

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 65 of 2016

In the matter of:

Application seeking approval of the Commission on the Draft Power Purchase Agreement between Uttarakhand Power Corporation Limited & M/s Beta Infratech Pvt. Ltd.

In the matter of:

Uttarakhand Power Corporation Ltd.

...Petitioner

AND

In the matter of:

M/s Beta Infratech Pvt. Ltd.

...Respondent No. 1

Power Transmission Corporation of Uttarakhand Ltd.

...Respondent No. 2

CORAM

Shri Subhash Kumar Chairman

Date of Hearing: November 15, 2016

Date of Order: February 17, 2017

This Order relates to the Petition filed by Uttarakhand Power Corporation Ltd., a distribution licensee (hereinafter referred to as "UPCL" or "Petitioner") seeking approval of the draft PPA for purchase of power from the Gas based power plant to be commissioned at Village Khaikhera, Kashipur, Dist. Udhamasinghnagar owned by M/s Beta Infratech (P) Ltd. (hereinafter referred to as "M/s BIPL" or "Respondent No. 1").

1. Background

- 1.1 The Petitioner filed a Petition dated 23.10.2016 seeking approval of the draft PPA to be executed with M/s BIPL. The Petition has been filed under Section 86(1)(b) of the Electricity Act, 2003, license conditions issued to UPCL, Regulation 39(3) of UERC (Conduct of Business) Regulations, 2014. The Petitioner submitted that it was facing continued power shortage throughout the year and had to depend on short term power purchase by undertaking power purchase through short term tenders and banking

arrangement with other utilities. UPCL also submitted that it had to purchase power through IEX on day ahead basis where the rates were volatile and power availability was not firm.

1.2 UPCL referred to regulation 55A of Uttarakhand Electricity Regulatory Commission (Terms and Conditions for Determination of Multi Year Tariff) Regulations, 2015 (hereinafter referred to as "MYT Regulations, 2015") and submitted that the Ministry of Power, Government of India, had also introduced the subsidy regime under the auction scheme for partial allocation of gas thereby providing support to the stranded gas based power projects, vide its Office Memorandum No. 4/2/2015-T.H. 01 dated 27.03.2015, wherein the scheme was applicable only for FY 2015-16 and FY 2016-17.

1.3 Further, UPCL submitted that Government of Uttarakhand vide Order no. 456 (2)/1/2015-04 (03)/160/2010 dated 28-04-2015 had issued direction for purchase of power from gas based projects located at Kashipur, Distt. Udham Singh Nagar vide which UPCL was directed as follows:

"4. उपरोक्त क्रय की जाने वाली गैस आधारित विद्युत से जो भी अतिरिक्त व्यय भार आयेगा उसे वाणिज्यिक तथा औद्योगिक उपभोक्ताओं पर अधिरोपित किया जायेगा।"

1.4 UPCL submitted that M/s Beta Infratech (P) Ltd. desires to sell 107 MW power scheduled to be generated from its project and it is desirous of purchasing upto 107 MW as per the actual power deficit on the terms and conditions stipulated in draft PPA.

1.5 The State Government vide its letter dated 10.06.2016 had approved procurement of power from the three gas based power projects located in the State of Uttarakhand equivalent to 50% of their total capacity for 25 years.

1.6 The copy of the petition was forwarded to M/s BIPL for submission of its comments on the same. The Commission held a hearing for admission of the petition on 15.11.2016. M/s BIPL vide its letter dated 11.11.2016 submitted its comments which are dealt with at appropriate places in this Order.

1.7 The Commission vide its Order dated 15.11.2016 while admitting the petition directed the parties as follows:

"

1. The Petitioner to issue to the Respondent on or before 18.11.2016, the Discom's Letter of Confirmation provided at Annexure-I of the PSDF support Agreement executed by the Respondent

with MoP, GoI and also the Letter of Intent (LoI) for purchase of power from M/s Beta Infratech Pvt. Ltd. In Discom Letter of Confirmation, the price for purchase of incremental energy should be Rs. 4.70/kWh or as notified by MoP in future.

2. *The Respondent to file Tariff Petition and Business Plan Petition in accordance with UERC (Terms and Conditions of Determination of Multi Year Tariff) Regulations, 2015 within 30 days of issue of the Order.*

3. *The Respondent vide its letter dated 11.11.2016 submitted that the connectivity of its power plant had already been approved by the Standing Committee of Northern Region at 220 kV Mahuakheraganj S/s and requested the Commission for issuance of direction to PTCUL for allowing the same connectivity for testing/commissioning and evacuation of power. Accordingly, PTCUL is directed to submit the status of evacuation of power from the project and the capacity available in the 220 kV Mahuakheraganj S/s within one week from the issue of the Order. Further, with regard to the connectivity, PTCUL is required to allow connectivity to the project for testing and commissioning activities including evacuation of power."*

1.8 In response M/s BIPL filed a Petition dated 11.01.2017 seeking determination of tariff for its power plant. However, PTCUL did not submit any reply in the matter.

2. Commission's Views & Decisions

2.1 Legal Requirement for approval of PPA

2.1.1 A PPA is a legal document incorporating operational, technical & commercial provisions to be complied in accordance with the relevant rules & regulations.

2.1.2 Section 86(1)(b) of the Electricity Act, 2003 stipulates that one of the function of the Commission is to regulate electricity purchase and procurement process of the 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.

2.1.3 Further, the Distribution and Retail Supply Licence issued by the Commission lays down certain conditions of license, which amongst others also has the following:

"5.1 The Licensee shall be entitled to:

(a) ...

(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;

..."

(Emphasis added)

2.1.4 Regulation 39 of UERC (Conduct of Business) Regulations, 2014 specifies as under:

- “(1) The distribution licensee shall file with the Commission in complete form copies of all Power Purchase Agreements already entered into by it.*
- (2) 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.*
- (3) 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”*

(Emphasis added)

2.1.5 Further, Uttarakhand Electricity Regulatory Commission (Terms and Conditions for Determination of Multi Year Tariff) Regulations, 2015, provides as:-

“1. Short Title, extent and Commencement

- (3) 55A shall be applicable for the years 2015-16 and 2016-17 unless extended further by the Commission.*

...

55A. Tariff Determination of Gas based generating stations:

The tariff of gas based generating stations covered under the “Scheme for Utilization of Gas based power generation capacity” issued by the Government of India, Ministry of Power vide Office Memorandum No. 4/2/2015-Th.1 dated 27.3.2015 can be determined in due consideration of the provisions of that scheme in deviation of the relevant regulations.”

2.1.6 In view of the above and in accordance with the requirement of the Act and Regulations referred above, UPCL as a distribution licensee is required to seek approval of the Commission of the PPAs entered or proposed to be entered into by it. Accordingly, the draft PPA between UPCL & M/s BIPL is being examined for consistency and conformity with the relevant provisions of the Electricity Act, 2003, MYT Regulations, 2015 and also in light of the Schemes/guidelines issued by MoP in this regard.

2.2 Consistency of the PPA with the Regulations

2.2.1 The draft PPA submitted by UPCL has been examined in light of the relevant rules & regulations. The Commission observed that certain clauses in the draft PPA submitted by UPCL are inconsistent with the provisions of the Act/Regulations. Such observations have been discussed in the subsequent sub-Paras. UPCL is required to take note of the same and incorporate necessary corrections in the draft PPA while executing the PPA with the project developers.

a. The Commission observes that the date mentioned in first line of the draft PPA has been left blank, hence, it should be duly specified at the time of signing the PPA.

b. Clause 1.1.40 of the draft PPA provides definition of “Fuel” as follows:

““Fuel” means the fuel used to generate electricity having the specifications as provided in Schedule C hereof, which may be (a) Domestic Gas; or (b) re gasified liquified natural gas (“RLNG”), or (c) a mix of domestic gas and RLNG”

The Commission observes that “Schedule C” mentioned in the above Clause specifies the technical limit, whereas, “Schedule B” of the draft PPA provides for details of fuel. Hence, the aforementioned reference made to “Schedule C” appears to be incorrect and needs to be replaced by “Schedule B” in Clause 1.1.40 of the draft PPA. Accordingly, the Clause 1.1.40 of the draft PPA shall be read as under:

““Fuel” means the fuel used to generate electricity having the specifications as provided in Schedule B hereof, which may be (a) Domestic Gas; or (b) re gasified liquified natural gas (“RLNG”), or (c) a mix of domestic gas and RLNG”.

c. Clause 1.1.59 of the draft PPA provides definition of “Normative Availability” or “Target Availability” or “Normative Annual Plant Availability Factor (NAPAF)” as follows:

““Normative Availability” or “Target Availability” or “Normative Annual Plant Availability Factor (NAPAF)” shall mean Eight Five (85%) Availability of aggregate Contracted Capacity at the Delivery Point on Contract Year basis. However, UPCL may vary the Availability Factor on monthly basis as required by UPCL but maintaining the NAPAF at 85% yearly basis.”

The Petitioner is required to remove the provision of variation in the

Availability Factor on monthly basis required by UPCL as the Contract with GAIL would be on take or pay basis and UPCL would be required to pay gas charges alongwith the AFC even if it does not schedule power from the generating station. Accordingly, Clause 1.1.59 of the draft PPA shall be read as under:

“Normative Availability” or “Target Availability” or “Normative Annual Plant Availability Factor (NAPAF)” shall mean Eight Five (85%) availability of aggregate Contracted Capacity at the Delivery Point on Yearly basis.”

- d. The Commission observes that in clause 1.1.72, i.e. “Scheduled Delivery date”, capacity and date has been left blank, hence, it should be duly specified at the time of signing the PPA.
- e. Further, Clause 9 of the PPA specifies Billing and Payment which provides a rebate of 2% for payment of bills through letter of credit and rebate of 1% is being allowed if payment is made within a period of one month of presentation of bills. Further, billing and payment schedule in accordance with the Gas Supply Agreement between M/s Beta and M/s GAIL are similar as have been observed in case of M/s Gama Infraprop Pvt. Ltd. The Commission on M/s GIPL’s petition vide its Order dated 25.01.2017 discussed the issue of mismatch in schedule of payment received from UPCL to the generator and payment to be made by the generator to Gas Supplier, i.e. M/s GAIL. The Commission vide its aforesaid Order dated 25.01.2017 had also taken cognizance of the financial hardship being faced by such generators.
- f. Further, vide the above mentioned Order the Commission had also clarified certain issues related to “Due Date”, “Payment Security”, “Applicability of Rebate” and purpose of “Letter of Credit” etc. Since the terms and conditions agreed between “generator & licensee” and also that between “generator & gas supplier” in the present case are similar as have been observed in the matter of M/s GIPL, accordingly, in line with the views taken in the above mentioned Order dated 25.01.2017, the Petitioner is required to take note of the same and incorporate necessary changes in the PPA as discussed in following Paras.
- g. Term “Due Date” as has been defined in Clause 1.1.32 of the PPA provides that:

"Due Date" shall mean the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is faxed/mailed to the Buyer and confirmed telephonically by the Buyer and by which date such Monthly Bill supplementary Bill is payable by Buyer;"

Text of the second line of the above mentioned definition specifies the time frame *"by which date"* the payment shall be made by UPCL, i.e. UPCL is required to make the payment of the bill within 30 days of receipt of the same.

Further, to elaborate the meaning of *"Due Date"* parties may also take reference of Clause no. 9.1.1, 9.1.4, 9.1.6, 9.2.1 (b) & 9.3.1 of PPA stipulating payment of Monthly Bills/Supplementary Bills/Provisional Bills *"within due date"/"on or before due date"*. Hence, meaning of *"Due Date"* should be construed accordingly and not as the payment to be made on 30th day of bill submission. However, till currency of GoI Scheme the due date shall be construed as 3 working days from receipt of bill by UPCL.

Based on the Commission's views in the Order issued on 25.01.2017 in the matter of M/s Gama Infraprop (P) Ltd Vs. Uttarakhand Power Corporation Limited and in view of special circumstances of this class of matters, it is hereby decided that:

- (i) The Respondent no. 1 may raise fortnightly Gas Supply Bills on the Petitioner on actual basis as is being received from M/s GAIL/supplier of gas. The final monthly bill would be raised by the generator after the month is over based on the Joint Meter Reading in accordance with the procedure laid down in the PPA duly adjusting the aforesaid amount already realized from UPCL for the first fortnight of the month.
- (ii) UPCL shall not charge any rebate from the generator till the currency of the Scheme and till further orders by the Commission in this regard. UPCL shall also make the payment to the generator within 3 working days from the receipt of Gas bills.
- (iii) Purpose of instituting LC Mechanism, as provided in the PPA, indicates both for payment of bills of the Respondent no. 1 by the Petitioner as well as for ensuring security of payment. The provision of rebate of 2% has been so kept so as to ensure that timely payment within a reasonable time is made to the

generator on presentation through LC. However, even if UPCL makes the payment within a reasonable time, i.e. within 3 working days of receipt of bill, even otherwise than LC, it can claim a rebate of 2% as the intent is to make timely payment. Accordingly, both the parties are directed to incorporate necessary changes so as to avoid ambiguity in the provisions of PPA as discussed above. However, the rebate shall not be applicable till the currency of the scheme of GoI.

Accordingly, the Parties are directed to incorporate clauses in the PPA in line with the observations made and directions given above and ensure compliance.

- h. Clause 9.4.1.1 of the draft PPA provides for "Letter of Credit" as follows:

"It is agreed by and between the Parties that the Buyers undertakes to provide to the Seller, in respect of security for payment of its Provisional Bill and Monthly Bill, a monthly unconditional, revolving without recourse and irrevocable letter of credit ("Letter of Credit"), opened and maintained by the Buyer, which may be drawn upon by the Seller in accordance with Clause 9.4.1.5 & 9.4.1.5."

It has been observed that the Petitioner has inadvertently referred Clause 9.4.1.5 twice whereas Clause 9.4.1.4 and Clause 9.4.1.5 should have been mentioned. Accordingly, Clause 9.4.1.4 should be inserted in place of Clause 9.4.1.5 in the last line of the Clause 9.4.1.1 of the draft PPA.

- i. Clause 12.4.3 of the draft PPA provides as follows:

"Any notice served pursuant to this Clause 12.44.2 shall provide, amongst other things, precise details of:

(d) The Change in law; and

(e) The effects on the Seller of the matters referred to in Clause 12.21."

The above referred Clause 12.44.2 and Clause 12.21 are not provided in the draft PPA. It appears that the Petitioner has inadvertently referred Clause 12.44.2 and Clause 12.21 in place of Clause 12.4.2 and Clause 12.2 respectively. Accordingly, the Clause 12.4.3 shall be read as follows:

"Any notice served pursuant to this Clause 12.4.2 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 Clause 12.2."*

j. Clause 17.3.2 of the draft PPA provides for "Dispute Resolution" as follows:

"If the Dispute arises out of or in connection with this Agreement if of the nature not covered in Clause 17.2.1 or Dispute is of such nature not adjudicated by Appropriate Commission then such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and Rules of the Indian Council of Arbitration and in accordance with the process specified in this Clause subject to relevant provision of the Electricity Act, 2003 and any other law applicable as amended from time to time

(a) *The arbitration tribunal shall consist of three (3) arbitrators, each Party to appoint one arbitrator, and the third arbitrator to be appointed by the arbitrators mentioned above;*

(b) *The place of arbitration shall be New Delhi, India or at such other place in India as may be mutually agreed by the Parties. The language of the arbitration shall be English;*

(c) *The Arbitration tribunal's award shall be substantiated in writing. The arbitration tribunal shall also decide on the costs of the arbitration proceedings and the allocation thereof;*

(d) *The award shall be enforceable in any court having jurisdiction, subject to the Applicable Law"*

The above mentioned Clauses are inconsistent with the Electricity Act, 2003 and the Regulations specified by the Commission providing the option to either of the Parties to file a Petition with the Appropriate Commission and adjudication of the dispute or referring the dispute to arbitration is the prerogative of the Commission. Accordingly, the above mentioned Clause 17.3.2 should be replaced as under:

" 17.3.2 If the Dispute arises out of or in connection with this Agreement is of the nature not covered in Clause 17.2.1 or where any dispute is referred to the Appropriate Commission to be settled through arbitration, the procedure specified in the Indian Arbitration and Conciliation Act, 1996 read with the Electricity Act, 2003 and UERC (Conduct of Business) Regulations 2014 as amended from time to time shall be followed to the extent applicable."

Furthermore, since the clauses in the Power Purchase Agreements of the

Petitioner with M/s Sravanthi Energy Pvt. Ltd and M/s Gama Infraprop (P) Ltd. are on similar lines which are contrary to the procedure of dispute settlement specified in the provisions of the Electricity Act. Accordingly, the Petitioner is hereby, directed to ensure necessary corrections in the PPAs executed with M/s Sravanthi Energy Pvt. Ltd and M/s Gama Infraprop (P) Ltd., which have already been approved by the Commission vide Order dated July 20, 2016 and Order dated February 08, 2016 UPCL is directed to take note of the same and report compliance within 7 days of the Order.

k. Other Issues

- i. The Respondent No. 1 in its comment had submitted that the connectivity of its power plant had already been approved by the Standing Committee of Northern Region at 220 kV Mahuakheraganj S/S owned by PTCUL. The generator requested the Commission to direct PTCUL to allow the connectivity for testing/commissioning and evacuation of power.
- ii. The Commission had vide its Order dated November 15, 2016 directed PTCUL to submit the status of evacuation of power from the project and the capacity available in the 220 kV Mahuakheraganj S/s within one week of the date of Order. Further, PTCUL with regard to the connectivity, was required to allow connectivity to the project for testing and commissioning activities including evacuation of power till the final decision of the Commission in the matter. However, no reply has been submitted by the PTCUL.
- iii. With regard to the connectivity, PTCUL is once again directed to allow connectivity to the project for testing and commissioning activities including evacuation of power as per the scheduled timeframe. Further, PTCUL is required to submit status of evacuation of power from the project and the capacity available in the 220 kV Kashipur-Mahuakheraganj line within one week from the date of this Order.

2.3 With this, Petition no. 65 of 2016 stands disposed.

2.4 Ordered accordingly.

**(Subhash Kumar)
Chairman**