

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No.: 03 of 2017

In the matter of:

Petition filed for amendment of Clause No. 9 relating to “Billing and Payment”, Clause No. 1.1.32 relating to “Due Date” and Clause No. 9.4 relating to “Payment Security Mechanism” of Power Purchase Agreement for procurement of 107 MW of Power on Long Term Basis between 225 MW Gas based Combined Cycle Power Plant of Gama Infraprop Pvt. Ltd. at Mahuakhedaganj, Kashipur and Uttarakhand Power Corp. Ltd. (UPCL).

In the matter of:

M/s Gama Infraprop (P) Ltd.

... Petitioner

AND

In the matter of:

Uttarakhand Power Corporation Ltd.

... Respondent

CORAM

Shri Subhash Kumar Chairman

Date of Hearing: January 09, 2017

Date of Order: January 25, 2017

This Order relates to the Petition filed by M/s Gama Infraprop (P) Ltd. (hereinafter referred to as “M/s GIPL” or “Petitioner” or “Generator”) seeking amendment of certain Clauses in the Power Purchase Agreement of its 107 MW Gas based power plant capacity executed with Uttarakhand Power Corporation Ltd. (hereinafter referred to as “UPCL” or “Respondent” or “Licensee”).

1. Background & Petitioner’s Submissions

- 1.1 The Commission had vide its Order dated 08.02.2016 approved the PPA between the Petitioner and the Respondent for purchase of 107 MW capacity from the Petitioner’s gas based power plant with the direction for incorporating observations made in the PPA vide the aforesaid Order of the Commission. In response UPCL had vide its reply dated 26.02.2016 submitted the revised PPA signed by both the parties involved in the matter.
- 1.2 M/s GIPL vide its Petition dated 14.12.2016 raised certain issues related to billing & payment mechanism as stipulated in the above mentioned PPA. The Petitioner submitted that the project

was ready to start commissioning in the year 2012, however, due to non-availability of fuel, i.e. e-bid RLNG which was beyond the control of the project proponent, the project became stranded for more than 3 years. Thereafter, Government of India came up with the scheme vide their office memorandum for utilization of the Stranded Gas Based Power Plants in India. The project was qualified under the scheme and was commissioned in March, 2016.

- 1.3 M/s GIPL vide its Petition submitted that since the project remained stranded for more than 3 years and PPA was signed for only 107 MW the liabilities of the company has increased and, hence, the company is under critical financial crunch.
- 1.4 The Petitioner submitted that in accordance with Clause 9.2 of the PPA, payment of monthly bills can be made by deducting a rebate of 1% if payment is made within a period of one month of bill submission or payment can be made through LC with a rebate of 2%.
- 1.5 The Petitioner further submitted that it has executed a Gas Supply Agreement with M/s GAIL where the bills for supply of gas are raised on fortnightly basis and the payment of the same has to be made within 4 working days. Further, clause no. 9.4 of the e-RLNG Supply Agreement with GAIL relating to the "Interest on Delayed Payments", on failure of the buyer to make payment of any sum due, simple interest on that sum shall accrue from the due date, until the date payments is made, on a day to day basis at SBI base rate applicable on the due date of payment plus 6.25%. Such interest shall compound annually.
- 1.6 The Petitioner submitted that the Commission has fixed a provisional tariff of Rs. 4.70 (capped unit price as per scheme) which does not allow recovery of any interest on the working capital employed by the Petitioner on the operations of the plant, which creates further financial burden to the Petitioner on account of interest on working capital, whereas a rebate is further offered by the Petitioner to the Respondent which is practically in lieu of the working capital interest claimed under the fixed cost.
- 1.7 M/s GIPL submitted that according to the Respondent, the LC issued by the UPCL is Payment Security Mechanism, hence, it can only be encashed in case of UPCL's default in payment by due date. Further, due date as per PPA is understood by UPCL as payment should be made on 30th day of bill submission, which becomes a condition of dispute due to which payment to M/s GIPL gets delayed. The Petitioner submitted that the petition has been filed for review of Clause 9 of the above mentioned PPA relating to "Billing and Payment".
- 1.8 The Petitioner has sought following relief in its prayer:

" ...

b. Issue the necessary order or as deemed fit to be to the State Discom to make fortnightly

payment of the amount equal to fortnightly gas bill submitted by Petitioner within 3 working days of submission. The same should be adjusted against the final bill for the current month;

- c. Issue necessary order or as deemed fit to be for exemption of any rebate till the same is recovered under fixed charge through interest on working capital.*
- d. Issue necessary order or as deemed fit to consider Letter of Credit issued as per PPA to be a Payment Mechanism as well as Payment Security Mechanism so that the payment of monthly bills can be made by UPCL through LC or by Cheque as soon as Petitioner presents the monthly bill (prompt payment);*
- e. Issue necessary order or as deemed fit to amend the due date clause 1.1.32 in PPA as "Due Date" shall mean on or before 30 days 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 or a Supplementary Bill is payable by Buyer."*

2. Respondent's Submission

- 2.1 The Respondent submitted that provision under which the Petition has been filed is incorrect and not applicable in the matter. Further, the reliefs claimed by the Petitioner cannot be granted in law as there is neither any justification for granting such relief nor any legal provision under which said relief can be granted. On the contrary the relief as prayed by the Petitioner is against and inconsistent with the Regulations and also against the terms and conditions of the power purchase agreement executed between the parties. UPCL submitted that granting of relief to the Petitioner would amount to discrimination between Petitioner and other generators.
- 2.2 UPCL submitted that generation of bill by M/s GAIL or its payment by the Petitioner is not relevant in the matter and further that the Respondent also supplies power in advance and receives the payments only after minimum 45 days. The Respondent submitted that the present petition is an outcome of afterthought as the Petitioner was fully aware about these facts and also the relevant provisions of the MYT Regulation, 2015 before executing the PPA.
- 2.3 UPCL submitted that the reliefs sought by the Petitioner cannot be granted unless the Regulation itself is amended and the Petitioner has not sought any amendment of the Regulation neither there is any justification or reasons for amending MYT Regulations.
- 2.4 UPCL submitted that M/s GIPL has sought review of clause no. 9 "Billing and Payment" of Power Purchase Agreement. Review of clause of PPA is not legally permissible, the PPA is a bi-lateral agreement executed between the parties with free consent and as per the provisions of the Regulation. However, the Petitioner has not stated any grounds for review neither has pointed out

any error apparent on the record.

- 2.5 The Respondent submitted that from the reliefs claimed by the Petitioner it is apparent that the Petitioner is seeking amendment of the Regulation in the garb of inherent power of the Commission which is legally not permissible.

3. Commission's views and decisions

- 3.1 The Respondent submitted that provisions under which petition have been filed is not correct. In this regard, Regulation 59 of the UERC (Conduct of Business) Regulations, 2014 specifies as under:

“

59 Inherent power of the Commission

- (1) *Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.*
- (2) *Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Central Act or State Act, a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient for dealing with such a matter or class of matters.*
- (3) *Nothing in these Regulations shall, expressly or impliedly bar the Commission to deal with any matter or exercise any power under the Central Act or State Act, for which no Regulations have been framed, and the Commission may deal with such matters or exercise such powers and functions in a manner it thinks fit.*

“

Similar provisions are also provided in the UERC (Terms & Conditions of Multi Year Tariff) Regulations, 2015. Apparently, the Commission has power to make such orders as may be necessary for ends of justice and also to deal with any matter or exercise any power under the Central Act or State Act, for which no Regulations have been framed, and the Commission may deal with such matters or exercise such powers and functions in a manner it thinks fit. The Commission had vide its Order dated 08.02.2016 approved the PPA between the Licensee and the Generator having provisions related to “billing & payment”, “rebate” and also “due date” alongwith the other related provisions in the PPA. Since the commencement of supply of power from M/s GIPL generating station to UPCL has been initiated 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 27.03.2015, hence, at present the Commission has

allowed capped unit price of tariff for the period of applicability of the Scheme which does not include recovery of complete Annual Fixed Charges in accordance with the Regulations.

- 3.2 Relevant clause 5(viii) of the above mentioned Scheme based on which recovery of monthly energy bill of M/s GIPL is allowed at capped unit price is as follows:

“Capping of fixed cost to be recovered by stranded developers: For the stranded gas based plants, the developers shall completely forego the return on their equity as detailed in para 10 below. Accordingly, the fixed cost recovery shall be limited to meet only the obligation towards debt servicing and Operation & Maintenance (O&M) cost.”

Accordingly, during the currency of Scheme such generators including M/s GIPL is allowed to recover fixed cost to meet only the obligation towards debt servicing and operation & maintenance cost only. Since no other component of AFC, such as interest on working capital, is being allowed to be recovered, hence, it cannot be denied that the delay in recovering the dues from the licensee comprising of the fuel cost and cost of debt servicing and O&M expenses would create financial hardship for such generators.

- 3.3 The Gas Supply Agreement entered into between M/s GIPL & M/s GAIL requires payment of fortnightly bills within 4 days by the Petitioner. In this regard, relevant Clause 9.2 of the Gas supply agreement is as follows:

“Payment

Within 4 (four) business days, after the receipt of the Fortnightly Payment Statement, debit note or credit note, Take or Pay Statement being the “Due Date”, the Buyer shall pay to the Seller the sum due in the Payment Statement, reconciliation Statement/debit note or credit note, Take or Pay Statement including any amount referable as a Disputed item (as defined in Article 9.3). The amount receivable by the Seller shall be paid to the account of the Seller as indicated in the Statement. Mode of Payment shall be by electronic transfer of funds to the designated SBI/ICICI/HDFC Bank account of Seller on or before due date as advised by Seller”

Further, in case of delay in payment of sum due as per “Payment Statement” or “Invoice” rendered to M/s GIPL by M/s GAIL there is penal provision of delayed payment. Relevant Clause 9.4 of the Gas supply agreement states that:

“Interest on Delayed Payments

Should Buyer fail to make payment of any sum due, simple Interest on that sum shall accrue from the Due date, until the date payments is made, on a day to day basis at SBI Base Rate applicable on the Due Date of payment plus 6.25%. Such Interest shall compound annually.”

The Commission appreciates the above referred facts and provisions stipulated in the Gas

Supply Agreement. The Respondent's contention that granting of relief to the Petitioner would amount to discrimination between Petitioner and other generators is not tenable. The payment of fuel costs to be made to GAIL is applicable only to the fuel based generating stations covered under the Scheme, however, in the State of Uttarakhand, power is predominantly procured by the discom from the hydro power based generating stations where there is no incidence of fuel costs. The balance power procured by the discom is from other thermal plants of the Central PSU's which are guided by CERC Regulations. Accordingly, the Commission does not find merit in the Respondent's submission that allowing the Petitioner's request may lead to discrimination with other generators.

- 3.4 The Respondent also contended that the purpose of the Petition is for reviewing Clause 9 "Billing and Payment" of PPA which is not permissible since the same has been included in the PPA with free consent of both the parties in accordance with the Regulations. In this regard, the Petitioner vide its rejoinder dated 19.01.2017 submitted that it has not made request for amendment in provisions of the Regulations. However, purpose of the petition is for amendment of Clause 9 "Billing and Payment", Clause 1.1.32 "Due Date" and Clause 9.4 "Payment Security Mechanism" of the PPA based on the justification stated in the petition. The Commission has taken cognizance of submissions made by the Petitioner that the petition has been made based on the trends of payments of bills made by the Respondent. Considering the peculiar situation of gap in time between revenue received by M/s GIPL from UPCL and payment of gas bills to M/s GAIL by M/s GIPL the Commission has decided to evaluate the existing provisions of billing and payment in PPA vis-à-vis provisions of payment stipulated in Gas Supply Agreement and its consequences on the financial position of the Petitioner.
- 3.5 In accordance with the existing mechanism of billing & payment provided in the PPA, M/s GIPL is claiming bills on monthly basis and the same is being paid by UPCL within 15 days of receipt of invoice. This mechanism of billing & payment does not take care of fortnightly payment to be made by M/s GIPL to the Gas Supplier, i.e. M/s GAIL since M/s GIPL can either make payment of the fortnightly gas supply bills on receipt of payment from UPCL or through availing the short term working capital loan from any Financial Institution. Factually, by the time M/s GIPL receives payment for monthly bills it owes payment of effectively 3 fortnightly gas supply bills to M/s GAIL leading to undue penal interest charges levied on the Petitioner besides this the Petitioner is not entitled for interest on working capital during the currency of the Scheme. Further, the Petitioner also has to face threat of termination of gas supply on account of non-payment of gas supply bills. The Petitioner has vide its rejoinder dated 19.01.2017 also furnished statement of interest charged on it due to delay in payment of Gas supply bills of M/s GAIL. The Commission

appreciates the submission of UPCL that M/s GIPL was aware of such provisions of payment and also provisions of the Regulations. However, the Petitioner as well as the Respondent did not foresee such a situation of financial hardship for the Petitioner and accordingly, did not make any provisions in the PPA to deal with such matter. With the passage of time the Petitioner has realized the gap in its cash-flow and has approached the Commission with this Petition.

- 3.6 Apparently, this situation is prima-facie on account of mismatch in billing cycle of M/s GIPL and M/s GAIL. Had the billing cycle of both M/s GIPL and M/s GAIL in sync such a financial gap for payment of gas bills would not have been arises. In view of the above referred circumstances, while appreciating the financial hardship being faced by the Petitioner and so as to obviate gap between “billing & payment” of monthly bills of M/s GIPL and fortnightly gas supply bills of M/s GAIL, the Commission, in exercise of its powers under Regulation 103 and Regulation 104 of the MYT Regulations, 2015, has decided to allow M/s GIPL billing of actual fortnightly Gas bills to UPCL as are being raised by M/s GAIL. This will in no way cause any financial implication for UPCL as it was paying the entire bill raised by such generators at the end of the month, however, the generator will now have the liberty to raise the fuel bills based on the actual, duly supporting the same with the bills raised by GAIL on every fortnightly basis. 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. UPCL will ensure to make the payment of all the bills raised by the generator within 3 working days so as to facilitate the generator to meet its payment obligations including the payment towards the fuel charges it has to make to GAIL in 4 working days from the date of invoice as per the e-bid RLNG Sale Agreement between the Petitioner and GAIL. This will continue during the currency of the GoI Scheme in this regard and subsequently, the payment will be made in accordance with the provisions of the PPA.
- 3.7 The Petitioner has made prayer for exemption of any rebate till the same is recovered under fixed charge through interest on working capital. In this regard, the Commission appreciates the concern of the generator. Rebate is so allowed so as to motivate the buyer to make timely payment of the bills. The seller by offering the rebate also gains as it saves on the working capital requirement and in turn saves on the interest. Though, the Commission has consistently been of the view that such commercial arrangements may be decided between the parties, however, there is a merit on the submissions of the Petitioner that since it is not being allowed any interest on working capital, it may be exempted from the payment of rebates to the licensee.

Furthermore, the Commission in its Order dated July 20, 2016 has already held as under:

“...Therefore, if the generator gets interest on working capital, it will have to pass on the rebate to

UPCL otherwise no rebate would be allowed to UPCL. The Commission would take a view on the same during tariff determination proceedings of the Respondent."

Hence, the Commission decides that till the currency of the scheme of GoI and till further Orders of the Commission, no rebate shall be allowed to UPCL and UPCL will ensure to make the payment of the bills raised by the generator within 3 working days after a Bill is received by it. In this regard, the Respondent submitted that it also supplies power in advance and receives the payments only after minimum 45 days. However, the Respondent chose to ignore the fact that it is being allowed working capital including interest thereof equivalent to two months of the expected revenue from sale of electricity at the prevailing tariffs. In the Petitioner's case it is not being allowed any interest on working capital till the currency of the Scheme.

3.8 The Petitioner submitted that the Letter of Credit (LC) issued as per PPA should be considered as Payment Mechanism as well as Payment Security Mechanism so that the payment of monthly bills can be made by UPCL through LC or by Cheque as soon as Petitioner presents the monthly bill (prompt payment). The Commission observed that under the Clause 9.4 "Payment Security Mechanism" of the PPA and relevant Clause 9.4.1.1, 9.4.1.2, 9.4.1.4 & 9.4.1.5 stipulate that:

"9.4.1.1 It is agreed by and between the Parties that the Buyer 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"

...

"9.4.1.2

...

Provided further that, the Seller shall not draw upon such Letter of Credit:

(i) prior to Due Date of the relevant Provisional Bill and /or Monthly Bill.

(ii) if the payment has already been made; and

(iii) shall not make more than one drawl in a month"

...

"9.4.1.4 In the event, the Buyer fails to pay a Provisional Bill or part thereof or Monthly Bill or part thereof or Supplementary Bill within the Due Date, the Seller may draw upon the Letter of Credit and accordingly the bank shall pay without any reference or instructions from the Buyer, an amount equal to such Provisional Bill, Monthly Bill and Supplementary Bill or part thereof by presenting to the schedule bank issuing the Letter of Credit, the following documents:

..."

From the text of the above referred provisions of the PPA, it may be inferred that the LC

mechanism has been instituted to ensure payment security to the Petitioner. At the same time Clause 9.2.1 "Rebate" of the PPA stipulates payment by the Respondent under LC mechanism by availing 2% rebate as follows:

"9.2.1. Rebate

(a) For payment of bills in full through the letter of credit on presentation, a rebate of 2% of the bill amount shall be allowed.

(b) Where payments of bills in full are made by a mode other than through the letter of credit but within a period of one month of presentation of bills by the generating company, a rebate of 1% of the bill amount shall be allowed."

Further, the Commission has already clarified the issue vide its letter dated 04.07.2016 on the Petitioner's request in the matter.

From the above mentioned Clause 9.2.1, Clause 9.4.1 & sub-clauses thereof there appears to be an ambiguity with regard to purpose of creation of LC mechanism i.e., whether it would be utilized for drawl of monthly payment by allowing 2% rebate to UPCL as stipulated in Clause 9.2.1 or it can be utilized only for ensuring payment security as per Clause 9.4.1. UPCL is making payment within 15 days by deducting rebate of 2%, hence, it cannot be denied that UPCL is paying bills as per option Sub-Clause (a) of Clause 9.2.1 of the PPA and also in accordance with the Regulation. Since it is specifically provided in Clause 9.2.1 that rebate of 2% can be availed only for payment of bills through Letter of Credit on presentation while it provides that 1% of rebate is being allowed if the payment is being made within one month of presentation of bills. This provision of rebate has also been agreed upon by the two parties. The provision of rebate of 2% has been so kept so as to ensure that prompt payment is made to the generator on presentation through LC. However, it is decided that 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 and any provision of rebate would be applicable only after the scheme of GoI is over.

3.9 The Petitioner has also requested for clarification of the term "Due Date "as has been defined in the PPA executed with UCPL. In this regard, 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 specify the time frame "by which date" clarifying that the thirtieth (30th) day shall be the outer limit by which payment shall be

made by UPCL. 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(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 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 as has already been discussed above.

3.10 Based on the Commission's views in the matter as discussed above it is hereby decided that:

- (i) The Petitioner may raise fortnightly Gas Supply Bills on the Respondent on actual basis as is being received from 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 Gas generators till the currency of the Scheme and till further orders by the Commission in this regard. UPCL shall also make the payment to these generators within 3 working days from the receipt of bills.
- (iii) Purpose of instituting LC Mechanism, as provided in the PPA, indicates both for payment of bills of the Petitioner by the Respondent 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 week 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.

3.11 Furthermore, since the issues raised by the Petitioner would also apply on the other gas based generating station, i.e. M/s Sravanthi Energy Pvt. Ltd., whose PPA, already approved by the Commission vide Order dated July 20, 2016 and that also includes these similar provisions, the Commission directs that the above referred findings/decisions shall also apply to it so as to have a consistent approach in the matter and avoid disputes in the matter. UPCL is directed to take note of the same and report compliance within 7 days of the Order.

3.12 Ordered accordingly.

(Subhash Kumar)
Chairman