

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Application seeking approval of the Commission on the Draft Power Purchase Agreement between UPCL & M/s GMR Chhattisgarh Energy Ltd.

In the matter of:

Uttarakhand Power Corporation Ltd.

... Petitioner

AND

In the matter of:

M/s GMR Chhattisgarh Energy Ltd.

... Respondent

CORAM

Shri Subhash Kumar Chairman

Shri C.S. Sharma Member

Shri K.P. Singh Member

Date of Hearing: October 15, 2015

Date of Order: November 06, 2015

The Order relates to the Petition dated 23.09.2015 filed by Uttarakhand Power Corporation Limited (hereinafter referred to as "Petitioner" or "licensee" or "UPCL") seeking approval of the Commission on the draft Power Purchase Agreement between the Petitioner and M/s GMR Chhattisgarh Energy Ltd. (hereinafter referred to as "Respondent" or "Generator") for procurement of power from coal based power plant of the above mentioned Respondents.

1. Background

1.1 The Petitioner vide its Petition dated 23.09.2015 had submitted draft Power Purchase Agreement for procurement of power from GMR Chhattisgarh Energy Limited seeking approval of the Commission. The Commission forwarded the copy of the Petition to the Respondent for submission of their comments on the same.

1.2 The Petitioner has submitted the petition under specific legal provisions of the Electricity Act, 2003 (Act) and the Regulations notified under it by the Commission. The specific legal provisions relied upon by the Petitioner are reproduced hereunder:

“(i) Section-86(1)(b) of the Electricity Act, 2003 which stipulates as follows:

“The State Commission shall discharge the following functions, namely:

(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;”

(ii) The Distribution and Retail Supply Licence issued by the Commission provides the following:

“5.1 The Licensee shall be entitled to:

(a) Purchase of otherwise acquire electricity from any Licensee on the tariffs and terms and conditions to be approved by the Commission;

(b) Purchase, import or otherwise acquire electricity from any generating company or any other person under Power Purchase Agreements or procurement process approved by the Commission.

5.2 The Licensee shall not without the general or special approval of the Commission:

(a) Purchase or import or otherwise acquire electricity under this Licence from any Person other than generating companies or any other person as per the purchase agreements or agreements approved by the Commission...

5.4

(a) The Licensee shall purchase the energy required by the Licensee for Distribution and Retail Supply in an economical manner and under a transparent power purchase or procurement process and in accordance with the Regulations guidelines, directions made by the Commission from time to time.

(b) In case of purchases of allocated share of electrical capacity and/or energy from Central Sector generation and inter-utility exchange of electrical capacity and or energy from other Regional Electricity Boards, such processes as are stipulated by the Central Electricity Regulatory Commission shall also be complied with, in addition to the directions and orders of the Commission.

(c) *An authorisation required from the Commission shall be granted when the Licensee has demonstrated to the Commission's satisfaction that:*

(i) *the additional electrical capacity and/or energy is necessary to meet the Licensee's service obligation in accordance with this Paragraph 5; and*

(ii) *the Licensee has examined the economic, technical, system and environmental aspects of commercially viable alternatives to the proposal for purchasing additional electrical capacity and/or energy and such examination has been carried out in a manner approved by the Commission.*

The restriction imposed in this paragraph 5.4 shall not be applicable to short term purchases (less than six months in duration), provided that such short term purchases are made in accordance with guidelines, if any, issued by the Commission and the details of such purchases shall be submitted to the Commission in the manner the Commission directs."

(iii) Regulation 39(3) of Uttarakhand Electricity Regulatory Commission (Conduct of Business) Regulations, 2014 specify as follows:

"The distribution licensee shall apply to the Commission for approval of the draft Power Purchase agreement that it proposes to enter into with the suppliers. The Commission may pass orders:

(a) *Approving the agreement; or*

(b) *Approving the agreement with modifications proposed to the terms of the agreement;*

or

(c) *Rejecting the agreement."*

1.3 Further, the Petitioner in the petition has stated that since it was the sole Distribution Licensee in the State of Uttarakhand, the jurisdiction for approving the Power Purchase Agreement (PPA) rests with the Commission. The Petitioner has also submitted that since the Commission in its Regulations has required the licensee to seek approval of the PPA, the Commission should admit the Petition and decide it after further deliberation.

1.4 The Petitioner has also submitted that the PPA which it proposes to enter into with the Respondent is for medium term for a period of three years. The Petitioner has submitted that the Respondent has offered to supply power at a particular tariff to which the Petitioner has agreed to. The correspondence between the two parties has been reproduced below:

“M/s. GCEL vide their letter dated 05-08-2015 had given their proposal to UPCL, which interalia states as:

“.....GCEL has proposed a single part tariff for the contracted capacity of 300 MW at UPCL periphery for a period of 3 years. The tariff is computed with fixed plant ex-bus yearly tariff plus the prevailing POC charges & losses as on the date of offer i.e. 05-06-2015.

<i>Sr. No.</i>	<i>Period</i>	<i>Tariff (Rs./Unit) (Ex-plant bus)</i>	<i>Transmission Charges & Losses (Rs./Unit)</i>	<i>Tariff at UPCL periphery (Rs./Unit)</i>
1.	<i>1st year</i>	3.25	0.45	3.70
2.	<i>2nd year</i>	3.35	0.45	3.80
3.	<i>Balance period</i>	3.45	0.45	3.90

”

- 1.5 The proposal dated 05.06.2015 was made from M/s GCEL wherein, the said generator has offered to supply 300 MW of power for a period of 3 years from unit#1 (685 MW) which has already been commissioned with generation/power supply commencing immediately from 01.10.2015.
- 1.6 In response to UPCL’s Petition dated 23.09.2015, the Respondent has submitted its comments vide its letter dated 14.10.2015. The Respondent has submitted that the Petitioner has evaluated all options for medium term procurement of power before entering into this draft PPA. On being enquired during the hearing, the Petitioner admitted that it has not followed the standard bidding guidelines of Ministry of Power, GoI in this regard and has not invited bids for medium term purchase of power.
- 1.7 The Respondent also requested the Commission to approve the medium term power purchase agreement and allow procurement of power as per the terms of the PPA as it was economical for the distribution company and has also been filed in accordance with the law. It is noted that as per preamble of the draft power purchase agreement, the tariff is to be as determined by this Commission.
- 1.8 The Commission held hearing on maintainability of the Petition on 15.10.2015. Further, the Respondent submitted that the power being offered by it was at a tariff which was lower than the prevailing market rates.
- 1.9 The Petitioner during the hearing reiterated the facts of the petition and contended that the Regulations provide for the distribution licensee to apply for approval of the draft PPA before the Commission and the Commission may pass Orders approving, modifying or rejecting the PPA. Hence, the Commission has the powers to either approve or reject the draft PPA entered

between the two parties.

- 1.10 Further, the Respondent argued that this Commission has jurisdiction for determination of tariff, as required in the PPA, as per provision in Section 64(5) of the Electricity Act, 2003.
- 1.11 The Commission enquired as to whether a transparent process was followed by the Petitioner for medium term procurement of power. Not responding to this the Petitioner and the Respondent kept on the harping on the issue that the Commission has jurisdiction for approval of the PPA hence a petition for approval of PPA and that the rates agreed by the parties are less than the prevailing rates and those expected to emerge from tariff determination by the Commission and hence economical for the licensee. The Petitioner also admitted during the hearing that the process of competitive bidding has not been followed for procurement of power by the Respondent. Further, the Petitioner also admitted that the Respondent would not be supplying the entire capacity, i.e. 685 MW for long term instead has offered to sell only 300 MW out of the 685 MW from Unit #1 already commissioned and ready for supply. The Petitioner stated that the power was being offered by the Respondent generator for a period of three years at the tariff which the two parties had mutually agreed.
- 1.12 Since the Respondent during the course of hearing had relied upon number of orders issued by the Hon'ble ATE, the Commission in its Order dated October 15, 2015 in the matter directed the Respondent to submit the Hon'ble ATE Orders relied upon by it.
- 1.13 The submissions were made by the Respondent on 20.10.2015. The Commission having gone through the reply submitted by the Respondent finds that the Respondent has relied upon Section 86(1)(b) and Section 64(5) of the Electricity Act, 2003 and has tried to support its contentions with the orders issued by the Hon'ble ATE.

2. Commission's Views & Decisions

2.1 Commission's jurisdiction

- 2.1.1 The Commission would first examine whether the Commission has the jurisdiction to approve the power purchase agreement entered into between the Petitioner and the Respondent.

A PPA is a legal document incorporating operational, technical & commercial conditions to be complied by the Parties concerned in accordance with the relevant provisions of the Act/Rules/Regulations for procurement of power by the distribution

licensee from the generators or the trading licensee. Approval of PPA by the Commission would ab-initio require approval of the terms and conditions incorporated in the PPA with regard to cost and quantum of power proposed to be procured by the distribution licensee besides approving other terms and conditions incorporated in the PPA in accordance with Act, Rules and Regulations. In this regard, Section 86(1)(b) of the Electricity Act, 2003 provides the following as one of the functions of the Commission:

“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;”

The Commission intends to examine whether as contended by both Petitioner and the Respondent, the petition accompanied by draft PPA need to be admitted and taken up for further deliberation. It is observed that while the PPA mentions that the tariff shall be, as may be determined by this Commission, the petition mentions that Respondent has offered to supply 300 MW at UPCL’s periphery for three years @ Rs. 3.70/kWh, Rs. 3.80/kWh and Rs. 3.90/kWh respectively from its already commissioned unit#1 of 685 MW.

On the issue of determination of tariff, as included in the draft PPA, it is seen that the proposed procurement is a medium term procurement and a part procurement of 300 MW out of the total proposed installed capacity of 1370 MW (2X685 MW). It emerges from the petition that both parties wish the Commission to determine the tariff. However, such determined tariff is proposed to be capped by the rates mentioned as aforesaid for each year of operation of this PPA.

2.1.2 During the hearing, the Petitioner was asked to submit the basis of tariffs arrived at by both the parties and proposed to be incorporated in the PPA to which the Petitioner as well as the Respondent submitted that the tariff has to be determined by the Commission under Section 62 of the Electricity Act, 2003. The parties have relied on Section 86(1)(b) of the Electricity Act, 2003 which gives the Commission powers to regulate power purchase including the price at which the electricity is procured by the distribution licensee from generating companies or licensees for distribution and supply within the State. The Respondent further submitted that even with respect to determination of tariff, as per Section 62 (1) (a), only a State Commission can determine the same and there is no other provision in the entire Electricity Act, 2003 which contemplates that a State Commission

cannot approve a PPA which is filed by a distribution licensee. The Respondent also stated that the approval of PPA would necessarily also require approval/ determination of tariff.

The Petitioner also submitted that since it was the sole distribution licensee in the State, UERC has the jurisdiction to approve the PPA and because it has submitted a petition for approval of the PPA the Commission is mandated to approve the Power Purchase Agreement.

The State Commission has plenary power under Section 86(1)(b) to regulate procurement of power as opposed to limited authority and approve the PPA between the parties. There is no ambiguity with regard to the power of Commission to regulate/ approve electricity purchase and procurement process of Distribution Licensee. This power of the Commission is unconditional and is not restricted in any way. Moreover from the plain reading of Section 86(1)(b) of the Act, it is amply clear that the Commission has to regulate the electricity purchase and procurement process including the price at which electricity shall be procured and the same does not infer that whatever is proposed by the licensee has to be approved by the Commission. Moreover as contended by both the parties, Section 86(1)(b) of the Act does not confer upon the Commission the power to fix tariffs as the same is governed by Section 62 and 63 of the Act.

Hence, while regulating the power purchase/procurement by the distribution licensee and approving the PPA in this regard, the State Commission would consider the tariff determined under Section 62 of the Act or adopt the tariff discovered through a competitive bidding process under Section 63 of the Act.

2.1.3 Section 63 of the Electricity Act provides that notwithstanding anything contained in Section 62 of the Act, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Thus, under Section 63, the State Commission has to adopt the tariff discovered through transparent process of bidding carried out in accordance with the competitive bidding guidelines issued by the Central Government.

The guidelines for determination of tariff by bidding process for procurement of power by the distribution licensee has been framed by the Central Government with the following objectives:

- i. Promote competitive procurement of electricity by distribution licensee;

- ii. Facilitate transparency and fairness in procurement process;
- iii. Protect consumer interest by facilitating competitive conditions in procurement of electricity;
- iv. Enhance standardization and reduce ambiguity.

2.1.4 Moreover in the case of Essar Power Ltd. Vs. Uttar Pradesh Electricity Regulatory Commission 2012 ELR (APTEL) 182. Hon'ble ATE held that:

"if the competitive bidding process has not been followed, the petition is required to be rejected."

In Essar Power case, the distribution company after having carried out the tariff based competitive bidding and having selected the qualified bidders proposed to enter into a PPA with a generating company who had not participated in the competitive bidding at a negotiated price lower than the lowest qualified bidder. The State Commission permitted the same. The Hon'ble Tribunal had set aside the order of the State Commission on the basis that such procurement from a party who had not participated in the competitive bidding is not as per the Government of India guidelines in this regard.

Admittedly in the present case, the competitive bidding process for procurement of power has not been carried out either as per the Government of India guidelines as per law or otherwise.

2.1.5 Another issue that needs to be looked into and also raised by the Respondent in its written submission is that the generator is not selling its full capacity to the state of Uttarakhand, even though the petition says so. It is selling only 300 MW out of 1370 MW of proposed capacity of the plant. At present one unit of 685 MW is operating. Whether in such a situation this Commission will have the jurisdiction for determination of tariff. It may be noted that the PPA entered is a medium term PPA and the generator is not offering its complete generation to the Petitioner and may offer it to other State distribution licensees when it gets buyers for the same. Relying on Section 64(5) of the Act, the Respondent has contended that the Commission has jurisdiction to determine tariff of its Generating Company. This apparently is a composite scheme of generation and hence, the jurisdiction of the State Commission is not attracted this issue has been dealt in later on in the Order.

2.1.6 Tariff determination process under Section 62 of the Electricity Act stipulates provisions for determination of the tariff by the appropriate Commission in accordance with the Tariff Regulations notified under Section 61 of the Act by the Commission. Accordingly, the

Commission has notified UERC (Terms and Conditions for determination of Tariff) Regulations 2011. The Regulations have laid down norms for determination of tariff of a generating company selling power to a distribution licensee and have given separate provisions for short term power procurement on competitive bidding basis. No specific Regulation have been framed for medium term as it was intended to be carried out under a transparent process of competitive bidding like short term. Also it must be noted that these MYT Regulations are based on cost plus basis and the concept of cost plus cannot be applied to short term and medium term. Cost plus tariff for Generating Companies is by nature front loaded. In initial life cycle of the project, both interest on debt as well as repayment is required to be allowed as a pass through. Repayment is funded by higher rate of depreciation allowed for this period. Tariffs for initial periods are higher than the tariffs for the rest of the life so the advantage of lower tariff will not accrue to UPCL in case of a medium term PPA. Tariff principles contained for tariff determination in MYT Regulation can only be applied to long term procurement and cannot be extended to either medium term or short term.

Therefore, it is clear that for medium term PPA, the Petitioner has to follow the tariff based competitive bidding process as per GoI guidelines consistent with the provisions of the regulations which require the power procurement process to be transparent process leading to economical cost. The APTEL orders referred to by the Respondent do not apply in the instant case. Contention taken by Respondent that tariff can still be determined by the Commission even if no regulation exist also has no applicability as in this case absence of regulation is intentional and not otherwise.

In this regard, the Respondent has also referred to the Order dated 29.07.2015 issued by MPERC in the matter of determination of tariff for the electricity supplied by M.B. Power Ltd. to MP State Discoms for a capacity of 30% of the entire power project. In this regard, it is to be noted that only Unit No. 1 having capacity of 600 MW of the company was commissioned till the date of issuance of the Order and out of the same the generator had offered 35% power to the State of MP through PPA route. The generator also signed a PPA with PTC for supplying 361 MW power to Uttar Pradesh after succeeding in Competitive Bidding Process under Case-1 bidding. As tariff for the power being sold, other than that contracted with MP discoms, is at through competitive bidding for balance capacity MPERC alone could have determined tariff. This case has no

application in the instant case.

The Respondent has also referred to the Order dated 13.05.2010 issued by DERC for approval of PPA between NDPL and TPTCL for procurement of 132 MW power on long term basis from Jhajjar Power Ltd. (M/s. JPL). In this matter, Haryana Power Generation Company Ltd. had initiated a competitive bidding process under Section 63 for procurement of 90% power from M/s. JPL and balance 10% capacity was proposed to be sold to NDPL on the basis of bidding process finalized by Haryana except trading margin payable to TPTCL based on CERC guidelines. DERC approved the same. Here again DERC merely adopted the tariffs discovered through competitive bidding route. Hence, there is no similarity in the cases.

2.1.7 The reliance placed by the Respondent to Section 64(5) reproduced as under can also not be sustained:-

“the existence of a non-obstante clause gives an overriding character to Section 64(5) even if there exists a composite scheme qua a generating company which is supplying electricity to more than one state”

However, it is clear from the Section itself that the Respondent has failed to interpret the Section correctly and did not note the difference of words in Section 64(5) and 79(1)(b). Tariff determination by the State Commission under Section 64(5) is invoked when the generator situated in another State offers entire power to the distribution licensee situated in another State. Hence, it does not talk of composite scheme for generation and sale of electricity which would be governed under Section 79(1)(b) of the Act. In the instant case, since there would be more than one beneficiaries of power, the same does not qualify under Section 64(5) of the Act but would fall under Section 79(1)(b) of the Act. The Electricity Act makes a clear provision under Section 79(1)(b) for such generating companies who intends to sell power under a composite scheme **to more than one state**, the Central Electricity Commission shall have the jurisdiction. Section 79 is reproduced hereunder,

“79. Functions of Central Commission.- (1) The Central Commission shall discharge the following functions, namely:--

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
- (c) to regulate the inter-State transmission of electricity;
- (d) to determine tariff for inter-State transmission of electricity;
- (e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;"
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

Therefore, it is amply clear that if the Respondent is not giving its complete generation to one State, the buyers will be 2 or more State distribution/trading licensees which would exclude it from the purview of Section 64(5). Further, Section 64(5) cannot in any manner usurp the powers given to CERC under Section 79(1)(b) of the Act. Therefore, the submissions of the Respondent relying on 62 and 64(5) are misplaced and outrightly denied.

2.1.8 The Petitioner while intending to buy power under a medium term ought to have employed tariff discovery/determination process in accordance with the provisions of the Act/Rules/Regulations in this regard.

In this regard, the Commission in Regulation 39(2) of the UERC (Conduct of Business) Regulations, 2014 has specified as under:

*"The distribution licensee to establish to the satisfaction of the Commission that **the purchase of power by it is under a transparent power purchase procurement process and is economical and the power is necessary to meet its service obligation.**"*

(Emphasis added)

The procurement of power proposed by the licensee is through negotiated routes and not through a transparent process which has to be done in the manner provided in Section 63 of the Electricity Act, 2003.

Accordingly, the Act/Rules/Regulations require the Petitioner, a distribution licensee, to seek approval of the draft PPA it proposes to enter into with the suppliers after having the tariff either determined by the appropriate Commission or discovered through

competitive bidding process thereby giving equal opportunity to all suppliers.

- 2.1.9 The contentions of both the Petitioner and the Respondent that it is the mandate of the Commission to approve the power purchase agreement is denied here because as explained earlier the Commission regulates the power procurement after examining the tariff for supply of power by the supplier/generator determined/discovered under Section 62 or Section 63 of the Act as the case may be and is not a mere post office to approve whatever comes to it. The Commission has examined the proposed power procurement process used by the Petitioner and finds the proposed process of entering into a medium term power purchase agreement for part of the generation with the Respondents against the tenets of the Electricity Act, 2003, Rules/Regulations made thereunder.
- 2.1.10 As already discussed above none of the criteria are fulfilled and no legal provisions have been followed. In fact what the parties are arguing is also not supported by the submissions made before the Commission including orders of the Hon'ble ATE rather these submissions are contradictory to what the parties are contending.
- 2.1.11 In this regard, the Commission is of the view that authorising signing of PPA by UPCL and GMR is inconsistent with the Regulations or is outside the ambit of the Regulations. Also, as already elaborated above, this Commission does not have jurisdiction to determine the tariff under Section 62 of the Act as part capacity of the plant is proposed to be procured. Moreover for medium term procurement tariff cannot be determined under regulation as such procurement was intended to be through competitive bidding alone.
- 2.1.12 While parting with this case, the Commission would like to give its views on the submission made by the Petitioner and the Respondent that the said purchase is economical and competitive considering the tariff discovered under various medium term and long term bids carried out elsewhere in the country, the Commission reviewed the recent trends in power exchange.

The State Commission noted that the average short term rate IEX rate for the calendar year 2015 was Rs. 2.80 per unit and the average rate during the peak hours was Rs. 3.08 per unit and further due to removal of congestion in the Northern Region Periphery the rates are likely to further decrease. Above analysis leads to the conclusion that while it is difficult to establish whether one would receive more competitive tariffs as compared to the proposed procurement if the bidding process is carried out today, there

has been a trend of reduction in tariffs discovered. The licensee is directed to ensure compliance to the regulation in future by procuring short and medium term power through a transparent procurement process consistent with Act/Policies notified by GoI.

2.1.13 Hence, the Commission decides to reject the petition as not maintainable for want of jurisdiction and infirmities in procurement process.

2.1.14 Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Subhash Kumar)
Chairman