



Petition No 871 and 891 of 2013

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order : 28.04.2014

PRESENT:

1. Hon'ble Shi Desh Deepak Verma, Chairman
2. Hon'ble Smt. Meenakshi Singh, Member
3. Hon'ble Shi 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 S.P.Pandey, C.E.(PPA), UPPCL
2. Sri Kallan Prasad, E.E (PPA), UPPCL
3. Sri Ranjan Kumar , G.M. Lanco Anpara Power Ltd.
4. Sri Raj Kumar Roy, Director, Lanco Anpara Power Ltd.
5. Sri Arun Tholia, AGM,, Lanco Anpara Power Ltd.
6. Sri G. P. Mishra, Asstt Mgr., Lanco Anpara Power Ltd.

Order

(Date of Hearing 31.01.2014)

1. M/s Lanco Anpara Power Limited (LAPL) is supplying 1100 MW coal based power to UPPCL from Anpara-C plant under Power Purchase Agreement (PPA) dated 12.11.2006 obtained through International Competitive Bidding. The tariff had been adopted by the Commission under section 63 of the Electricity Act, 2003 in petition no. 509 of 2007 vide order dated 31.12.2007.

Petition no. 871 of 2013

2. M/s Lanco Anpara Power Limited had filed the 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. In the petition 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;
 - 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 ;



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- 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.

LAPL filed additional submissions on 11.03.2013, 3.4.2013, 3.5.2013 and a rejoinder on 14.5.2013.

3. The prayer was made by LAPL on the facts and grounds which are narrated as follows:

(A) Material Deviation from the Request for Proposal (RFP) Conditions in respect of Coal

- (i) The Anpara C Project was conceived and advertised as a 'pit head Project' with existing coal linkage from Northern Coal Fields Limited (NCL). The bidding process for the Project was undertaken by all the bidders, including the Petitioner herein on the understanding that the coal requirement would be met through long term linkage coal supply from the Khadia Expansion mine of NCL (hereinafter "Khadia mines"). This was expressly stated in the Request for Proposal (RFP) documents. Based on the fact that the Plant would receive long term linkage coal from the Khadia mines, the RFP documents specified that the Coal Transportation System required to be set up/ enhanced by the successful bidder of the Project would be the Merry Go Round (MGR) system of Anpara A and Anpara B power stations.
- (ii) On the basis of the aforesaid representations, the Petitioner configured the entire coal transportation infrastructure and project equipment for the Anpara C Plant in accordance with the specifications stipulated under the RFP document. Accordingly, the boiler design as well as the coal transportation, receiving and handling infrastructure was configured in line with coal



specifications and the coal linkage/ availability and transportation that was specified in the RFP documents.

- (iii) However, due to the promulgation of various policy changes by the Government in respect of coal allocation/ supply, including but not limited to the 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. Consequently, the Petitioner in order to ensure the supply of coal to the Anpara C Plant was constrained to enter into a Fuel Supply Agreement (hereinafter "FSA") dated 24.04.2012 with NCL. This however, materially altered the fuel supply arrangements for the Plant inasmuch as there was a significant reduction in the quantity of linkage coal from the Khadia mines, as a result of which the Petitioner was constrained to source coal from non-linked sources also. Thus, the originally envisaged pit head project came to be converted into a non-pit head project. It may be noted that the Petitioner in an attempt to get NCL to offer the quantity and quality of linkage coal as indicated in the RFP document had duly impressed upon the NCL the issues with respect to the desirability of source specific linkage coal. However, the request for such coal was negated by Coal India Limited (hereinafter "CIL"), citing the promulgation of the NCDP, which permitted CIL resile from its earlier letters of assurance issued to various projects. CIL, thus, washed its hands of its obligation to supply coal as per the RFP citing change in the government policy and directives for the same.
- (iv) The effective reduction in supply from the Khadia mines was firstly on account of the allocation itself being lower than the envisaged quantity; and secondly, because of the change in envisaged quality of coal i.e., the coal supplied was of a lower Gross Calorific Value



(GCV) vis-à-vis GCV envisaged earlier under the PPA. As a result of which the committed linkage coal quantity as per the FSA was only adequate to meet 55% requirement of the Anpara C Plant.

- (v) Therefore, the Petitioner in order to make up the shortfall requirement of coal to enable it to generate power at the Plant was constrained to start procuring coal from various non-linkage sources including Imported Coal. However, despite the same the Petitioner was unable to achieve the desired Plant Load Factor (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 to that large extent. This was due to the fact that that the coal specifications from non-linkage sources are significantly different in terms of physical and chemical attributes as compared to long term linkage coal as was originally specified in the RFP document. It is submitted that the Plant equipment and transportation infrastructure had been configured keeping in mind the linkage coal and comparatively higher use of the non-linkage coal is adversely affecting the health of the Plant.
- (vi) As an outcome of the above mentioned significant shortfall in coal supply from the Khadia mines, the Petitioner had to start relying upon non MGR modes of transportation including road transport, which was not envisaged at the time of setting up of the Plant. The original representation, on the basis of which the transportation infrastructure was established, stipulated that the coal from the Khadia mines would be transported through the MGR system in Bottom Opening Bottom Reclaiming N type (BOBRN) Wagons by augmenting the existing MGR system of Anpara “A” and “B” power stations. The entire logistics for coal transportation, receiving in the



plant and feeding to the Coal Handling Plant (hereinafter “CHP”) were designed considering entire coal requirement being met from Khadia mines only. Basis this representation in the RFP document, the augmentation of the MGR system including Track Hopper for unloading of coal and procurement of 96 BOBRN Wagons and three (3) Locomotives for transportation of coals from Khadia mines to Plant had already been completed by the Petitioner. The Petitioner had also entered into a ‘Facilities and Services Agreement’ with UPRUVNL for utilizing, amongst other facilities, the existing MGR facilities to cater to its entire requirement of coal from Khadia mines. It is pertinent to note that the Track Hopper, designed to unload and feed coal only from BOBRN Wagons, was the sole coal receiving and handling infrastructure built in the Anpara C Plant in line with the stipulations of the project documents. However, due to the changes in various policies including NCDP and the consequent FSA, the coal supply for the Plant was no longer solely from the Khadia mines alone and therefore, the Petitioner had to start relying on alternative arrangements for transportation of the same.

- (vii) Most of the non-linkage coal including the imported coal started being supplied through BOX-N Wagons of Indian Railway (Non-MGR mode) in terms of the Indian Railway policy, which mandated that the Anpara C Plant could receive imported coal only through BOX-N wagons due to its distance from ports. However, the existing infrastructure at site (with only Track Hopper as coal receiving facility) which was set up in terms of the RFP document was not designed to receive coal through any mode other than the BOBRN (MGR mode) wagons. Thus, in the absence of the infrastructure to unload BOXN wagons, the same was being done manually at the Track Hopper. Manual unloading of BOXN wagons



being a highly time consuming process was making it difficult for the Plant to receive and unload the entire coal quantity as required to operate the Plant continuously at full load. The infrastructural constraints being experienced by the Petitioner due to the enactment of the various directives by the Government altering the coal allocation and arrangement policies has also been recognized by the Ministry of Railways. In this regard, a copy of the letter dated 26.11.2012 was received by the Petitioner from the Director Traffic Trans. (G), Railway Board, acknowledging the aforesaid difficulties. In addition to the same, the Anpara C Plant was also receiving 20% of Linkage coal through Road tankers. In absence of any mechanized facility for unloading & feeding coal received by road, the Petitioner had no option but to manually unload and feed this coal into the Track Hopper thereby, consuming much more time than what the Petitioner would have incurred in feeding the same quantity of coal through MGR system.

- (viii) Therefore, on account of the reduction in quantity of coal supply from the Khadia mines and the inadequacy of infrastructural facilities that had been arranged/ augmented by the Petitioner as per the Project documents for transportation to and receipt of coal at the Plant, the Petitioner's performance under the PPA got significantly prevented, hindered and delayed. In this regard it is pertinent to note that the design and configuration of the project site including construction layout requirements coupled with the limited area of 256 acres also prevented the Petitioner from creating any additional infrastructure to accommodate the infrastructural changes necessitated by the usage of non-linkage and imported coal.



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- (ix) Due to the aforementioned factors, the rate of coal feed into the Track Hopper was reduced significantly since, even if coal was procured and brought to the Plant premises, the same could not be effectively and optimally utilized for continuous full load operations of the Plant. This had a severe adverse impact on the generation of power at the Plant as the requisite quantities of the daily coal requirement could not be unloaded and fed into the boilers for sustained operations.
- (x) Thus, as a consequence of linkage coal supply not materializing to the extent envisaged and required for the Plant coupled with the absence of suitable coal handling and receiving facilities at the Project site, the Petitioner despite its best efforts, was unable to generate and supply power to the extent contemplated under the PPA.
- (xi) Another significant drawback of using non-linkage coal for the Plant was the adverse impact it had on the plant equipment at site. The Petitioner submitted that the plant equipment had been configured keeping in mind a specific quality of coal, namely linkage coal. However, due to the increasing reliance on non-linkage and imported coal, which was necessitated due to the inadequate supply of coal from Khadia mines, the existing plant equipment came to be adversely affected, which consequently hindered/prevented the operations at the Plant.
- (xii) In order to ensure full load operations, it was constrained to source approximately 45% of its coal requirements from non-linkage sources, primarily imported coal. In this regard it is pertinent to note that the firing of imported coal, which has very different characteristics in terms of Moisture, Volatile Matter, Fuel Ratio,



Total Sulphur, Hardgrove Grindability Index, Ash characteristics, etc. vis-à-vis domestic coal in unblended form or blended beyond a small percentage, to a power plant boiler designed for domestic coal has serious consequences for the performance of such plant as well as the equipment maintenance. On account of the same, the Petitioner witnessed a failure in some of the equipment on account of firing of imported coal, which consequently significantly affected the operations of the Anpara C Plant. Such negative impact was accentuated on account of imported coal being fired in unblended form.

(xiii) The following equipment suffered on account of the usage of imported coal as opposed to domestic coal:

(a) Boiler health and performance – The performance of Boiler, which was designed keeping in view the linkage coal, came under stress on account of the high percentage of imported coal (~40%) due to technical limitations caused by high moisture / Volatile Matter (VM) / GCV. The actual percentage of imported coal fed to boilers has been as high as 100% in the absence of any blending facility as mentioned above. Such huge variation in the coal quality caused a deleterious impact on the boiler parts affecting the Availability of the Unit. In addition to the above, on account of the aforementioned change, the Petitioner began witnessing equipment failure and higher maintenance cost for the newly constructed plant. A few such instances are set out herein below:

1. Tube failure – Erosion effects in front portion of the boiler
2. Incompatible ash characteristics causing Slagging, Fouling, Erosion, Corrosion and Clinkering problem



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3. Fire in the Coal Mills due to high VM component of Imported Coal
 4. Deterioration in Performance of Coal Mills in terms of Coal fineness & effective capacity (choking)
 5. Deterioration in Performance of Coal Handling Plant due to high moisture content and fine particles in the imported coal
 6. Ash Build up in various parts of duct including Economizer hopper area
 7. Frequent failure of coal burner diffuser due to high VM component of imported coal causing outage of boiler
 8. Fast deterioration in heat value of imported coal when stacked in the yard due to high VM component
 9. Emptying bunkers for any Mill shutdown - to avoid the fire in the bunker due to high VM component of imported coal.
- (b) Negative impact on Heat Rate – The boiler equipments are pre-set (designed) for efficient burning of a particular specification of coal on continuous basis and not for such large intra-day variation in the specification of coal. Firing of imported coal of very low ash content, in a boiler designed for high ash content domestic coal affects the heat transfer profile between radiative and convective sections of the boiler and becomes difficult to attain rated steam temperature. Imported coal with high moisture content has derated the capacity of coal mills and requires higher quantum of heat for coal drying in the mill. Imported coal with high FC / VM ratio has periodically caused difficulty in its combustion, resulting in lower ignition stability and high un-burnt loss. Imported coal has also led to increase in Superheater and Reheater spray in order to maintain the desired steam parameter leading to loss of usable heat.
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Burning of imported coal with high Hydrogen / Moisture content and different ash characteristics causing Slagging / Fouling has affected the Boiler Efficiency negatively. On account of the aforementioned changes, the Anpara C Project was consuming more than 2511 Kcal to generate one KWh of dispatch-able energy (as against the Contracted heat rate of 2511 Kcal/KWh) which in effect resulted in under recovery of the variable charges. As a consequence, the Petitioner due to no fault of its own, was not only experiencing losses, but was also unable to meet recovery of cost of the coal.

- (c) Working capital requirements – On account of imported coal being priced much higher than the envisaged linkage coal, the Petitioner was compelled to arrange and incur higher financing cost towards Working Capital requirement than envisaged at the time of bidding.
- (xiv) The aforesaid factors further accentuated the negative impact of non availability of adequate linkage coal through MGR system in the form of high down time and maintenance requirements and despite its best efforts the Petitioner was unable to run the Anpara C Plant in a manner and to the extent contemplated under the PPA.
- (xv) The Petitioner had duly and repeatedly vide its letters dated 07.04.2012, 03.07.2012 and 01.12.2012 informed the Respondents of the difficulties being faced by it on account of the aforesaid reasons and its inability to operate the Plant at the contractually stipulated Availability factor. The Petitioner had accordingly requested the Respondents to take immediate and necessary as required under the PPA. However, till date



no response has been received from the Respondents in this regard.

- (xvi) On account of the Indian Political Events resulting from the enactment of new directives by the Government including but not limited to the NCDP, the Petitioner, was significantly prevented/ hindered from performing its material obligations under the PPA. Due to unavoidable and incurable infrastructural constraints, the Petitioner despite its best efforts had been able to operate the Plant at an Average Availability Factor of only 40% (approx.) since the Commercial Operation Date (COD) of the Plant. The said situation has been continuing for a period exceeding 270 consecutive days, which under the PPA is the stipulated time period where-after, the Petitioner would be entitled to terminate the PPA. Clause 13.6 expressly provides that if the Seller's (Petitioner herein) performance of its material obligations is significantly prevented, hindered or delayed or the average Availability Factor of the Power Station is less than 65% in any period of 270 consecutive days as a result of the Indian Political Events, either party would be entitled to terminate the PPA.
- (xvii) On account of the occurrence of the Indian Political Events, namely the change in directive/ policy regarding coal supply, the Petitioner had been prevented from performing its obligations under the PPA. Further, even the Average Availability Factor of the Plant also admittedly had been (-)40% since COD i.e., for a period exceeding 270 days. Being constrained by the same, the Petitioner in exercise of its rights under clause 13.6 of the PPA issued the Termination Notice to



the Buyers calling upon them to commence the Buy-out process as provided under the PPA.

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

- (i) The Buyers, since the execution of the PPA have been in material default of their payment obligations under the PPA, both in terms of institution of a payment security mechanism and in releasing timely and complete payments to the Petitioner. The Petitioner humbly submitted that the same had an adverse impact on the financial sustainability of the Project operations inasmuch as the Petitioner was unable to run the Project at optimum operation due to the significant outstanding dues payable to it by the Buyers. Furthermore, due to the absence of a payment security mechanism for the Project, the Petitioner was also unable to refinance the Project post COD and was constrained to continue at the high cost of financing. The high cost of financing coupled with the shortage in cash flows severely impacted the Petitioner's ability to operate the Plant in the manner required under the PPA. This further aggravated the difficulties that were being experienced by the Petitioner on account of the occurrence of the Indian Political Events as detailed above. The result was that the Petitioner despite its best efforts was unable to operate the Plant at its optimum capacity and has also accumulated huge financial losses.
- (ii) The PPA under clause 10.6 mandates that the Buyers prior to purchase of electricity from the Petitioner, necessarily have to institute a payment security mechanism in accordance with the terms of the PPA.



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- (iii) Clauses 10.5 and 10.6 of the PPA, impose upon the Buyers an obligation to issue individual standby Letters of Credit (hereinafter “LCs”) equal to 1.10 times of the monthly tariff payment calculated by averaging the succeeding monthly tariff payments for a 6 months period. The PPA expressly stipulated that the LCs were to be issued no later than twenty days before the Commissioned Date of the first Unit and the Default Contingency Agreements for establishment and operation of Default Contingency Accounts were to be entered into before Financial Close. It may be noted that Unit #1 of the Plant was commissioned on 10.12.2011, however, till date the Buyers had not issued the requisite LC. It is submitted that Respondent No. 1 had issued LCs in favour of the Petitioner; however the same is inadequate (amounting only to Rs. 25 crores) and is not as per the requirements of the PPA.
- (iv) The Buyers had also failed to create Default Contingency Accounts as was required under the PPA. Whilst the parties had executed Default Contingency Agreements on 12.11.2006, till date the Default Contingency Accounts had not been created by the Buyers. The Petitioner had repeatedly by way of various letters, notified the Buyers that a payment security mechanism was to be set up by the Buyers under the PPA and accordingly had requested the Buyers to comply with the same.
- (v) On account of the afore-mentioned factors, the Petitioner was finding it extremely difficult to operate the Anpara C Plant. The Petitioner humbly submitted that it had, in its envisaged financing plan for the project considered the credit enhancement support on account of payment security mechanism for the refinancing of the project funding post COD which is required to lower the interest outflow. However, in the absence of the envisaged payment



security mechanism and failure to achieve desired Credit Rating, the Petitioner was facing significant problems in getting the Project re-financed and was constrained to continue with current high cost of financing. The Petitioner states that the existing high cost of financing was raising serious concerns about financial sustainability of the Project operations. The Petitioner submitted that it had repeatedly voiced its concerns to the Respondents in this regard and had also issued a cure notice in this regard; however, despite the same the Buyers continued to be in default under the PPA.

- (vi) Further, the Petitioner has submitted that as a result of the persistent delay in payment of invoices beyond the due dates and the consequent accumulation of outstanding dues with the Buyers, the financial difficulties of the Petitioner was further exacerbated, which was not only creating difficulties in the day to day operations but was also delaying onward payment to the Lenders of the Project. In this regard, it is pertinent to note that the Buyers have accepted all invoices generated by the Petitioner and have never denied their liability to render payments to the Petitioner for supply of electricity to the former. The Buyers have simply failed to render payments without assigning any reason for the same. Further, even the repeated reminders sent by the Petitioner have merited no response by the Buyers.

- (vii) Finally, being aggrieved by the complete inaction on part of the Respondents, the Petitioner was constrained to issue the Preliminary Termination Notice to the Respondents.

The Petitioner respectfully submitted that UPPCL has been defaulted in making timely and complete payments and have also failed to institute the requisite payment security mechanism as mandated under the PPA. The



Petitioner has further submitted that it has severely impacted them. LAPL has stated that on various occasions they shared their concerns orally and in writing with UPPCL but they did not respond. Being aggrieved by the failure of the UPPCL to remedy the same and perform their obligations under the PPA, the Petitioner on 10.12.2012 issued a Preliminary Termination Notice to UPPCL. The Petitioner has further submitted they served the termination notice dated 24.01.2013 under clauses 13.6 read with 13.3.1 of the PPA where-under, LAPL is entitled to terminate the PPA in case any of its material obligations is significantly prevented, hindered or delayed or the average availability factor of the plant is less than 65% in any period of 270 consecutive days. LAPL has added that in furtherance to termination notice dated 24.1.2013, they served buy out notice to UPPCL on 11.2.2013.

Reply by UPPCL

4. UPPCL submitted that the State Government of U.P. had appointed U.P. Rajya Vidyut Utpadan Nigam Limited for conducting of the bidding process and selecting the successful bidder for development of Anpara –‘C’ project under build, own and operate basis. U.P. Rajya Vidyut Utpadan Nigam Limited issued Request for Proposal (‘RFP’) and the said ‘RFP’ included Model Power Purchase Agreement. The Request for Proposal was approved by the State Regulatory Commission (hereinafter referred to as the ‘Commission’) on 19.10.2005 and in accordance with RFP which included the Model Power Purchase Agreement, the Petitioner and other bidders had participated in tender process and it is this Model Power Purchase Agreement, which was approved by the Commission on 19.10.2005 was executed on 12.11.2006 between the Petitioner and the answering Respondents. The said Power Purchase Agreement which was executed between the parties on 12.11.2006, was also approved by the ‘Commission’



on 31.12.2007 in Petition No. 509/2007. The Respondent has stated that the PPA approved by the 'Commission' itself provides complete mechanism for redressal of disputes between the parties and as such, any party aggrieved by violation of any of the provisions of the 'PPA' has to resort to the remedy provided in the agreement itself and not otherwise. UPPCL has mentioned that Ministry of Coal, Government of India vide its notification dated 18.10.2007 after execution of the Power Purchase Agreement on 12.11.2006 notified new Coal Distribution Policy. After the notification of new Coal Distribution Policy, the State Regulatory Commission vide its order dated 31.12.2007 approved the Power Purchase Agreement executed on 12.11.2006.

In the present case, New Coal Distribution Policy as alleged by the Petitioner was notified on 18.10.2007 shortly after execution of the Power Purchase Agreement on 12.11.2006. The New Coal Distribution Policy comes within the definition of 'Change in Law' and it is this change in policy of coal distribution, which according to the Petitioner has affected its functioning for which it is seeking its remedy through the present petition. 'Change in Law' is defined under Clause-1.1.1. of the 'PPA'.

From a bare perusal of the provisions noted above and facts mentioned with respect to issuance of 'RFP', approval of Model Power Purchase Agreement, issuance of notification of new Coal Distribution Policy, execution of 'PPA' between the parties and approval of the 'PPA' by the 'Commission' reveals that a complete mechanism has been provided in the 'PPA' which is agreed between the parties for redressal of grievances arising out of violation of any provision of the 'PPA'.

When the remedy has already been provided in the 'PPA' which was approved by the 'Commission', the Petitioner has to resort to the



remedy which is provided therein and as such, the present petition under section 86(1)(f) of the Electricity Act, 2003 before this Hon'ble Commission is not maintainable. It may be submitted here that approval of the 'PPA' by the 'Commission' amounts to decision of the 'Commission' and that in case of occurrence of any dispute, parties have to resort to the remedy provided in the Agreement as such, the petition under section 86(1)(f) of the Electricity Act, 2003 is not maintainable.

Clause 18.2 of the 'PPA' provides for redressal of the grievance and Clause 18.2.1 provides that dispute between two or more parties shall be referred to the dispute resolution procedures, first under Article 18.2.2 and then under Article 18.3. Clause-18.2.2. of the 'PPA' provides for constitution of panel for mediation and Clause 18.2.4 provides that in the case of a dispute, any party may approach the panel for commencement of dispute resolution proceedings and all the parties shall exchange, within fourteen days of the dispute being referred to the Panel, mediation briefs in English with principal supporting documentation summarizing their respective cases and deliver copies of the briefs to the Panel.

Clauses–18.2.5 to 18.2.14 of the 'PPA' provides the procedure for resolution of the dispute by mediation panel and Clause-18.2.15 provides that in the event that any such dispute is not settled by the parties through the mediation process, then any party may refer the dispute to arbitration in accordance with Article 18.3. Therefore, in view of the above provisions of Clause-18.2 of the 'PPA', the precondition of making any application under Clause-18.3 for appointment of arbitrator is resolution of dispute by the mediation panel on the request of the aggrieved party alleging violation of the agreement. As such, the application of the Petitioner under section 86(1)(f) of the Electricity Act, 2003 is misconceived and is liable to be rejected.



In view of the above facts and provisions of Power Purchase Agreement and legal position, the Respondent requested that petition was not maintainable before this Hon'ble Commission and liable to be dismissed.

UPPCL Interim Relief Application and LAPL Reply

5. In the meanwhile, on 6.5.2013, UPPCL filed an interim application requesting direction to the Petitioner to avoid any willful curtailment of capacity and to restore full generation in view of the power crises in the State till final disposal of the petition by the Commission.

6. LAPL filed rejoinder in subject petition and reply of interim relief application on 14.5.2013. In its reply, LAPL contested that without deciding the maintainability, the issue of interim relief may not be addressed. UPPCL protested the maintainability on the ground that when the recourse of dispute was available in the PPA itself, the Petitioner might not approach the Commission for specific relief without exhausting the provisions of PPA. The Petitioner, LAPL, defended the maintainability under section 86 (1) (f) by citing the Hon'ble Supreme Court of India order in case of Gujrat Urja Vikas Nigam Limited vs. Essar Power Ltd. 2008 ELR (SC) 0001. The Hon'ble Supreme Court of India had observed that section 86(1) (f) of the Act of 2003 was a special provision for adjudication of dispute between the licensee and the generating companies. Such disputes could be adjudicated upon either by the State Commission or persons to whom it is referred for arbitration. UPPCL, on the basis of Hon'ble Supreme Court decision, had put forth their objection stating that the question before the Hon'ble Supreme Court of India was whether application under section 11 of the Arbitration Act, 1996 was maintainable in view of statutory specific provisions contained in the



Electricity Act, 2003. UPPCL had further added that the only question before the Hon'ble Supreme Court of India was whether the High Court had the power under section 11 to appoint the arbitrator in such a situation or not.

Decision of the Commission on Interim Relief and Maintainability

7. 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.



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8. 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.

 9. 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 recourse 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.
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10. 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.
 11. Regarding the interim relief sought by UPPCL requesting direction to the Petitioner to avoid any willful curtailment of capacity and to restore full generation till final disposal of the petition, the Commission ruled that in view of the power crises in the State, there must not be any willful curtailment of capacity by generating company so that the power crises might not worsen. In tandem, UPPCL was required to ensure timely payments to LAPL for the supplied power as per the PPA. With this, the application of UPPCL on interim relief was also disposed of as above.

UPPCL Petition no 891 of 2013

12. In the meanwhile, UPPCL had also filed a petition no 891 of 2013 on 21.5.2013 challenging the Lanco's termination notice dated 24.1.2013 and buy out notice dated 11.2.2013. As this petition was in continuation of subject petition, the Commission considered clubbing this petition with the subject petition vide order dated 23.5.2013.

Hearing dated 29.11.2013

13. On 29.11.2013, the Hon'ble Commission further heard both the parties. LAPL once again detailed the intricacies of the issues including the problems faced by them in running the plant, their financially deteriorating condition and viability on account of non availability of quality coal and inordinate delay in clearing the dues by UPPCL. LAPL requested that since the termination notices had already been served on UPPCL, therefore, a sustainable tariff may be allowed



by the Hon'ble Commission. UPPCL, opposed the termination notices and submitted that UPPCL requires power for the consumers of the State and requested Hon'ble Commission to take an appropriate view in the matter to resolve the uncertainty and to ensure regular supply to the State. The Commission enquired that under which provision of the Electricity Act or the relevant regulation the Commission can entertain prayer for a sustainable tariff especially when the plant has been setup through bidding process under section 63 of the Electricity Act, 2003. The Commission also enquired as to what would be the mechanism for deciding the sustainable tariff, if any? The Commission ruled that the issues of termination of PPA and determination of sustainable tariff, if any, should be decided together.

14. After hearing both the parties, the Commission vide its order dated November 29, 2013 directed the parties to apprise the Commission in writing as to under which provision of the Electricity Act, 2003 (hereinafter "2003 Act") and/or other relevant regulations, this Hon'ble Commission can entertain a prayer for a sustainable tariff especially when plant has been set up through bidding process under Section 63 of the 2003 Act and also the mechanism for deciding the sustainable tariff. The Commission directed M/s Lanco Anpara Power Limited and UPPCL to file their written arguments within fifteen days. It was further directed that the written arguments must accompany with their categorical and detailed reply on the questions raised above by the Commission which are essential to proceed in the matter.

LAPL's written submission dt 7.12.2013

15. In its written submission dated 7th December, 2013, LAPL has justified the termination notices and submitted that it is clearly in accordance with the terms of PPA especially the terms of Article 13.3.1 which inter alia states as follows:



“An Indian political event means any of the events or circumstances, or combination of events and circumstances, referred below occurring in India or directly involving India which result directly or indirectly in the seller’s performance of its obligations being prevented, hindered or delayed or in the Availability Factor of the Power Station being reduced but only to the extent that such events and circumstances are not a lawful and reasonable response to the default, neglect or other wrongful act of the Seller, its employees or the Seller’s Contractors and their consequences are beyond the Seller’s reasonable control.”

LAPL has added that Article 13.6 lays out the process for termination on occurrence of an Indian Political Event. Article 13.6.1 specifically provides that if the Seller’s performance of its material obligations under the PPA is being prevented, hindered or delayed or the Average Availability Factor of the Plant is reduced below 65% in any period of 270 consecutive days, either party may elect to terminate the PPA. Article 13.6.1 is extracted below:

“13.6.1 If the Seller’s performance of its material obligations is significantly prevented, hindered or delayed or the average Availability Factor of the Power Station is less than sixty five (65) percent in any period of two hundred and seventy (270) consecutive days as a result of Indian Political Events, any Party may elect in a written notice to the other Parties to terminate this Agreement and require the Project to be sold to the Buyers, in accordance with Article 13.6.2”

Accordingly, LAPL has submitted that it has acted in terms of its rights under Article 13.3.1 read with 13.6, whilst terminating the PPA. LAPL has further submitted that in respect of this Hon’ble Commission’s specific directions at paragraph 8 of the order dated November 29, 2013, in addition to requesting this Hon’ble Commission’s intervention for payment of outstanding by the Buyers, LAPL has also prayed for the following:

Prayer (b) – Pass an order determining new tariff for the supply of power from the Anpara ‘C’ plant to Respondents (Buyers) till the successful completion of Buy-out of the plant.



Prayer (c) – In the alternative, pass an order determining new tariff for the supply of power from the Anpara ‘C’ plant to Respondents (Buyers), instead of the 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

LAPL submitted that through the above quoted prayer (c) it has already submitted its willingness to operate the Project in the larger public interest in case the Buyers, for any reason whatsoever, are not willing to complete the Buy-out of the Project post the termination of the PPA, provided a new Tariff is determined and granted by this Hon’ble Commission keeping in view the viability of the plant also taking into account the accumulated losses incurred by the plant. LAPL would also like to highlight that as a responsible project developer fully cognizant of larger public interest, it is continuing the operations of the Plant uninterrupted despite even incurring losses on account of these operations resulting in near wipe off of the entire Net Worth the project company.

Keeping in view all of the facts and the relevant laws as stated above and the submissions made by the Buyers during the hearing held on November 29, 2013 before this Hon’ble Commission, LAPL reiterated its stand that it is willing to operate the Project provided a new Tariff is worked out for the Project.

16. LAPL has further submitted that the Project tariff determined under Section 63 of the 2003 Act has become redundant. Accordingly, LAPL has submitted that for any power procurement by UP DISCOMS from the Anpara ‘C’ Plant whether operated by the Buyers post Buy-out or by LAPL as an alternative to the Buy-out, can only be at a new Tariff as may be determined by this



Hon'ble Commission exercising the exhaustive powers entrusted to it in this regard, as submitted below;

- a. LAPL has submitted that State Electricity Regulatory Commissions, in exercise of their powers under Section 86(1) (b) of the 2003 Act are empowered to regulate purchase of electricity by distribution licensees within the state. This includes regulation of the price at which such electricity shall be procured from generating licensees through power purchase agreements for distribution and supply within the state. Relevant portion of Section 86(1) (b) of the 2003 Act is extracted herein-below for the sake of convenience:

“Section 86. (Functions of State Commission): --- (1) *The State Commission shall discharge the following functions, namely: -*

- (a)
(b) *regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*
....”

- b. LAPL has submitted that a bare perusal of the above quoted provision clearly indicates that this Hon'ble Commission has the power to regulate any and all purchase of electricity or procurement process within the State of UP by the Buyers, including the price at which electricity is to be procured from Anpara 'C'.
- c. LAPL has further submitted that in addition to having extensive powers to regulate the procurement of electricity within the State of UP, this Hon'ble Commission is also mandated 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 grows in a healthy manner.



This is clearly discernible from the 2003 Act itself, the long title of which provides as follows:

“An Act 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, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.”

LAPL has submitted that the long title of the 2003 Act as quoted above clearly provides for the objectives of the 2003 Act and sets up the regulatory commissions to fulfill the aspirations of the 2003 Act. This Hon'ble Commission is accordingly mandated under the 2003 Act to ensure that the objectives of the 2003 Act are fulfilled in letter and spirit.

- d. LAPL has also submitted that the above interpretation also finds support in the Ld. Attorney General of India's opinion dated August 7, 2012 rendered to the Forum of Regulators. In the said opinion, the Ld. Attorney General observed as follows:

“The Long Title of the Act emphasizes measures for the development of the electricity in the forefront. One way of developing the electricity industry, as mentioned in the Long Title, is to promote generation, transmission, distribution and use of electricity in the country which needed a boost in the electricity supply. It also talks of supply of electricity to all areas which can only take place if there is a boost in generation, transmission and distribution. At the same time, the interests of the consumers has to be taken into account. Rationalization of electricity tariff is a must. All this has to be done by the Appropriate Commission.”

[emphasis supplied]

- e. LAPL then submitted that the said statutory mandate to balance the interests of all stakeholders also finds a clear mention in the National



Tariff Policy framed by the Central Government under Section 3 of the 2003 Act, relevant part of which provides as follows:

“1.3. It is therefore essential to attract adequate investments in the power sector by providing appropriate return on investment as budgetary resources of the Central and State Governments are incapable of providing the requisite funds. It is equally necessary to ensure availability of electricity to different categories of consumers at reasonable rates for achieving the objectives of rapid economic development of the country and improvement in the living standards of the people.

1.4. Balancing the requirement of attracting adequate investments to the sector and that of ensuring reasonability of user charges for the consumers is the critical challenge for the regulatory process. Accelerated development of the power sector and its ability to attract necessary investments calls for, inter alia, consistent regulatory approach across the country.”

[emphasis supplied]

In view of the above, LAPL has submitted that taking guidance from the above-mentioned provisions of 2003 Act, , the opinion of the Ld. Attorney General of India and the National Tariff Policy, the following inferences emerge:

- i. Under the scheme of the 2003 Act, the Appropriate Commissions have a statutory mandate to *inter alia* ensure that the interests of all stakeholders are adequately protected and balanced.
- ii. The 2003 Act equips the Appropriate Commissions with adequate statutory powers to enable them to effectively discharge their functions. These powers include amongst others, Sections 79 and 86 for the Central and the State Commissions respectively.



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- iii. That Sections 79 and 86 as the case may be, amongst others, empower the Appropriate Commissions, in larger public interest, to intervene in matters relating to tariff and allow them to deliberate upon tariff issues.
 - iv. That the above power of the Appropriate Commissions to intervene in matters relating to tariffs is exhaustive and needs to be widely construed.
 - v. That once the Appropriate Commission is of the view that larger public interest and its own statutory mandate require it to do so, such Appropriate Commission may then intervene in a situation which requires its intervention.
 - vi. Whilst intervening, the said Appropriate Commission may mould the relief(s) in the manner befitting the facts and circumstances of the case at hand and by exercising the discretion vested upon them under the 2003 Act.

In addition to the above wide ranging powers vested with the Hon'ble Commission as mentioned above, LAPL has also invited the attention of the Hon'ble Commission to the PPA provision regarding determination of new Tariff when PPA comes to an end and Buyers' express willingness to procure power for an extended period of time, as enshrined in Article 2.3.2 of the PPA. This provision underscores the understanding of the parties regarding a mechanism where upon the expiry of the PPA, the parties may extend the term of the PPA at a tariff to be mutually decided. However, in the event the parties cannot agree upon a mutually acceptable tariff, the PPA provides that the tariff for the extended period shall be as decided by this Hon'ble Commission whose orders in this regard shall be final and binding upon the parties. In other words, LAPL has submitted that the understanding



of the parties is that in the event the PPA comes to an end and the parties choose to extend the same, this Hon'ble Commission has the power to determine tariff for such an extended period.

LAPL has further submitted that taking a cue from the said provisions of the PPA, this Hon'ble Commission may, in view of the expiry of the PPA as a consequence of the termination; determine the tariff, which tariff shall be final and binding upon the parties. LAPL has submitted that even though the terms of the PPA may not be strictly applicable in such a situation, this Hon'ble Commission may however derive the parties' understanding from the same and exercise its jurisdiction to ensure that the interests of all the stakeholders are adequately protected and balanced and that the sector as a whole does not suffer.

Further, LAPL has submitted that since the State of UP is willing to continue buying power from the Plant post termination also, wherein and since LAPL is willing to supply the same (provided there is a new Tariff), this Hon'ble Commission may be pleased to determine the new tariff for the Plant in accordance with the provisions of the 2003 Act and the applicable regulations framed there under by this Hon'ble Commission as mentioned in the aforesaid paragraphs. LAPL has further submitted that those aforesaid mechanism of new Tariff determination is not only in conformity with the provisions of the 2003 Act and the Tariff regulations and norms framed there under by this Hon'ble Commission but also complies with the understanding of the parties as captured in Article 2.3.2 of the PPA itself.

LAPL has lastly submitted that this Hon'ble Commission may exercise its jurisdiction under amongst others, Section 86 of the 2003 Act to determine a new tariff in accordance with law.



UPPCL's written submission dated 9.1.2014

17. In compliance to the Hon'ble Commission's order dated 29.11.13, UPPCL has filed submissions dated 9.1.2014 as follows:

- (i) That the State of Uttar Pradesh for the purposes of setting up a generating plant at Anpara, authorized U.P. Rajya Vidyut Utpadan Nigam Limited (hereinafter referred to as the 'UPRVUNL') for the purposes of floating the bids on global basis. The said plant was to be established on build, own and operate basis by the successful bidder.
- (ii) That in pursuance of the directions of the State Government, 'UPRVUNL' notified Request for Proposal (hereinafter referred to as the 'RFP') inviting bids for the said purpose.
- (iii) That the aforesaid Request for Proposal which included Model Power Purchase Agreement was duly approved by the U.P. State Regulatory Commission (hereinafter referred to as the 'Commission') vide its order dated 19.10.2005.
- (iv) That after completion of the bid process, the bid of the Respondent was finally selected and Letter of Acceptance ('LOA') was issued by the 'UPRVUNL' on 27.9.2006.
- (v) That consequent to the selection of the Respondent and consequent to issuance of the acceptance letter of 'UPRVUNL', a Power Purchase Agreement ('PPA') was signed between the DISCOMS of Petitioner and the Respondent on 12.11.2006.
- (vi) That on the same day i.e. on 12.11.2006, an agreement namely "Facilities and Services Agreement" for utilizing the existing common facilities was signed between the Respondent and UPRVUNL .



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- (vii) That on the request of the Respondent, capacity of the Project which was initially for 2x500 MW was enhanced to 2x600 MW by the Government of U.P. vide its order dated 20.8.2007.
- (viii) That it may be submitted here that the State Regulatory Commission vide its order dated 20.10.2008 also approved the aforesaid enhancement of the capacity of the project.
- (ix) That in the meantime, Ministry of Coal, Government of India vide its notification dated 18.10.2007 issued a New Coal Distribution Policy (hereinafter referred to as the 'NCDP').
- (x) That after execution of the Power Purchase Agreement and after the notification by the Ministry of Coal, Government of India on 18.10.2007, the State Regulatory Commission approved the Power Purchase Agreement vide its order dated 31.12.2007.
- (xi) That it is relevant to mention here that due to change in configuration from 2x500 MW to 2x600 MW, Standing Linkage Committee, Ministry of Coal, authorized Northern Coal Field Limited for issuance of Letter of Acceptance on 17.12.2008 for linkage coal for additional 200 MW capacity and consequently the Northern Coal Field Limited issued Letter of Acceptance for 2x600 MW project for 4.182 MTPA (Million Ton Per Annum) coal (Grade 'C'/E) on 1.7.2009.
- (xii) That after the notification of the Government of India, Ministry of Coal dated 18.10.2007 and after commissioning of the plant, Fuel Supply Agreement between the Respondent and Northern Coal Field Limited was signed on 24.4.2012.
- (xiii) That as per the provisions of the Fuel Supply Agreement it was agreed between the parties that coal will be made available to the Respondent from different mines of Northern Coal Field Limited by Rail/MGR/ Road Transport.



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- (xiv) That the said Fuel Supply Agreement took note of the circumstances arising out of the New Coal Distribution Policy.
- (xv) That the 'PPA' is a complete code in itself defining responsibilities and obligations of contracting parties and therefore ,has taken special care with respect to remedy provided to the parties in the event of occurrence of any Indian Political Event because of 'Change in Law' and the specific procedure is provided for this specific event in the agreement . As per the definition of Indian Political Events in the 'PPA', as per Clause 13.3.1(iii) 'Change in Law' is one such Indian Political Event. New Coal Distribution Policy was notified on 18.10.2007 which is said by the Respondent to be 'Change in Law' and because of which it is said that the project of the Respondent is adversely affected.
- (xvi) That the remedies provided to the parties for this specific event is provided in the 'PPA' and for demonstrating the contention , a few provisions of 'PPA' would be relevant to be cited as follows :-

"13.1.1(iii) Change in Law:

The Seller shall be entitled to apply for relief under and in accordance with Article 14.1 in relation to any increased costs or reductions in revenue attributable to a Change in Law."

"14.1 Change-in-Law

If directly due to one or more Change in Law:

(a) the Seller's revenue or costs directly attributable to the Project are increased or decreased by not less than fifty (50) lakh Rupees in a Contract Year; or

(b) the Seller is required to undertake capital expenditure directly attributable to the Project of not less than fifty (5) lakh Rupees in order to perform its obligations or exercise its rights pursuant to this Agreement.,

Then this Article 14 shall apply.



Provided that the amounts mentioned in sub-articles (a) and (b) above shall escalate from year to year based on the Indian Wholesale Price Index (WPI)."

"14.2.1 If the Seller is affected by a Change in Law in accordance with Article 14.1 wishes to claim a Change in Law under this Article 14 it shall give notice in accordance with Article 14.2.3 to the Buyers of such Change in Law as soon as reasonably practicable after becoming aware of the same."

"14.2.2 Notwithstanding Article 14.2.1, the Seller shall be obliged to serve a notice to the Buyers under this Article 14.2 if it is beneficially affected by a Change in Law. Without prejudice to the factum of materiality of other provisions contained in this Agreement, the obligation to inform the Buyers contained herein shall be material for the purposes of Article 15.1(m) of this Agreement."

"14.2.3 Any notice served pursuant to this Article 14.2 shall provide, amongst other things, precise details of :

- (a) the Change in Law; and*
- (b) the effects on the Seller of the matters referred to in Article 14.2.3(a)."*

"14.3.1 Within sixty (60) days of a notice being served pursuant to Article 14.2, the Parties shall meet and endeavour to agree on what amendment needs to be made to this Agreement through the Monthly Tariff Payment to provide that the Seller is put into the same financial position as it would have been but for the and immediately prior to the occurrence of the Change in Law."

"14.3.2 Upon reaching agreement on the amendment required to this Agreement pursuant to Article 14.3.1 the Parties shall execute such amending agreement to give effect to that agreement within thirty (30) days thereof."

"14.3.3 If within sixty (60) days of the commencement of the meetings between the Parties pursuant to Article 14.3.1:

- (a) the Parties are unable to reach agreement on the amendment required pursuant to Article 14.3.1; or*
- (b) having reached agreement on the amendment required pursuant to Article 14.3, no amending agreement has been executed within a further thirty (30) days of such agreement.*



any Party may refer any areas of disagreement to be settled in accordance with Article 18.2 so that the necessary amendment to this Agreement pursuant to Article 14.3.2 is executed. The Parties shall execute such amending agreement so determined in accordance with Article 18.2 as soon as reasonably practicable after the recommendation under Article 18.2 is received.”

- (xvii) That a perusal of the above provisions would amply demonstrate that a specific and complete relief has been provided in the 'PPA' for redressal of any grievance occurring because of the 'Change in Law'/Indian Political Events so that the Seller is put into the same financial position as it would have been but for the and immediately prior to the occurrence of the Change in Law.
- (xviii) That it may be mentioned that preliminary objections and counter Affidavit on the Petition no. 871/2013 filed by M/s LAPL has been submitted. A Petition no. 891/2013 has also been filed by UPPCL challenging the validity of pre- termination notice and termination notice. After detailed arguments during hearing on 27-05-13 written statements have been submitted. Therefore without prejudice to the legal position and the averments made during the course of proceeding, UPPCL now take up the specific issues as directed at para-8 in UPERC order dated 29-11-13 hereunder :

A- In the present case it has been established fact that tariff based bidding was done for setting up the plant. The tariff discovered through transparent process of bidding has been adopted by Commission under section-63 of Act. The bid tariff as approved and adopted is therefore applicable for the term of Agreement until its termination or expiry of term. Any other tariff



could be considered during extended period after expiry of term as mentioned at cl-2.3.2 of PPA.

B- The Power Purchase Agreement dated 12.11.2006 which was executed between the parties was approved by the Commission on 31-12-07 in Petition No. 509/2007. The New Coal Distribution Policy announced on 18-10-07 after execution of the Power Purchase Agreement on 12.11.2006 comes within the definition of 'Change in Law' and it is this change in policy of coal distribution, which according to M/s LAPL, has affected functioning of plant for which it is seeking its remedy. The Power Purchase Agreement itself provides complete mechanism including the remedy in its Article-14 for dealing with occurrence of change in law so that financial position of seller is not adversely affected and the Seller is put into the same financial position as it would have been but for the and immediately prior to the occurrence of the Change in Law. Therefore, the amendment in monthly tariff in order to mitigate the effect of change in law could be admissible in accordance with provisions of PPA.

C- It is relevant to attract on the few clauses of UP Electricity Reforms Act 1999 in respect of " Functions of commission" which are reproduced as follows :

Cl-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 the consumers;"

Cl-10 (p)

To regulate the assets, properties and interest in properties relating to the electricity industry in the State in such manner as to safeguard the public interest;



As UP state needs power to meet the increasing demand of consumers in state, therefore, the UPPCL has humbly requested to resolve the impediments in light of the aforesaid vested powers to them safeguarding the larger interest of consumers in State.

Hearing dated 31.1.2014

18. During the hearing, Sri R.K. Roy of LAPL quoted Hon'ble APETL's order dated 31.3.2010 in the matter of BSES Rajdhani Power Ltd. Vs. DERC regarding the issue that whether the compliance with the competitive bidding process as envisaged in clause 5.1 in the Nation Tariff Policy , 2006 is mandatory for the procurement of power by distribution company. In the judgement Hon'ble APTEL has concluded that the approval of the State Commission, vide order dated 30.4.2009, to the PPA entered between the parties without going through the competitive bidding process was perfectly valid in law. Sri Roy added that section 62 and section 63 of the Electricity Act, 2003 are not mutually exclusive and rather section 63 is only an extension of section 62. Sri Roy submitted that considering their termination of PPA, the Hon'ble Commission may consider a new tariff under section 62. Sri S.P. Pandey of UPPCL reiterated that the PPA itself provides compensation by way of incremental tariff in case of change in law and therefore the compensation may be considered within the PPA. Sri Roy added that the payment security mechanism, as to be provided by the UPPCL as per the PPA, is still not adequate. UPPCL reiterated its written submissions.

19. Hearing both the parties at length and considering the facts of the case, long term mutual relationship of the parties due to the PPA, the difficulties arisen in the operation of PPA and the interest of the consumers of the State, prior to



going into details, the Commission 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. With this the Commission decided to conclude the hearings in the matters.

LAPL Written Submissions dated 14.2.2014 and 20.2.2014

20. As directed by the Commission, LAPL has filed affidavit on 14.2.2014 reiterating the coal constraint and non-establishment of payment security mechanism alongwith the consequences as below:

- 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 has further submitted that keeping in view all of the above and the submissions made by the UPPCL during the hearing held on 31st January



2014 before the Hon'ble Commission regarding the importance of supply of power from this Project for the State of UP, they propose to consider the following options:

- 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 has 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.

UPPCL's Written Submission dated 5.3.2014

21. UPPCL has already requested to the Hon'ble Commission to resolve the impediments to ensure the power and to safeguard the interests of the consumers of the State. UPPCL has mentioned that NCDP was announced only after the signing of PPA which has affected LAPL. The PPA itself provide complete mechanism including the remedy in its article 14 so that financial position of LAPL is not adversely affected and they may be put into the same financial position as they would have been but only under the provisions of PPA. UPPCL has accepted that amendment in monthly tariff could be admissible within the provisions of PPA. In letter dated 5.3.2014, UPPCL has categorically mentioned that they do not have any objection if the Hon'ble 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.

22. In view of above acceptance in their written submission's by both the parties, the Commission is of the opinion that with 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.

23. Here, the attention of the Commission has also been drawn by the parties towards the case of Adani Power vs Mahavitran (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.

Adani Power vs Mahavitran (MEDCL):

Adani Power Maharashtra at Tiroda had in 2008 entered into an agreement with the state utility to supply power from its two units -- 2 and 3 --



with a total capacity of 1,320 mw at a levellised tariff of Rs 2.64 per unit. But in 2009, the Union Environment Ministry cancelled the term of reference (ToR) for Lohara blocks, which covered almost 75 per cent of the fuel needed for supply of power under the PPA, resulting in non-availability of fuel. Adani Power had sought from concerned ministries an alternate block, or revocation of earlier cancellation of ToR. The company had also requested Mahavitaran to revise the tariff in such a way that the impact of change in circumstances was mitigated. Failing to get response from Mahavitaran, the company moved the MERC.

MERC rejected the petition from Adani Power seeking revision of its PPA with Mahavitaran to hike electricity tariff. It directed both the parties to constitute a panel to evaluate financial impact due to non-availability of coal from Lohara blocks, in order to determine compensatory tariff. Dismissing the Adani Power's petition, Maharashtra Electricity Regulatory Commission has said: "As the power purchase agreement (PPA) was based on a bid process, the responsibility of fuel tie-up rests only with Adani Power... the sourcing of coal from the block was an arrangement made by the company without involvement of Mahavitaran. The PPA does not include any condition that it can be terminated if coal from Lohara coal blocks is not available." MERC directed Adani Power and Mahavitaran to form a committee to look into the details of the case, evaluate the financial impact of non-availability of coal from Lohara blocks and accordingly determine a compensatory charge to be provided to the producer over and above the tariff agreed in the PPA, for a limited period till the coal situation eases.

The Maharashtra Electricity Regulatory Commission has decided above petition no 68 of 2012, Adani Power vs MEDCL, vide order dated 21.8.2013. The relevant portion of the order is as follows:

Quote

"59. APML has terminated the PPA effective from 23 February, 2011 citing force majeure events and invoking the provisions under clause 3.3.3 and 12.3 of the PPA. MSEDCL has not accepted the event as



force majeure and has refuted the termination claimed by APML. Under the present petition APML has approached the Commission for adjudication of dispute under Section 86 of the EA-2003 with respect to the PPA signed between APML and MSEDCL on 8 September, 2008. APML has requested the Commission to direct MSEDCL to return the performance guarantee submitted as per the terms of the PPA or to consider a revision in Tariff and sign a new PPA.

.....

100. As regards the arguments of APML that the PPA is void as it has been executed based on a mistake of fact, the Commission notes that both parties signed the PPA on 8 September, 2008 after obtaining the approval of the draft PPA. Subsequently APML has made considerable progress in the Project and has obtained the coal linkages based from MoC and CIL / CIL subsidiaries citing the PPA. The MoC / CIL does not consider request for coal linkage without a valid PPA. Further the Commission notes that the adoption of Tariff, per se, does not principally affect the bargain, which resulted in PPA (valid contract) between the two parties i.e., MSEDCL and APML. Moreover the Tariff for the PPA has already been adopted vide Order dated in Case No. 24 of 2013. Therefore, the argument of APML regarding the PPA being void due to a mistake of fact at the time of execution is not tenable.

101. Therefore, the Commission concludes that other grounds of termination of the PPA dated 8 September, 2008 cited by APML are devoid of any merit and hence rejected.

.....

139. the Commission has decided to form a Committee to look into the details of the case, evaluate the impact of withdrawal of ToR on Unit 2 and 3 of Tiroda TPS and accordingly determine a compensatory charge to be provided to APML, if required. The compensatory charge agreed should be over and above the Tariff agreed in the PPA and should be admissible for a limited period till the event which occasioned such compensation continues to exist and should be subject to the periodic review by the parties to the PPA.

140. Accordingly, the Commission directs APML and MSEDCL to constitute a Committee within 10 days from the issuance of this Order. The Committee shall consist of Principal Secretary (Energy), Government of Maharashtra/Managing Director of MSEDCL, Chairman of APML, or their nominees, an independent financial analyst, an independent technical expert and an eminent banker of repute. The



financial analyst, technical expert and the banker will be selected based on mutual consent between APML and MSEDCL.”

Unquote

Adani Power Vs. Uttar Haryana Bijli Vitaran Nigam Ltd. & others

In this case, the Central Electricity Regulatory Commission, in petition no. 155/MP/2012, Adani Power Vs. Uttar Haryana Bijli Vitaran Nigam Ltd., Dakshin Haryana Bijli Vitaran Nigam Ltd. & Gujarat Urja Vikas Nigam Ltd., in the matter of application under Section 79 of the Electricity Act, 2003 for evolving a mechanism for regulating including changing and/or revising tariff on account of frustration and/or of occurrence of “force majeure” (Article 12) and/or “change in law” (Article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government, has taken a view.

The petition was filed for revision of tariff discovered through the bidding process. The coal supplies were affected due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government as the coal supplies were also to be made from Indonesia. The petition was filed on account of frustration and/or of occurrence of “force majeure” and/or “change in law” events under the PPAs. CERC has not accepted the events as ‘force majeure’ and/or ‘change in la’ but recognized the ‘hardship’ faced by the generator.

The salient points of the CERC order dated 2.4.2013 are as follows:

Quote

“73. It has been vehemently argued by the Respondents that change in price cannot be the cause for frustration of contract. In our view, each case should be dealt with on its own merit. While it is expected that the parties to the contract would factor all possible contingencies including price escalation, there are certain events which are beyond the contemplation of the parties and if the impact of such events are not taken into account, it would render the contract unworkable. If the price escalation is on account of some event which was beyond the contemplation of the parties, then the impact of price variation needs to be duly considered and addressed in order to enable the parties to



continue to perform their obligations under the contract. Hon'ble Supreme Court in Continental Construction Company Limited Vs. State of Madhya Pradesh [AIR 1988 SC 1166] has held as follows:

“The question about specific reference on a question of law was examined by this Court recently in the case of Tarapore and Company Vs. Cochin Shipyard Limited, Cochin (1984)2 SCC 680; AIR 1984 SC 1072). There it was observed that if the agreed fact situation, on the basis of which agreement was entered into, ceases to exist, an agreement to that extent becomes otiose. If rates initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that the contractors claim for compensation for the excess expenditure due to price rise could not be turned down on the ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. Reliance was placed very heavily on this decision on behalf of the Appellant before us. It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in Tarapore and Company case. That made all the difference. The basis of bargain between parties in both these cases were entirely different.”

Further, in the case of Tarapore and Company Vs. Cochin Shipyard, Cochin (1984)2 SCC 680, the Hon'ble Supreme Court inter alia held as follows:

“These clauses were presumably referred to in to context of an argument that the price escalation clause does not cover the claim for compensation for additional expenditure on imported plant and machinery and technical know-how, because the contract substantially provides for the same to be supplied by the contractor. In our opinion, this over-simplification of the clauses of the contract involving works of such magnitude is impermissible. The whole gamut of discussions, negotiations, and correspondence must be taken into consideration to arrive at a true meaning of what was agreed to between the parties.”

74. The principles that emerge from the above judgements is absence of a clause for price escalation in the contract cannot be the ground for denying the compensation on account of actual expenditure on account of price rise. Therefore, if the actual cost of production of electricity goes beyond what was agreed in the PPAs, compensation should not be denied merely on the ground that there is no provision in the PPAs. Therefore, in our view, ways and means need to be found to compensate the Petitioner for the loss or additional expenditure incurred by it on account of procurement of coal



75. The Statement of Objects and Reasons accompanying the Electricity Bill 2001, which led to enactment of the Electricity Act inter alia provides that

“1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State governments can create a State Electricity Regulatory Commission. States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts.

“3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing

the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holder and experts.”

76. The Statement of Objects and Reasons makes it clear that the Electricity Regulatory Commissions at the Centre and in the States have



been established as independent institutions to discharge the functions assigned under the statutes under which they have been established. Another objective in accordance with the Statement of Objects and Reasons is to encourage private sector participation in generation, transmission and distribution of electricity. The objects of the Act are further set out in the long title, reproduced below:

“An Act 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, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.”

77. From the long title of the Act it follows that its objectives include taking of measures conducive to development of electricity industry, promotion of competition, protection of the interest of the electricity consumers as also the rationalisation of the electricity tariff.

78. The issues raised in the present context relate to tariff. The provisions relating to determination of tariff are contained in Part VII of the Act, comprising Sections 61 to 66. The tariff for the commercial activities of generation, transmission, distribution and supply of electricity undertaken under the Act is determined by the Appropriate Commission by specifying the terms and conditions for the purpose as laid down in Section 61. The factors that guide the Appropriate Commission while specifying the terms and conditions for determination of tariff have been prescribed under Section 61 which reads as under:

“61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*



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- (e) *the principles rewarding efficiency in performance;*
 - (f) *multi year tariff principles;*
 - (g) *that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;*
 - (h) *the promotion of co-generation and generation of electricity from renewable sources of energy;*
 - (i) *the National Electricity Policy and tariff policy:*
Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

79. From clause (d) of Section 61 it is seen that safeguarding of the interest of the consumers of electricity is one of the factors to be considered by the Appropriate Commission while specifying the terms and conditions. However, while safeguarding the interest of the consumers, the Appropriate Commission has to ensure recovery of cost of generation, transmission, distribution and supply of electricity in a reasonable manner. In other words, in accordance with Section 61, the Appropriate Commission has to strike a balance between the consumers' interest and the investors' (generating company, transmission licensee and distribution company) interest, with emphasis on the need for applying commercial principles in conducting the activities of generation, transmission, distribution and supply of electricity.

.....

82. The common threads running along the length and breadth of the statutory scheme under the Act and the statutory instruments framed thereunder are the protection of the consumers' interest and ensuring adequate return on the investments in the sector. The consumers' interest is protected not only by fixing competitive tariff but it is equally imperative to ensure continuous, uninterrupted and reliable supply of electricity. For the purpose of qualitative supply of electricity, it is necessary that adequate investments are made for creating infrastructure for generation, transmission, distribution and supply of electricity and this is possible only when the investor gets adequate return on the investments made. Therefore, in the final analysis, the recovery of costs of the investors serves the consumers' interest by attracting investments in the sector by improving quality of supply of electricity to the consumers. Thus, twin objectives of protection of

consumers' interest and recovery of cost of services provided are complementary. All the authorities established under the Act, have to strive towards achieving these objectives. This Commission as the apex regulatory body for power sector has the additional responsibility for meeting the objectives of law.

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84. The Hon'ble Supreme Court has held in a number of cases that the power to "regulate" confers plenary power over the subject matter of regulation. The term 'regulate' is very wide. The Hon'ble Supreme Court in its judgments has interpreted the expression 'regulate' as under:

(a) Jiyajeerao Cotton Mills Ltd. Vs. M.P.Electricity Board 1989 SCC Supl.(2) 52

"The word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied."

(b) D.K. Trivedi & Sons Vs. State of Gujarat 1986 SCC Supl.20

"The word 'regulate' means 'to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings."

(c) V. S. Rice and Oil Mills & Others Vs. State of A.P. AIR 1964 SC 1781

"The word 'regulate' is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices."

(d) K. Ramanathan Vs State of Tamil Nadu & Anr. (1985)SCC (2) 116

"The word 'regulate' is variously defined as meaning to adjust; to order or govern by rule, method or established mode. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and the power must be regarded as plenary. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed."

85. The next question to be considered is the kind of relief that may be granted at this stage. Learned counsel for the Petitioner, based on

certain studies, conducted by World Bank and others argued that renegotiation and readjustment of contractual obligations in the case of long-term contracts is the internationally accepted norm since long-term contracts are considered to be incomplete in the sense that it is not possible for the parties to precisely and adequately foresee all future developments having implications on viability of such contracts. A reference to the various works/studies quoted by learned counsel has been made above while noting down his submissions. UNIDROIT principles recognise 'hardship' as the basis of renegotiation of the long-term contracts. The other study from which the sustenance was drawn by learned counsel for the Petitioner was by J. Louis Guasch. Learned counsel for the Respondents has submitted that the analysis in the study by J. Louis Guasch applied to future contracts only and not to concluded contracts.

86. Some of the relevant and important findings of John Stern and J. Louis Guasch quoted by the learned counsel for the Petitioner are recalled for taking a progressive decision by this Commission in introducing renegotiation:

- To revise the terms of contract, the parties must both agree to renegotiate its terms. If the renegotiation is unsuccessful, the contract collapses;
- All long-term contracts are incomplete and it is not always possible to imagine all possible contingencies; On the basis of experience in developing countries and in some continental European countries, it has been found that Governments often establish semi independent or independent monitoring and enforcement agencies who have the power to review and in particular to modify these contracts following a review instituted either by the buyer or by the seller;
 - *In the long-term contracts spreading over twenty one years and above, prices may need to be varied sharply in unpredictable ways because of major commodity price shocks and/or exchange rate crisis;*
 - *In many cases, the need for major renegotiations and the high rates of cancellation for concession contracts involving investment commitments represent major regulatory failures. There are no provisions for negotiation and absence of genuine independence to regulators to revisit the tariff;*
 - *External regulator could help align trust perceptions, for example, through dispute resolution methods, periodic and emergency reviews and so on;*
 - *Allowing some room for renegotiation and regulatory adoption may seem appropriate and socially desirable in the fact of new problems, changed circumstances and additional information and experience;*



- Opportunistic renegotiation should be discouraged in both existing and future concessions. The key issue is how to design better concession contracts and how to induce both parties to comply with the agreed upon terms of the concession to secure long term sector efficiency and vigorous network expansion;*
- Restoration of financial equilibrium should clearly specify the capital base on which the firm is allowed to earn a fair return;*
- Another element that needs to be very clearly stated in the financial equilibrium clause of the contract is the period of application. The period of application refers to the period of time over which the financial equilibrium is evaluated and in principle it could range from one year to life of the concession. Both these extreme points are inappropriate; A three to five year period seems more appropriate. The financial equilibrium should not bail the operator out for adverse realisations of normal commercial risk; When facing petitions for renegotiation, the sanctity of the bid contract must be upheld. The operator should be held accountable for its submitted bid. The financial equation set by the winning bid should always be the reference point and the financial equilibrium behind the bid should be restored in the event of renegotiation or adjustment;*
- Renegotiation should not be used to correct for mistakes in bidding or for overtly risky or aggressive bids.*

87. Though the study provides sufficient guidelines for renegotiation of all long-term contracts in the light of the international practice, we are not inclined to favour any re-negotiation of the tariff discovered through the process of competitive bidding as in our view, the sanctity of the bids should be maintained. The parties should not renegotiate the tariff discovered through the competitive bidding as that will bring uncertainty to the power sector and is prone to misuse. In our view, the parties should confer to find out and agree for a compensation package to deal with the impact of subsequent event resulting from the operation of Indonesian Regulations which has adversely affected performance under the PPAs while maintaining the sanctity of the PPAs and the tariff agreed therein. In other words, the compensation package agreed should be over and above the tariff agreed in the PPAs and should be admissible for a limited period till the event which occasioned such compensation continues to exist and should also be subject to periodic review by the parties to the PPAs.

88. Therefore, the Petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensation package to be called 'compensatory tariff' could be variable in nature commensurate with the



hardship that the Petitioner is suffering on account of the unforeseen events leading to non-availability of coal linkage or increase in international coal price affecting the import of coal which has affected its performance under the PPAs. As and when the hardship is removed or lessened, the compensatory tariff should be revised or withdrawn. In our view, this is the most pragmatic way to make the PPAs workable while ensuring supply of power to the consumers at competitive rates.

89. We are also conscious of our statutory responsibility to balance the interest of the consumers with the interest of the project developers while regulating the tariff of the generating companies covered under our jurisdiction. In our view, under the peculiarity of the facts of the case and keeping in view the interest of both project developer and consumers, there is a need to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over and above the tariff decided under the PPAs to mitigate the hardship arising out of absence of full domestic coal linkage and the need to import coal at benchmark price on account of Indonesian Regulations. Accordingly, we direct the Petitioner and the Respondents and the respective State Governments to constitute a committee within one week from the date of this order. The committee shall consist of the Principal Secretary (Power), Govt. of Gujarat / Managing Director of GUVNL and Principal Secretary (Power), Govt. of Haryana / Managing Directors of UHBVNL and DHBVNL, the Chairman of Adani Power Ltd. or his nominee, an independent financial analyst of repute and an eminent banker of the commensurate level. The nominees of financial analysts and banker should be selected on mutual consent basis. The Committee shall go into the impact of the price escalation of the Indonesian coal on the project viability and obtain all the actual data required with due authentication from independent auditors to ascertain the cost of import of coal from Indonesia and suggest a package for compensatory tariff which can be allowed to the Petitioner over and above the tariff in the PPAs.”

Unquote

The Commission's view

24. The Commission has gone into the facts of the case, perused the records and carefully considered the views expressed by Hon'ble CERC and Hon'ble MERC in the above two quoted cases. 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.

25. 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.

26. 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.
27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

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

(Indu Bhushan Pandey)
Member

(Meenakshi Singh)
Member

(Desh Deepak Verma)
Chairman

Place : Lucknow
Dated: 28.04.2014