently to modify the oil guns and related control valves etc to affect a turndown ratio of at least 1:4 so that the oil guns could be fired at the minimum oil consumption levels (50% of the existing levels).
- (ii) Precautions for procurement of Imported Coal - With a view to ensure the boiler operation in a stable mode without having any deleterious effects on the heating surfaces, burners, fans etc following suggestions are made:
 - a. Extreme caution needs to be exercised to limit the firing of high calorific value coal within safe limits with reference to loading of the boiler so that the heat release rates etc could be contained within design values. This can be easily worked out by the calorific value of the coal being fired, the

individual burner firing capacity and the designed burner area heat release rates etc.

- b. Special attention to be paid to the volatile matter content of the coal from the point of view of boiler water walls overheating/erosion point of view.
- c. Sulphur content in the coal is also important and could be kept under control only by blending of coal or not buying the high Sulphur coal. Appropriate broad coal blending facilities needs to be provided.

Summary of compensations, as worked out by the Committee, is given in the following table:

| A. Compensation for the past losses (COD till the date of notice of termination i.e. 11thFebruary 2013): | | | |
|--|---|------------------------------|--|
| S No | Elements | LAPL Request (Rs Crores)* | As determined by the Committee (Rs Crores) |
| 1 | Under recovery of fixed charges | 401.31 | 401.31 |
| 2 | Under recovery of Variable Charges | 81.66 | 77.46 |
| 3 | Compensation for Higher Secondary Oil Consumption | 26.01 | 20.81 |
| Total | | 508.98 | 499.58 |

* LAPL has claimed for past Losses of Rs 653 Crs for the period from COD to 11th February 2013 - already authenticated by E&Y based on audited financials of LAPL. However, the Committee noted that these claims which are proposedly based on some actual numbers of expenditure etc.. These claims are not valid since the PPA was in existence and any claim can be with reference to the PPA conditions only. Accordingly, the number of 653 Cr as the losses of



under recovery before 11th February 2013 is misleading. The actual losses with reference to PPA works out to only 508.98 Cr. as shown in the above table and these have been considered by the Committee.

B. Compensatory Tariff from 12th February 2013 onwards

(Levelized for the PPA duration):

| S No | Elements | LAPL Request (Rs/kWh) | As determined by the Committee (Rs/kWh) |
|--------------|-----------------------------|------------------------------|--|
| 1 | Interest on Loan | 0.069 | 0.069 |
| 2 | Interest on Working Capital | 0.062 | 0.062 |
| 3 | O&M Expenses | 0.079 | 0 |
| 4 | Secondary Fuel consumption | 0.078 | 0.024 |
| Total | | 0.288 | 0.155 |

Note: In addition to the above, LAPL has claimed compensation of Rs 0.075 per kWh (levelized for the PPA duration) for increase in capital cost of the project consequent to delay in project COD due to various reasons including delay in handing over of the project site.

Other Recommendations:

- (a) LAPL have informed that they have considered an ROE of 16%. The Committee recommends that LAPL will take a cut of at least 0.5% over the assumed number of 16% in view of the compensations claimed by them.
- (b) In view of the recommendations for compensations for the past losses and the future compensatory tariff, it is strongly recommended that the clauses in the PPA relating to the termination of PPA etc shall be suitably reviewed and modified in the best interest of UPPCL as well as LAPL.

- (c) In spite of the payment security mechanism being in place, the situation in respect of coal supply and payment etc. continues to be the same as before the date of notice of termination, the following measures shall be adopted:
- i. NCL along with UP Govt. should ensure entire supply of coal from Khadia mines as envisaged in the RFP/PPA or else the alternate sources of supply should ensure the quality of coal to be within stipulated parameters.
 - ii. UPPCL, UP Govt. shall impress upon Indian Railways to ensure transportation of coal through BOBR wagons only in case coal is to be received through Railway wagons from alternate sources.
 - iii. LAPL shall be allowed to sell their power outside UP and UPERC shall facilitate grant of open access for the purpose by way of suitable directions to UP SLDC.
 - iv. LAPL shall also be eligible for compensations on the same principles as indicated in para 6.1 of the recommendations in case similar situation arises.
- (d) UP Government and UPPCL shall take up with REC, the lead lender for the project not to charge higher rate of interest from the project to keep the tariff of the project low, the benefit of which shall accrue to the consumers of UP as per the provisions of UPERC Regulations.
13. The presentation of this report took place on 24.4.2015 and 27.05.2015 in which the members of the Expert Committee namely Shri V. S. Verma, Shri A.P. Mishra and Shri K.B. Dubey, representatives from UPPCL and LAPL were present. It was decided by the Commission in consent with the parties that the Committee would further examine claim of Rs 0.075 per kWh (levelized for the PPA duration) which was recognized by the Committee in the report but was not examined and verified by them.
14. Vide letter no. 366/मु0अ0/पी0पी0ए0/लैनको अनपारा dated 06.08.2015, UPPCL submitted the decision of its Board of Directors to the above recommendations of the Expert Committee as follows:

1. रिपोर्ट के भाग-1 में फिक्स्ड चार्ज के रूप में रू0 499.58 करोड की धनराशि के भुगतान की जो संस्तुति की गयी है उसे यदि नियामक आयोग द्वारा स्वीकार किया जाता है तो उस धनराशि की रिकवरी के लिए वर्ष 2015-16 के टैरिफ में एक निश्चित दर पर निश्चित अवधि के लिए सरचार्ज स्वीकृत कर दिया जाय जिससे 1 वर्ष में उस धनराशि का भुगतान लैन्को को करना सम्भव हो सके।
 2. टर्मिनेशन नोटिस के बाद की अवधि के लिए 15.50 पैसे प्रति यूनिट की जो वृद्धि संस्तुत की गयी है उसे यदि स्वीकार किया जाता है तो उसके प्रभाव को भी वर्ष 2015-16 के टैरिफ में अवश्य शामिल कर लिया जाये।
 3. समिति की संस्तुति के अनुसार उक्त धनराशि पर "दिनांक 11.02.2013 से वास्तविक भुगतान की तिथि तक **SBI PLR** की दर से ब्याज दिये जाने" पर निदेशक मण्डल ने असहमति व्यक्त की।
 4. निदेशक मण्डल द्वारा इस तथ्य को संज्ञान में लिया गया कि नियामक आयोग द्वारा दिनांक 27.05.2015 को कमेटी को निर्देशित किया गया है कि परियोजना की वाणिज्यिक उत्पादन की तिथि में विभिन्न कारणों से हुए विलम्ब के आधार पर कमेटी ने जिन 7.50 पैसे प्रति यूनिट की बढ़ोत्तरी का प्रकरण नियामक आयोग पर निर्णय हेतु छोडा है उस धनराशि की शुद्धता (**Accuracy**) एवं प्रमाणिकता (**Authenticity**) की पुनः पुष्टि करके कमेटी एक माह के अन्दर आयोग को रिपोर्ट प्रस्तुत करे। निर्णय लिया गया कि कमेटी की अगली रिपोर्ट आने के पश्चात इस प्रकरण पर निदेशक मण्डल की अगली बैठक में निर्णय लिया जायेगा।
15. Meanwhile, the addendum report was submitted by the Committee on 30.6.2015 and a presentation was made before the stakeholders and the Commission on same date. The copy of addendum report was sent to GoUP

and UPPCL for comments. The summary conclusion and recommendation in the addendum report is are follows:

The break-up of LAPL claim of Rs 0.075/kWh (Levelised for PPA duration) as per the following table:

| Elements | Cost | Tariff (Levelised for PPA duration) |
|--|---------|-------------------------------------|
| | [Rs Cr] | [Rs/kWh] |
| [1] | [2] | [3] |
| Increase in Interest During Construction (IDC) | 282.56 | 0.075 |
| Increase due to variation in foreign exchange | 282.00 | |
| Increase in Capital Costs due to other reasons | 62.61 | |
| Total | 627.17 | |

The summarized recommendation is as below:

| S. No. | Item | Cost as claimed by LAPL (Rs Cr) | Cost as Allowed (Rs Cr) | Tariff based on Column 3* (Rs/kWh) |
|--------|-----------------------------|---------------------------------|-------------------------|------------------------------------|
| | [1] | [2] | [3] | [4] |
| A | Scheduled COD to Actual COD | | | |
| (i) | Additional IDC | 221.58 | 221.58 | 0.027 |
| (ii) | Forex Variations** | 208.78 | 184.68 | 0.022 |
| (iii) | Other Reasons*** | 62.61 | 55.30 | 0.007 |

| | | | | |
|-------------|------------------------------------|--------|--------|-------|
| Total (A) | | 492.97 | 461.56 | 0.056 |
| B | Financial Closure to Scheduled COD | | | |
| (i) | Additional IDC | 60.98 | 60.98 | 0.007 |
| (ii) | Forex Variations | 73.22 | 68.17 | 0.008 |
| Total (B) | | 134.20 | 129.15 | 0.015 |
| Total (A+B) | | 627.17 | 590.71 | 0.071 |

*Levelized Tariff for PPA duration

** For the purpose of forex variations, all foreign exchange releases after the actual COD have been taken into account

*** The Committee considered and allowed only the cost towards installation of wharfwall railway siding at Kakri under the additional cost due to various reasons

LAPL had claimed total compensatory tariff of Rs 0.363/kWh (Levelised for PPA duration) including the claim of Rs 0.075/kWh. Against, the above claim and as covered in the above paragraphs, the Committee has found that the compensatory tariff of Rs 0.226/kWh (Levelised for PPA duration) is justifiable and the break-up of the same is given in the following table:

| S. No. | Elements | LAPL claim (Levelised for PPA duration) [Rs/kWh] | As determined by the Committee(Levelised for PPA duration) [Rs/kWh] |
|--------|-----------------------------|---|--|
| 1. | Interest on Loan | 0.069 | 0.069 |
| 2. | Interest on Working Capital | 0.062 | 0.062 |
| 3. | O&M Expenses | 0.079 | 0 |
| 4. | Secondary Fuel consumption | 0.078 | 0.024 |
| 5. | Increase in Capital Cost | 0.075 | 0.071 |
| Total | | 0.363 | 0.226 |

16. Vide letter no. 466/मु0अ0/पी0पी0ए0/लैनको अनपारा dated 16.09.2015, UPPCL submitted the decision of its Board of Directors as follows:

लैनको द्वारा इस परियोजना का पी0पी0ए0 समाप्त करने का निर्णय ले लिया गया है तथा इस परियोजना की बिजली अन्य समकालीन परियोजनाओं से सस्ती है। उक्त के दृष्टिगत परियोजना के पी0पी0ए0 को समाप्त करना उ0प्र0 पावर कारपोरेशन लिमिटेड के हित में नहीं है। अतः लैनको अनपारा पावर लिमिटेड परियोजना हेतु साइट के हस्तान्तरण में विलम्ब व अन्य कारणों के फलस्वरूप C.O.D. में विलम्ब के कारण कैपिटल कॉस्ट में वृद्धि होने और परियोजना को चलाये जाने हेतु **sustainable tariff** प्रदान किये जाने के दृष्टिगत मे0एल0ए0पी0एल0 को रू0 0.071/kwh का अतिरिक्त लेवेलाइज्ड टैरिफ पूर्व में संस्तुत रू0 0.1550/kwh के साथ, उ0प्र0 विद्युत नियामक आयोग के आदेश की तिथि से दिये जाने हेतु उ0प्र0 विद्युत नियामक आयोग को संस्तुति भेजे जाने का निर्णय लिया। साथ ही यह भी निर्देश दिये गये कि बढ़ा हुआ टैरिफ इस शर्त के साथ स्वीकृत किया जाय कि नियामक आयोग द्वारा रिटेल टैरिफ में इसकी प्रतिपूर्ति अनुमन्य की जाय।”

17. The Public Hearing in the matter was held by the Commission on 5.10.2015. Notice was given to the stakeholders and interested parties to submit comments in the above matters in writing directly to the Commission at Kisan Mandi Bhawan, 2nd Floor, Gomti Nagar, Lucknow, personally or by post so as to reach before September 29, 2015 with a copy to the Petitioners who were to file reply upto October 03, 2015. Copies of the reports in PDF format were made available on UPERC website (www.uperc.org).
18. During the Public Hearing, Sri R.S.Awasthi, Consumer Representative presented his detailed objections both orally and through written submission. The copy of the same was served to LAPL for reply. The copies of LAPL reply dated 9.10.2015 was sent to Sri Awasthi on 12.10.2015.



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19. LAPL, in reply to Sri R.S. Awasthi's submissions, has submitted that the Hon'ble Commission vide its notice dated 21.09.2015 had directed all the stakeholders and interested parties to submit their comments on or before 29.09.2015. Shri Rama Shanker Awasthi has filed his objections on 05.10.2015, that is, after the lapse of the deadline set by this Hon'ble Commission. Therefore, LAPL has requested that the instant objection cannot be taken on record and is liable to be ignored.

Since Sri Awasthi was present during the hearing and had raised the objections orally during the public hearing and only followed it up with his written submission dated 5.10.15, the Commission chose to take those objections on record and so the copy was served to LAPL for reply. Hence stirring the issue again has no meaning.

20. LAPL has nevertheless submitted its replies to the objections of Shri Awasthi as follows:-

Objection:

- (a) PPA cannot be reopened by an adjudicatory decision of the State Commission, but only by a legislative action which is by framing delegated legislation- Regulations.

The reference has been taken from following orders:

- (i) Order dated 1.7.15 by Hon'ble Supreme Court in the case of Petroleum and Natural Gas Regulatory Board vs Indraprastha Gas Limited
- (ii) PTC India Ltd. Vs. CERC reported in 2010 (4) SCC 603
- (iii) Sukhdev Singh v. Bhagat Ram reported in (1975)1 SCC 621;

- (iv) Transmission Corporation of Andhra Pradesh v. Sai Renewable Power Ltd &ors. Reported in (2011)11 SCC 34.
- (v) BSNL vs BPL Mobile Cellular Ltd. (2008) 13 SCC 597

Reply:

LAPL has stated that the issue arose on account of (a) material deviation from the RFP conditions in respect of coal supply and associated logistics, and (b) failure of buyers to institute requisite Payment Security Mechanism. This resulted in power supply from the LAPL unworkable and led to the termination notice of PPA by LAPL. In the wake of such unforeseen circumstances, the Commission in exercise of its expansive regulatory powers has proceeded to explore an arrangement which serves the interest of all parties involved including the consumers and generating company. It is pertinent that both the buyers and seller in the instant case have acknowledged the unworkability of the PPA and have therefore submitted themselves to working out a sustainable solution by the Hon'ble Commission in the larger public interest. In this regard, LAPL has referred the Commission's order dated 23.05.2013.

LAPL has further submitted that Competitive bidding under section 63 presupposes that the terms and conditions of bidding will remain true and valid for the entire term of PPA. However, if the very basis of bidding are taken away or are wiped off at a subsequent period of time, then the entire edifice of section 63 will fall. Then in such a situation the regulator has to resort to stated principles under the Electricity Act, 2003 to fill-in the vacuum and remedy the situation.

LAPL has submitted that no distinction has been made under section 61 of the Act, in terms of its applicability to Section 62 or Section 63 of the Act. It may be noted that Section 61 merely uses the phrase

‘determination of tariff’. ‘Determination of tariff’ is provided for under both Sections 62 and 63 of the Act, thereby indicating that Section 61 does not differentiate between Sections 62 and 63 of the Act. This Hon’ble Commission whilst determining tariff either under Section 62 or Section 63 of the Act, shall be guided by commercial principles and is bound to maintain a balance between interest of consumers and recovery of cost of electricity in a reasonable manner. The Hon’ble Commission is also obligated to ensure that the tariff so determined progressively reflects the cost of supply of electricity.

LAPL has further added that the Hon’ble Tribunal has held that in terms of section 86(1)(b), the regulation of electricity purchase and procurement process to distribution licensee including the price at which electricity shall be procured from generating companies through agreements for purchase of power for distribution and supply between the State is within the sole domain of the State Commission. There is no provision in the Act which overrides or restricts the said powers of the State Commission, including the provision contained in section 63. It is, thus, clear that the over-arching regulatory authority of State Commission is not detracted or diminished in any manner even in such cases where the power has been procured through competitive bidding route under section 63, as has been in the instant case. LAPL has cited following cases:

- (i) BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission & Ors. (Appeal No. 106 & 107 of 2009; judgment dated 31.03.2010),
- (ii) Jiyajeerao Cotton Mills Ltd. Vs. M.P. Electricity Board reported in (1989) SCC Supl (2) 52,
- (iii) D.K.Trivedi & Sons Vs. State of Gujarat reported in (1986) SCC Supl 20,



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- (iv) V.S.Rice and Oil Mills & Others Vs. State of A.P. reported in AIR 1964 SC 1781,
 - (v) K. Ramanathan Vs State of Tamil Nadu & Anr. reported in (1985) SCC(2)116,
 - (vi) PTC India Ltd. Vs. CERC reported in 2010 (4) SCC 603,
 - (vii) Tata Power Company Ltd. Vs. Reliance Energy Limited &Ors. (2009)16 SCC 659,
 - (viii) Cellular Operators Association of India v. Union of India &Ors. reported in (2003)3 SCC 186.

LAPL has stated that the principles enunciated in the above judgments clearly establish that the Commission has plenary power to balance the equities between the parties in view of the changed circumstances, keeping in view the objects of the Act to promote competition, encourage investment in electricity sector and protect consumer interest.

Objection:

- (b) The role of the State Commission in a competitive bidding process is very limited to adoption of tariff and the State Commission cannot vary or amend the tariff which is under Section 63 of the Electricity Act.

The citations have been taken from the case of Essar Power Limited vs UPERC & ors, 2012 ELR (APTEL) 182.

Reply:

LAPL has submitted that the Hon'ble Commission having due regard to this situation and the unworkability of the contract has sought

to work out an arrangement between the contracting parties to make the PPA workable taking into account the change of circumstances and also the failure of UPPCL to comply with the terms of PPA. Therefore, in effect the Hon'ble Commission is not substituting the terms of PPA entered under Section 63 of the Act, but is infact trying to work out a workable arrangement between the parties in relation to certain factors in the face of the termination notice.

LAPL has added that the Expert Committee that had been set up by the Hon'ble Commission to work out all these arrangements has infact rightly taken note of the very intent of these proceedings that how the case of LAPL stands at a complete different footing from the other proceedings on compensatory tariff that have been initiated by various other Commissions under different set of facts and circumstances.

Objection:

- (c) Section 61, 62 etc. does not have application to a competitive bidding process, where the guidelines have already been framed by the Central Government under Section 63.

The reference has been taken from the case of BSES Rajdhani Power Limited vs DERC, 2010, ELR (APTEL) 404.

Reply:

LAPL has submitted that in order to appreciate the nature, extent and scope of regulatory powers of State Commission vis-à-vis the tariff / price at which a distribution licensee procures power from generating companies, it is important to understand that procurement of power by distribution licensees can be done by either the following two alternative routes, viz.:-

- (a) Negotiated PPA Route - Through bilateral/negotiated PPAs, where the agreement is subject to prudence check and regulatory determination of tariff by Commission under Section 62;
- (b) Bidding Route - Through transparent process of competitive bidding conducted in accordance with Central Government's Bidding Guidelines, where the Appropriate Commission adopts the tariff discovered through bidding process under Section 63.

LAPL has submitted that the 2003 Act prescribes two methodologies for tariff determination for supply of electricity by a generating company to a distribution licensee as mentioned above, which are stipulated under Section 62 and Section 63 of the Act, respectively;

Section 61 of the Act sets out the guiding principles that must be adhered to by the Appropriate Commission whilst determining tariff. Section 61 of the Act inter alia provides that the Appropriate Commission shall be guided by the following principles:

- the generation of electricity is conducted on commercial principles;
- factors which would encourage competition, efficiency, economical use of resources, good performance and optimum investments;
- safeguarding of consumers' interests and at the same time, recovery of the cost of electricity in a reasonable manner;
- the tariff progressively reflects the cost of supply of electricity;
- the National Electricity Policy and the tariff policy.

LAPL has submitted that the usage of the phrase 'shall be guided' under Section 61 of the Act indicates that the adherence to the principles



prescribed under Section 61 of the Act is mandatory and the Appropriate Commission is bound to abide by the above-stated principles whilst determining tariff. In this regard, it is pertinent to note that no distinction has been made under section 61 of the Act, in terms of its applicability to Section 62 or Section 63 of the Act. It may be noted that Section 61 merely uses the phrase 'determination of tariff'. 'Determination of tariff' is provided for under both Sections 62 and 63 of the Act, thereby indicating that Section 61 does not differentiate between Sections 62 and 63 of the Act. The above position, is further corroborated by the fact that the non-obstante clause in Section 63 only pertains to Section 62 of the Act and does not extend to Section 61 of the Act. A bare perusal of Section 63 of the Act provides that notwithstanding anything contained in Section 62 of the Act, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

LAPL has submitted that in view of the above, it is clear that under the scheme of the 2003 Act, this Hon'ble Commission whilst determining tariff either under Section 62 or Section 63 of the Act, shall be guided by commercial principles and is bound to maintain a balance between interest of consumers and recovery of cost of electricity in a reasonable manner. The Hon'ble Commission is also obligated to ensure that the tariff so determined progressively reflects the cost of supply of electricity.

Objection:

(d) Sanctity of bidding process to be maintained.

The citations have been taken from the case:

- (i) Hari Shankar vs Excise & Taxation Commr, (1975) 1SCC 737
- (ii) State of Haryana vs Jage Ram (1980) 3 SCC 599



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- (iii) Excise Commr vs Issac Peter, (1994) 4 SCC 104
 - (iv) PPL vs Hotel Venus, (2007) 10 SCC 33
 - (v) Yazdani International vs Auroglobal, (2014) 2 SCC 657
 - (vi) Sasan Power vs CERC, Hon'ble APTEL judgement dt 23.3.2015
 - (vii) JSW Energy vs MSEDCL 2013 ELR (APTEL) 343
 - (viii) MSPGCL vs MERC, Hon'ble APTEL judgement dt. 18.1.2013

Reply:

LAPL has submitted that it is important to underscore the fact that although the term “compensatory tariff” has been used in the present proceedings, in reality and as the records would exhibit, the present is a case where on account of (a) material deviation from the RFP conditions in respect of coal supply and associated logistics, and (b) failure of buyers to institute requisite Payment Security Mechanism, both of which altered/vitiated the basis on which the Project was bid for by LAPL, power supply from the Project was rendered unworkable and led to the termination of PPA by LAPL. In the wake of such unforeseen circumstances, the Commission in exercise of its expansive regulatory powers has proceeded to explore an arrangement which serves the interest of all parties involved including the consumers and generating company. It is pertinent to note that both the buyers and seller in the instant case have acknowledged the unworkability of the PPA and have therefore submitted themselves to working out a sustainable solution by the Hon'ble Commission in the larger public interest. In this regard, it is useful to refer to the order dated 23.05.2013 wherein the Hon'ble Commission observed as follows:

.....

Competitive bidding under section 63 presupposes that the terms and conditions of bidding will remain true and valid for the entire term of PPA. However, if the very basis of bidding are taken away or

are wiped off at a subsequent period of time, then the entire edifice of section 63 will fall. Then in such a situation the regulator has to resort to stated principles under the Electricity Act, 2003 to fill-in the vacuum and remedy the situation.

Objection:

- (e) Section 86(1)(f) – Power to regulate cannot over-ride Section 63 of the Electricity Act – one provision of the statute cannot be used to override, nullify or defeat the objective of another provision and the statutory competitive bidding process.

The reference has been taken from following cases:

- (i) Bisra Lime Stone Co. Ltd. Vs OSEB (1976) 2 SCC 167
- (ii) Vemagiri PGL vs Transmission Corporation of AP Ltd, Hon'ble APTEL order dt. 5.10.2007

Reply:

LAPL has submitted that as has been discussed in the preceding paragraphs, through various pronouncements, the plenary powers of the State Commission have time and again been recognized. It is settled law that the statute should be read as a whole and should be construed harmoniously. Section 63 of Electricity Act, 2003 does not dispense with mandatory powers of the State Commission as provided under Section 86 of Electricity Act, 2003. LAPL has added that Sri Awasthi has failed to appreciate that although the term “compensatory tariff” has been used in the present proceedings, in reality and as the records would exhibit, the present is a case where on account of (a) material deviation from the RFP conditions in respect of coal supply and associated logistics, and (b) failure of buyers to institute requisite Payment Security Mechanism,

both of which altered/vitiated the basis on which the Project was bid for by LAPL, power supply from the Project was rendered unworkable and led to the termination notice by LAPL.

In the wake of such unforeseen circumstances, the Commission in exercise of its expansive regulatory powers had to step in so as to work out a solution which serves the interest of all parties involved including the consumers and generating company. It is pertinent to note that both the buyer and seller in the instant case have acknowledged the aforesaid circumstances and have therefore submitted themselves to the working out of a sustainable solution by the Hon'ble Commission in the larger public interest.

Objection:

(f) Claim of losses, financial difficulties or agreement onerous to perform is no ground for avoidance of the agreement or variation in the agreement.

The reference has been taken from following cases:

- (i) Alopi Prasad & Sons Ltd. V. Union of India reported in AIR 1960 SC 588;
- (ii) Travancore Devaswom Board v. Thanth International reported in (2004)13 SCC 44;
- (iii) Continental Construction Co. Ltd. v. State of M.P;
- (iv) Rajasthan State Mines & Minerals Ltd v. Eastern Engg. Enterprises;

Reply:

LAPL has submitted that above cases have no bearing in the present case. It is submitted that the present case is not one where the



conditions of performance have become onerous. In this case, the PPA that was entered between the parties pursuant to a bid process under Section 63 of the Electricity Act stands completely vitiated in view of the facts that (1) the various representations that had been made in the RFP documents with regard to source of availability of fuel, and (2) Payment Security Mechanism, which were set at naught by subsequent events thereby destroying the very substratum of facts on the basis of which LAPL had participated in the bidding process and the parties had agreed on the terms of the PPA. LAPL has added that it is settled law that a contract becomes frustrated if the changes in events are so fundamental that it strikes at the very root of the contract.

The Commission has examined various objections raised by Sri Awasthi and replies thereto by LAPL. Sri Awasthi's objections are mainly procedural and jurisdictional and he has questioned the authority of the Commission to find a solution beyond the boundaries of section 63 of the Electricity Act, 2003. As is evident from the preceding paragraphs, the solution of the problem could not be found by the parties within the four corners of the terms of PPA. The Commission therefore, tried to find a solution to the problem, without disturbing the PPA under section 63 for which the authority flows to the Commission from section 86(1)(f) and the preamble of the Act. The purport of such an exercise is to provide a compensatory package, if at all due to LAPL without disturbing the PPA, so as to address the impediment which has been caused in functioning of this project on a viable basis. So far as Shri Awasthi's objections at (a),(b),(c),(d),(e) & (f) are concerned they are basically related to maintaining the sanctity of bidding process. It may be clarified that it is not the intent of the Commission to take out Anpara-C project outside the scope of section 63 of the E.A. 2003 that deals with the determination of tariff by bidding process. The Commission also does not intend to change the terms of the agreement already entered into between LAPL and UPPCL. All that the Commission is doing is to allow some sort of



compensatory package to LAPL over and above the existing tariff under section 63 on the recommendation of the expert committee constituted for the purpose and in consent with both the parties after appreciating the hardship faced by LAPL and recognizing the non-adherence of the material conditions contained in the RFP, default on the part of UPPCL in establishing 'Payment Security Mechanism' and its failure to make timely payment of the bills raised by LAPL towards electricity supplied to make Anpara-C plant viable and sustainable on long term basis coupled with the fact that UPPCL cannot afford to lose Anpara-C which is very competitive. This compensatory tariff is to be revised or withdrawn as and when the hardships cited above are removed or lessened.

Shri Awasthi has also referred to some judgements of Hon'ble courts in his written submissions in support of his arguments. He has not filed the copies of these judgments. It comes out, however, that the judgments are basically related to sanctity of the bidding U/s 63 and refusal of the Hon'ble Court to allow reopening of the PPAs. As is clear from discussions earlier, these judgements do not apply to the facts of the present case as the Commission is considering here a compensation package over and above the tariff approved U/s 63 for reasons arising out of some unforeseen conditions which could not be imagined at the time of signing the PPA. The facts involved in the above relied upon cases are thus quite distinguishable from the facts of the present case in as much as the Commission is not considering any changes/alteration in the terms of PPA entered into between the parties and also not disturbing the sanctity of section 63. It may be noted that the Commission had directed the Committee to work on compensatory tariff which by its nomenclature itself, addresses an unforeseen situation or condition causing hardship and is over and above the tariff granted under the bidding process. This compensatory tariff could be variant and would be only for the period the hardship continues.

Apart from above legal issues, some technical issues have also been raised by Sri Awasthi. The reply has been given by LAPL and the copy of reply was served to Sri Awasthi who has not made any further submission. Nevertheless, it is observed that these technical issues had already been duly examined by the Expert Committee in their detailed report so there is no need of any further discussion in this order.

21. In the meanwhile, on 26.10.2015, one Shri Shafiullah made a written submission with annexures and requested the Commission to grant him a personal hearing. As the hearing had been concluded on 5.10.2015 and opportunity had already been given to all through Public Notice, the Commission found that the objections of Shri Shafiullah could not be entertained at this stage and his request for personal hearing at this stage was also not acceptable. However, it is found that the issues mentioned by him had been duly examined and taken care of by the Expert Committee in their report which had been uploaded on the Commission's website.

22. **The Commission's view**

There are certain undisputed facts in the case. To recapitulate, LAPL, who had successfully won a bid in the year 2006 for supply of coal based power to UPPCL, served a notice of termination of PPA effective from 11.02.2013 alleging (a) material deviation from the RFP conditions in respect of coal supply and associated logistics and (b) failure on the part of UPPCL to establish requisite 'Payment Security Mechanism', two important requisites based on which the Project was bid for by LAPL. Pursuant to notice of termination of the PPA on 11.02.2013, LAPL also served Buy-Out Notices to the UPPCL. UPPCL opposed the termination notices issued by LAPL and also the maintainability of the petition filed by LAPL. Subsequently, during the

course of proceedings, UPPCL accepted the facts of hardship being faced by LAPL on account of above mentioned reasons and requested the Commission vide letter no 859/C.E./PPA dated 5.3.2014 issued by Managing Director, UPPCL, to settle the issue by providing an increased tariff due to various impediments faced by LAPL as long as the solution carved out in the matter falls within the legal framework and it is in the general interest of the people of U.P. by providing cost effective electricity on a long term basis. UPPCL has also admitted during the hearings that the power from LAPL is cheaper than the power from other many sources and has repeatedly emphasized the need of power from LAPL to meet the demand in the state of Uttar Pradesh. Further, it is also an acknowledged fact that being a pithead power station the variable charges for LAPL will always remain competitive in comparison to other IPPs.

The Commission observed that both parties admit that due to certain circumstances beyond their control, acute hardship was being caused in performing within the boundaries of the PPA and the reliefs / remedies prescribed under the PPA were not sufficient to address this hardship. Therefore, in the larger public interest of the consumers which admittedly is the basic ingredients of the Electricity Act, 2003, both UPPCL and LAPL had requested the Commission to work out a sustainable solution by way of grant of increased tariff etc. In consideration of the distinctive facts, both parties also admitted during the hearings that it may not be possible to resolve the disputes within the confines of the PPA as the PPA may not have envisaged these hardships and therefore, requested the Commission to intervene and explore the possibility of increased / compensatory tariff to resolve the impasse that have arisen.

During course of the hearing, LAPL contended that the tariff adopted by the Commission u/s 63 of the Electricity Act, 2003 has become redundant in



view of their termination notice and therefore either there was a buyout option or else if LAPL were to continue to operate the plant, it could only be on a new tariff to be determined by UPERC in exercise of its regulatory powers. UPPCL has unequivocally admitted its default in establishing 'Payment Security Mechanism'. Upon hearing the parties and considering their written submissions, decided case laws on the subject and recognizing the hardship faced by LAPL on account of Coal Availability and Payment Security Mechanism and considering the consent given by UPPCL vide its MD's letter dated 05.03.2014 to allow increased tariff, the Commission constituted a Committee of experts to assess as to what could be justifiable components of this compensation. The Committee, vide the Commission's order dated 28.04.2014 and 12.5.2014, was to suggest the compensatory tariff over and above the tariff as decided under the PPA and also to suggest any further practicable and judicious measures to address the situation. The Expert Committee submitted its report on 03.03.2015 and 30.06.2015. The report of the Expert Committee was put on the Commission's website www.uperc.org. A public hearing to this effect was held and the submission made by the concerned parties were taken on record and the final order was reserved by UPERC by order dated 19.10.2015.

The Commission before proceeding in the matter pondered as to under what legal provisions a dispute of this nature may be entertained. The fact of acute hardship having been accepted by UPPCL, a solution to the problem needs to be found. Going strictly by the PPA, post termination notice by UPPCL, the option of buyout by UPPCL existed. UPPCL, however, has not come forth for this option. Any other arrangement may result into costly power from this plant and that is why UPPCL does not want to let go of this cheaper source of power. In this background compensation package seems to be the only solution to keep the project afloat. An issue which came up here was regarding the question of Commission's jurisdiction in giving such compensation package. In our view, the jurisdictional powers bestowed upon



State Commissions are much wider under the provisions of Electricity Act 2003 and have been so designed as to take care of such exigencies. The jurisdiction of State Commission under Section 86(1)(f) of the Act has no restriction on the nature of disputes. It can adjudicate upon so long as it is inter-se licensees or inter-se generator and licensee, as held by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd, Vs Essar Power Ltd in which Hon'ble Supreme Court has decided that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction or limitation in Section 86(1) (f) about the nature of dispute. Section 86 of the EA 2003, gives plenary power to the State Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating company through agreements for purchase of power for distribution and supply within the state. It is well settled that the power to regulate carries with it full power over the things pertinent to the subject matter and in absence of restrictive words, the power must be regarded as plenary. Under the EA, 2003 the Commission has been vested with dual role of adjudicator for disputes in its capacity of a quasi-judicial authority under section 86(1)(f) and regulator to implement the provisions of EA, 2003 section 86(1)(b).

The Commission has a statutory obligation to protect and balance the interests of all stakeholders within the sector. The objective behind the Act as stated in the Preamble is to inter alia ensure that the interests of all stakeholders within the sector are adequately balanced and protected and that the sector as a whole progresses in a healthy manner. Hence, the Commission comes to the conclusion that the Act not only empowers but even necessarily casts responsibility on the Commission to adjudicate such distinctive issues to provide affordable power in the interest of the consumers of the State.

It will also have to be kept in mind that this project, even though taken up under section 63 of the Electricity Act, 2003, under the bidding route, had a distinct feature of Facilities and Services Agreement and also a Fuel Policy between the parties under which UPPCL had certain obligation to meet, coal availability being one of them. In this respect, this project is not the usual section 63 project but is distinct in nature and also, its bidding documents differ from the standard documents approved by the Government of India for Case-2 bidding under section 63 of the Electricity Act, 2003. It is known that due to the reduction in quantity of coal supply from the Khadia mines, fuel supply materially altered for this project and resulted in procurement of coal from non-linked sources. To bring coal from non-linked sources, BOXN wagons and road transport were used which was not envisaged in the PPA. LAPL had to create infrastructural facilities for non-linkage and imported coal at the Plant. Due to shortages and these limitations, the performance under the PPA has been affected significantly. It is also established that the PLF and Availability Factor were badly affected due to the use of non-linkage coal and as a result LAPL under recovered the fixed charges. The variable charges were also effected due to higher heat rate and secondary oil consumption. It has been accepted by both the parties that the capital cost, interest on loan and working capital have increased in the changed scenario.

Further, the lack of Payment Security Mechanism, a fact admitted by both the parties, has further deteriorated the performance of LAPL. As a result, the dispute arose which has not been evenly covered under the terms of the PPA. The events were unforeseen and unprecedented. Obviously, if UPPCL's obligations were not met by them, the responsibility for the consequences thereof cannot be cast upon the project proponent i.e.LAPL.

In its order dated 28.4.14, the Commission had taken a view that the issue of non-availability of adequate fuel linkage from Coal India Limited for

the project of the LAPL may be a temporary phenomenon which could be resolved in future. LAPL therefore, needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensatory tariff could be variable, proportionate to the hardship that the petitioner is suffering on account of the unforeseen events and could be only for the period that the hardship continues. As and when the hardship on account of non-availability of linkage coal is removed or lessened, the compensatory tariff shall be revised or withdrawn.

Taking into consideration the Commission's own observations on the issues of hardships and the Expert Committee's conclusions in their reports, the Commission comes to the conclusion that it would be fully justified in ensuring that the Consumers/UPPCL continue to avail cheaper power from Anpara C plant of LAPL on long-term basis. While doing so the Commission is also duty bound to attend to the hardships being faced by LAPL in running its Anpara C plant. Therefore, recognizing the nature of the facts and circumstances of the present case, prayer / consent of both the parties and recommendations of the Expert Committee, the Commission comes to the conclusion that LAPL should be allowed some compensation / compensatory tariff to make its Anpara C plant viable and sustainable on long term basis.

The Expert Committee has, after detailed examination of the issues and following the principle of balancing the interest of the consumers of the State and the long-term viability and sustainability of the operations of the Project, has recommended the Compensation / Compensatory tariff for LAPL in its detailed reports. The Commission recognizes the efforts put in by the Expert Committee in making such an exhaustive report.

The Expert Committee which also consisted of a representative of UPPCL and the Government of UP, recommended a package which was

discussed threadbare in the presentations before all the stakeholders and also in the Public Hearing. UPPCL agreed to the above recommendations with of course some conditions regarding payment schedule, interest and date of applicability of order etc.

After due examination of the Expert Committee report and responses/comments received on the same, the Commission feels that the compensation/compensatory tariff, suggested by the Expert Committee to make the plant viable and sustainable on long term basis coupled with the fact that consumers of the State/UPPCL cannot afford to lose the power from the project which is very competitive can be allowed by UPERC.

23. In view of the above submissions and deliberations and for 'safeguarding interest of Consumers of the State of UP' and at the same time to allow 'recovery of cost of electricity in a reasonable manner', considering the distinctiveness of the case and request of UPPCL as well as LAPL for a sustainable solution, the Commission decides to allow compensation / compensatory tariff as suggested by the Expert Committee and admitted by LAPL and UPPCL in the process as follows:

A. Compensation for recovery of the past losses (from COD to the date of notice of termination i.e. 11th February 2013):

| S No | Elements | LAPL Request (Rs Crores)* | As determined by the Committee and approved by the Commission (Rs Crores) |
|------|---------------------------------|------------------------------|--|
| 1 | Under recovery of fixed charges | 401.31 | 401.31 |
| 2 | Under recovery of | 81.66 | 77.46 |

| | Variable Charges | | |
|--------------|---|---------------|---------------|
| 3 | Compensation for Higher Secondary Oil Consumption | 26.01 | 20.81 |
| Total | | 508.98 | 499.58 |

The Commission noted Expert Committee's observation that LAPL claimed for past Losses of Rs 653 Crs for the period from CoD to 11th February 2013. However, the Committee did not find it valid since the PPA was in existence and any claim could be with reference to the PPA conditions only. Accordingly, the figure of Rs 653 Cr claimed as the losses of under recovery before 11th February 2013 was revised to Rs 508.98 Cr. by LAPL for examination by the Committee.

It is directed, considering the pre condition put forth by UPPCL, that this amount of Rs. 499.58 Crs. shall be paid by UPPCL in twelve monthly installments starting January, 2016 and as an equitable proposition LAPL would not charge any interest since 11.2.2013 to the date of payment. The paid amount will be considered by the Commission in ARR of Discoms proportionately.

B. Compensatory Tariff for sustainability of the project (Levelized for the PPA duration):

| S. No. | Elements | LAPL claim [Rs/kWh] | As determined by the Committee and approved by the Commission [Rs/kWh] |
|--------|---------------------|------------------------|---|
| 1. | Interest on Loan | 0.069 | 0.069 |
| 2. | Interest on Working | 0.062 | 0.062 |

| | | | |
|--------------|----------------------------|--------------|--------------|
| | Capital | | |
| 3. | O&M Expenses | 0.079 | 0 |
| 4. | Secondary Fuel consumption | 0.078 | 0.024 |
| 5. | Increase in Capital Cost* | 0.075 | 0.071 |
| Total | | 0.363 | 0.226 |

* Due to delay in project CoD caused by various reasons including delay in handing over of the project site.

However in lieu of compensatory tariff over and above the tariff determined through the bidding process, LAPL would provide a cut of 0.5% in the Return of Equity which shall be reflected in the monthly bills of supplied electricity. The 'Compensatory Tariff', would necessarily be applicable prospectively i.e. from the date of this order of the Commission and shall be allowed in the ARR as agreed by UPPCL.

24. It may be mentioned here that since the Commission has based its decision on the consent of both the parties i.e. generator (supplier) and procurer (buyer), the terms of payment of items mentioned at the bottom of A & B above in para 23, shall be precondition for any payout under this order of the Commission.

It is also directed that as and when the hardship on account of non-availability of linkage coal and payment security mechanism etc. is removed or lessened, the compensatory tariff will be revised or withdrawn on petition filed by any of the two parties.

25. LAPL is further directed to take measures for technical improvements like increasing the turn down ratio of fuel oil burners and precautions in procurement of coal as recommended by the Expert Committee. LAPL must



also make best efforts to get the loan refinanced so as to reduce the interest burden. Post refinancing, if the actual interest rate falls below the rate of interest as per the Common Loan Agreement, the benefit arising out of it will be passed on by LAPL to UPPCL.

Government of UP and UPPCL should ensure entire supply of coal from Khadia mines as envisaged in the RFP/PPA and shall take up with REC, the lead lender for the project, not to charge higher rate of interest from the project to keep the tariff of the project low, the benefit of which shall accrue to the consumers of UP. GoUP and UPPCL shall also impress upon Indian Railways to ensure transportation of coal through BOBR wagons only in case coal is to be received through Railway wagons from alternate sources.

With above, the petitions are disposed of.

(Indu Bhushan Pandey)
Member

(Desh Deepak Verma)
Chairman

Place : Lucknow
Dated: 23.11.2015