

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**(Appellate Jurisdiction)**

**IA No. 665 of 2017 in**  
**DFR No. 2361 of 2017**

**Dated: 30<sup>th</sup> November, 2017**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson**  
**Hon'ble Mr. S.D. Dubey, Technical Member**

**In the matter of:**

**Mr. Rama Shanker Awasthi**  
**301, Surbhi Deluxe Apartments,**  
**6/7 Dalibagh, Lucknow – 226001**

**.... Appellant(s)**

**Vs.**

**1. R.K.M. Powergen Private**  
**Through Executive Director,**  
**14, Dr. Giriappa Road,**  
**T. Nagar, Chennai – 600017**

**2. Uttar Pradesh Power Corporation Ltd.,**  
**(through its Chairman),**  
**7<sup>th</sup> Floor, Shakti Bhawan,**  
**14, Ashok Marg, Lucknow – 226001**

**3. Uttar Pradesh Electricity Regulatory Commission**  
**Through its Secretary,**  
**II Floor, Kisan Mandi Bhawan,**  
**Gomti Nagar, Vibhuti Khand,**  
**Lucknow – 226010**

**.... Respondent(s)**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Anushree Bardhan  
Ms. Poorva Saigal  
Mr. Shubham Arya

Counsel for the Respondent(s) :Mr. Buddy A. Ranganadhan  
Mr. Aman Gupta for R-1  
Mr. Rajiv Srivastava  
Ms. Garima Srivastava  
Ms. Gargi Srivastava for R-2  
Mr. C. K. Rai  
Mr. Umesh Prasad  
Mr. Mohit Rai for R-3

## ORDER

1. In this appeal the Appellant has challenged order dated 11/02/2016 passed by the Uttar Pradesh Electricity Regulatory Commission (“**the State Commission**”) in Petition No.1078 of 2015. In this application the Appellant who is a consumer residing in the State of Uttar Pradesh has prayed that he may be granted leave to file the appeal.

2. By the impugned order the State Commission has allowed the restoration of Letter of Intent to Respondent No.1 M/s R K M Powergreen Private Ltd which was cancelled in the year 2013 due to non-responsiveness of M/s R K M Powergreen Private Ltd (“**RKM**”) in submission of Contract Performance Guarantee and execution of Power Purchase Agreement (“**PPA**”).

3. It is averred in the application that the impugned order restoring the Letter of Intent was passed by the State Commission without any public hearing. No notice of the proceedings was given to the Appellant and other similarly situated consumers and hence

they had no opportunity to participate in the said proceedings. It is further stated that the Appellant became aware of the order dated 11/02/2016 while participating in Petition No.1106 of 2016 at the time when the Appellant represented to the State Commission that the tariff discovered in the Competitive Bidding Process held in 2012 at a levelised tariff of Rs.5.088/KWh ought not to be adopted and the PPA entered into between RKM and Uttar Pradesh Power Corporation Ltd ("**UPPCL**") ought not to be approved.

4. It is further stated that on 01/02/2017 the State Commission passed order in Petition No.1106 of 2016 whereby it approved the sale of power from RKM to UPPCL at the tariff of Rs.5.088 per Kwh. It is the case of the Appellant that the Appellant participated in the proceedings of Petition No.1106 of 2016, raising all the relevant objections so that order of the State Commission dated 11/02/2016 would not take effect. If the State Commission had not adopted the said tariff and had not approved the PPA, there would have been no occasion for the Appellant to challenge order dated 11/02/2016, because the restoration of Letter of Intent would have become academic and of no implication. It is submitted that order of the State Commission restoring the Letter of Intent could take effect

only after the order dated 01/02/2017 was passed by the State Commission. It is further submitted that the consumers in the State of Uttar Pradesh will suffer irreparably if RKM is allowed to have the PPA at the levelised tariff of Rs.5.08/KWh discovered in the Competitive Bidding Process held in the year 2012 when in subsequent Tariff Based Competitive Bidding Process the tariff discovered is only Rs.3.94 to 4.63/Kwh. In the circumstances the Appellant has sought leave to appeal.

5. We have heard Mr. Ramachandran, learned counsel appearing for the Appellant. Counsel has reiterated the above submissions. We have perused the written submissions filed by him. Gist of the submissions is as under:

- (a) The plea that the Appellant may be an aggrieved party in regard to subsequent order which relates to tariff but not an aggrieved party in regard to impugned order dated 11/02/2016 which relates to restoration of Letter of Intent is without any merit. The Letter of Intent and tariff adoption are sequential orders and relate to procurement of

power by UPPCL. Interest of the consumer is involved in both the orders. The Appellant who is a consumer residing in Uttar Pradesh cannot therefore be held to be not an aggrieved person.

- b) This issue stands concluded in this Tribunal's decision dated 30/11/2016 passed in Appeal No.173 of 2016 **Rama Shankar v. Lanco Anpara Power Limited.**
- c) The Appellant is claiming excessive tariff of Rs.5.088/KwH discovered in a Competitive Bid initiated in the year 2012 overlooking substantial reduction in tariff at which the electricity is available in the year 2016.
- d) This Tribunal has in its decision dated 14/11/2017 passed in Appeal No.285 of 2016 in **Dans Energy Pvt. Ltd v. Uttarakhand Electricity Regulatory Commission** has emphasised the necessity to consider the least cost purchase.

- e) The approach adopted by UPPCL and the State Commission in considering the restoration of Letter of Intent is against consumer interest. It is well settled that the touchstone is the consumer interest (**Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Pvt. Ltd.**<sup>1</sup>)
- f) In the circumstances the application for leave to appeal deserves to be granted.

6. We have heard Mr. Ranganadhan learned counsel appearing for RKM Respondent No.1 and perused the written note filed by him. Gist of the submissions is as under:

- a) To maintain an appeal under Section 111 of the Electricity Act (“**the said Act**”) a person has to be “an aggrieved person”(See: **GRIDCO v. Jindal**)

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<sup>1</sup> 2017 12 SCALE 781

**Stainless Ltd.**<sup>2</sup> where this Tribunal has laid down the criteria which a person has to satisfy before he can be an aggrieved person).

- b) In the application the Appellant has not disclosed as to what is the legal injury or legal prejudice the Appellant has suffered.
- c) The Appellant had never questioned the Letter of Intent granted on 22/05/2013. The decision by the State government to restore the Letter of Intent was on 16/07/2015. Even at that time the Appellant did not challenge the restoration.
- d) The grant of Letter of Intent is a pure contractual event between RKM and UPPCL.
- e) As held by this Tribunal in **Lanco Power Ltd.** even though the discovered tariff is a part of the purely contractual PPA, since it impacts the consumers,

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<sup>2</sup> 2009 ELR (APTEL) 459

the consumers would have a right to be heard in a process where the tariff is being finalised. However, in this case tariff is not being finalised, but it is a mere step in aid to the fruition of the contract. **Lanco Power Ltd.** is completely distinguishable on facts.

- f) The Standard Bidding Documents contemplate that the disputes pertaining to the tariff shall be adjudicated upon by the Appropriate Commission whereas the disputes other than those pertaining to tariff may be adjudicated by Arbitration.
  
- g) Pursuant to the Letter of Intent, the Generation facility has been completed and supply has commenced on 02/04/2017. RKM has made an investment of 1300 crores, the same could not be undone by a consumer challenging a pure contractual issue.

h) On the concept of aggrieved person reference may also be made to i) **Pushpendra Surana v. CERC**<sup>3</sup>, **Banarasi & Ors. v. Ram Phal**<sup>4</sup>, iii) **Northern Plastics Ltd. v. Hindustan Photo Films**<sup>5</sup>

i) The application, in the circumstances, be dismissed.

7. Mr. Srivastava learned counsel for Respondent No.2 has also vehemently opposed the application for leave to appeal.

8. It is necessary first to understand the background of the case. On 22/05/2013, Letter of Intent was issued by UPPCL to RKM for supply of 350 MW power at the levelised tariff of Rs.5.088/KwH. This tariff was discovered in a Competitive Bid initiated in the year 2012. On 19/12/2013 UPPCL cancelled the said Letter of Intent due to failure of RKM to submit Contract Performance Guarantee. UPPCL filed Petition No.1078 of 2015 for restoration of Letter of Intent issued to RKM. In this petition impugned order dated

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<sup>3</sup> 2014 ELR(APTEL) 820

<sup>4</sup> (2003) 9 SCC 606

<sup>5</sup> (1997) 7 SCC 452

11/02/2016 was passed by the State Commission giving approval to the restoration of Letter of Intent issued to RKM. UPPCL then filed Petition No.1106/2016 before the State Commission for adoption of tariff. On 27/10/2016 the State Commission issued public notice in this petition. It is the Appellant's case that at that stage he came to know about the proceedings regarding the restoration of Letter of Intent and adoption of tariff. The Appellant participated in the proceedings of Petition No.1106 of 2016 so that the State Commission's order dated 11/02/2016 would not take effect. The Appellant objected to adoption of tariff of Rs.5.088 per unit discovered in Competitive Bidding Process held in 2012 and quoted by RKM. However, by order dated 01/02/2017 passed in Petition No.1106 of 2016, the State Commission adopted tariff of Rs.5.088 per unit as quoted by RKM for 25 years. The Appellant then filed a common appeal being DFR No.916 of 2017 against order dated 11/02/2016 and order dated 01/02/2017. Since RKM and UPPCL raised objection regarding the maintainability of the common appeal, the Appellant filed present appeal on 24/07/2017 against order dated 11/02/2016.

9. It is vehemently contended on behalf of RKM that the Appellant neither questioned the grant of Letter of Intent in favour of RKM on 22/05/2013 nor did he question the restoration of Letter of Intent on 16/07/2015 immediately. The Appellant chose to wait till order dated 01/02/2017 adopting tariff was passed by the State Commission. The Appellant could be said to be aggrieved by the order adopting tariff, as it impacts the consumers, but certainly not by order restoring the Letter of Intent. It is submitted that grant of Letter of Intent is purely a contractual event between RKM and UPPCL, which is not open to challenge by the Appellant.

10. We are not impressed by this submission. We find substance in the contention of the Appellant that he *bona fide* participated in the tariff proceedings and opposed adoption of tariff. Had the State Commission not adopted the tariff quoted by RKM there would have been no occasion or reason for him to challenge the order restoring Letter of Intent in favour of RKM. The order restoring Letter of Intent in that event, would have lost significance. We are inclined to accept the submission that therefore the Appellant did not challenge the order restoring Letter of Intent. Being a consumer, the Appellant was right in avoiding multiplicity of proceedings. It

cannot be inferred from this that the Appellant is not aggrieved by the impugned order restoring Letter of Intent. The moment the State Commission adopted tariff quoted by RKM, the impugned order became relevant and hence the Appellant has challenged it.

11. The case of the Appellant is that the State Commission has allowed RKM to have the PPA at a levelised tariff of Rs.5.088/KwH discovered in the Competitive Bidding Process held in 2012, when in subsequent Tariff Based Competitive Bidding Process, the tariff discovered is only Rs.3.94/KwH to Rs.4.63/KWh. *Prima facie*, prejudice to consumers is writ large in these circumstances. This event, as we have already noted, makes approval granted to restoration of Letter of Intent to RKM also relevant. It cannot be said that said order causes no prejudice to the consumers. Where consumer interest is involved, this Tribunal will have to be cautious and must endeavour to safeguard consumer interest. Our attention has rightly been drawn to the judgment of the Supreme Court in **Gujarat Urja Vikas Nigam Ltd.** where the Supreme Court has observed that interest of consumers, as an objective, can be clearly ascertained from the said Act. The Preamble of the said Act, notes the Supreme Court, mentions 'protecting interest of consumers'.

The Supreme Court goes on to observe in this judgment that its approach ought to be cautious and guarded when the decision has its bearing on the consumers. These observations apply with equal vigour or perhaps with more vigour to this Tribunal. We would therefore prefer to take a lenient and consumer friendly approach in such matters unless we suspect any sharp practice, which we do not notice in this matter.

12. It is not possible, in the circumstances of the case, to treat the approval to restoration of Letter of Intent in favour of RKM as a purely contractual matter having no relevance to consumers. As noted by this Tribunal in **Rama Shankar Awasthi v. Lanco** in a given case even a decision in a contractual matter can have repercussions on tariff. It can have adverse impact on consumer interest. Therefore, such a strict view cannot be taken in matters involving tariff.

13. Once we reach a conclusion that the Appellant as a consumer is prejudiced because of adoption of tariff quoted by RKM, it is not possible to hold that the Appellant as a consumer is not prejudiced because of restoration of Letter of Intent in favour of RKM. We have

no hesitation in coming to the conclusion that the Appellant is a person aggrieved within the meaning of Section 111 of the said Act. We therefore allow the application by granting the Appellant leave to appeal.

14. Before parting we would like to make it clear that observations made in this order which may touch the merits of the case are made for the purpose of disposal of this application. Needless to say that final view on the merits will be taken independently and in accordance with law after hearing the parties.

15. The application is disposed of in the afore-stated terms.

16. Pronounced in the Open Court on this **30<sup>th</sup> day of November, 2017.**

**S.D. Dubey**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**