Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal Nos. 26 & 36 of 2007

Dated: 12th May, 2008.

Present: Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Mr. H.L. Bajaj, Technical Member
Hon'ble Mrs. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Appeal No. 26

Uttar Pradesh Power Corpn. Limited, …Appellant

Versus

Noida Power Corpn. Limited. ….Respondent

Counsel for the Appellant(s) : Mr. Sitesh Mukherjee, Mr. Rajiv Yadav,
Ms. Sakya Singh Chaudhary &
Mr. Sapan Kumar Mishra, Advocates

Counsel for the Respondent(s): Mr. Shanti Bhushan, Sr. Advocate
Mr. Jayant Bhusan Sr. Advocate,
Mr. Vishal Gupta and Mr. Sanjeer K. Kapoor Advocates,
Mr. Suresh Tripathy and Mr. A.S. Chahal, Advocates
Mr. Sanjeev K. Pathak, Advocate
Mr. Gautam Ghosh, Dy. GM, NPCL

Appeal No. 36

Noida Power Corpn. Limited. …Appellant

Versus

Uttar Pradesh Power Corpn. Limited, ….Respondent

Counsel for the Appellant(s): Mr. Shanti Bhushan, Sr. Advocate
Mr. Jayant Bhusan Sr. Advocate,
Mr. Vishal Gupta and Mr. Sanjeev K. Kapoor Advocates,
Mr. Sanjeev K. Pathak, Advocate
Mr. Gautam Ghosh, Dy. GM, NPCL

Counsel for the Respondent(s): Mr. Sitesh Mukherjee, Mr. Rajiv Yadav,
Ms. Sakya Singh Chaudhary &
Mr. Sapan Kumar Mishra, Advocates
Mr. Suresh Tripathy and Mr. A.S. Chahal, Advocates

ORDER

Consequent to the divergence of opinion between the Members of the Hon'ble Bench consisting of Hon'ble Technical Member (Mr. A.A. Khan) and Hon'ble Judicial Member (Mrs. Justice Manju Goel) leading to pronouncement of separate judgments both on October 25, 2007, in Appeal Nos. 26 of 2007 and 36 of 2007, a reference was made by the Hon'ble Bench to the Hon'ble Chairperson under Section 123 of the Electricity Act, 2003. The Hon'ble Chairperson referred the matter to Hon'ble Technical Member (Mr. H.L. Bajaj) for his opinion under Section 123 of the Electricity Act, who delivered his judgment on 08 May 08. The Hon'ble Chairperson

thereafter has constituted a Bench under Section 123 of the Electricity Act consisting of Hon'ble Technical Member Mr. A.A. Khan, Hon'ble Technical Member Mr. H.L. Bajaj and Hon'ble Judicial Member Mrs. Manju Goel to deliver a majority judgment.

2. We consider it necessary to extract Section 123 of the Electricity Act, 2003 as below:

> *"123.* ***Decision to be by majority.*** *– If the Members of the Appellant Tribunal of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Appellate Tribunal an such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it."*

3. One of us (Hon'ble Technical Member Mr. H.L. Bajaj) by his judgment delivered on 08.05.2008 has decided the core issue of dispute in the original Appeals being the 'Marginal Cost' defining it to be as "*incremental cost to procure next unit of electricity*" which is an internationally accepted definition and concluding that *"I hold that the 'Marginal Cost' is the average pooled purchase cost of the additional power which has to be applied to the entire 400 MW additional procurement. Remaining issues of divergence get covered with this finding by me."* This

definition of 'Marginal Cost' and its implementation in the instant case are in congruence with the judgment of one of us (Hon'ble Technical Member Mr. A.A. Khan) except that cost of power procured through the mechanism of unscheduled inter-change will also be taken into account while working out the average pooled purchase cost of additional power of 400 MW.

4. Reliance on the Minutes of Meeting of the group of Forum of Indian Regulators for giving recommendations on the computation of Surcharge and Additional Surcharge on account of Open Access held on December 17-18, 2004 cannot be placed for the definition of Marginal Cost as the same is given merely as an assumption for considering the alternative method of computing quantum of Surcharge and subsequently, the Tariff Policy, *inter alia,* dealing with cross subsidy Surcharge and Additional Surcharge for Open Access has been issued by the Government of India on January 06, 2006.

5. In view of the above the decision on the substantive issue of ,Marginal Cost' being in line with the judgment of one of us (Hon'ble Technical Member Mr. A.A. Khan) we adopt the same as majority judgment.

6. In the result, Appeal No. 26 of 2007 fails and is dismissed and Appeal No. 36 of 2007 is allowed, with no orders as to costs.

Pronounced in the open court on this 12th day of May, 2008.

(H.L. Bajaj)
Technical Member

(A.A. Khan)
Technical Member

As per Ms. Justice Manju Goel, Judicial Member

The majority view of this Tribunal that has emerged after reference under section 123 of the Electricity Act 2003 is that the marginal cost has to be computed at average rate of the rates of the incremental purchase of UPPCL aggregating to over 400 MW as put by the learned Technical Member Shri A.A.Khan in his own judgment or the average pooled purchase cost of additional power which has to be applied to the entire 400 MW additional procurement as said by learned Technical Member, Shri.H.L.Bajaj. At the outset I need to remind myself that the issue before this Tribunal did not relate to tariff fixation as done under section 62 and the relevant rules and regulations in this behalf. Hon'ble Shri H.L.Bajaj has referred to Appeal No. 124 of 2005 in the case of Kashi Vishwanath Vs UERC dated 02nd June, 2006 in which the Tribunal has ruled that the tariff has to be determined on the "*basis of pooled average cost of power purchase from all sources for all categories of consumers*". This rule has no application to the present case in which we are confronted with the question of interpretation of a contract and the question as to whether the seller of power is entitled to recover his dues. It is the question of contract *inter se* two parties and not the question of tariff generally.

2) The question before us is not what is marginal cost. The

question is what was understood to be the marginal cost. The question is not what the contract should have been. The question is what the contract has been. The question is whether a court can refuse to enforce a contract having held that the contract is valid and enforceable. The question is whether one party having got a contract specifically enforced decline to perform his part of the contract. The question is whether the party having received a benefit under the contract can resist a claim for the consideration on the ground that the consideration has worked out to be more than his expectation.

3) The whole question depends upon the interpretation of contract entered into by the two parties – the UP Power Corporation Ltd. (UPPCL) and NOIDA Power Co. Ltd. (NPCL). The majority view is also that the contract between the parties is a legal and valid contract. The contract is not vitiated for any reason. The seller should be entitled to recover the contractual price of commodity sold. Therefore, there is no escape from the conclusion that UPPCL, supplier of power is entitled to recover the contracted price from NPCL.

4) The next question, therefore, is what is the contracted price? In my earlier judgment I have gone into the sequence of events which I do not think is necessary to reproduce here again. My judgment dated 25.10.07 may be read as a part of the present order.

5) The letter of 08.05.06 is closely followed by the letter of 10.05.06. The letter of 10.05.06 refers to the decision to supply 10 MW of additional electricity to NPCL. Therefore, this letter obviously refers to the contract which is evidenced by the letter of 08.05.06. There is no point in saying that the letter dated 10.05.06 does not refer to the letter dated 08.05.06 as the letter dated 10.05.06 was occasioned on account of additional supply of power as agreed to by the letter dated 08.05.06. The definition of marginal cost as given in letter of 10.05.06 is virtually the same as the definition of marginal cost given by the Forum of Indian Regulators in the Minutes of Meeting held on 17th & 18th December, 2004. Reference can be made to paragraphs 26, 27 and 29 of my judgment dated 25.10.07. The UPPCL did receive the letter dated 10.05.06 and came to know the method by which the marginal cost was going to be calculated. It still proceeded to take the supply of additional power. The NPCL therefore has acted under the two letters dated 08.05.06 and 10.05.06 and should be presumed to have understood the meaning of marginal cost being assigned to the term by UPPCL.

6) It is not the case of NPCL that it understood marginal cost to be something different. Nor does NPCL dispute the concept of marginal cost as given by these two documents.

7) It is to be noted is that the NPCL never offered any alternative definition of marginal cost. Marginal cost as defined by either of the two learned Technical Members cannot be read into the contract. At no point of time NPCL claimed that what it understood to be the marginal cost was the average rate of the rates of the incremental power purchase of the 400 MW of additional power or the average pooled purchase cost of the 400 MW additional procurement thereby equating marginal cost with average cost. While interpreting the contract the court has to see what was understood by the parties. Since neither party understood the marginal cost as what is being stated by the majority view I am unable to agree to read the same as constituting a term of the contract. The Court cannot make out a third case. Nor can the court add its own term into a contract or substitute one term by its own term in the name of fairness of equity.

8) Since the contract is held to be legal and valid I could not persuade myself to agree with the view that the contractual price is not recoverable. The contractual price is what the parties contracted to. There was no meaning of marginal cost except what is given in the letter of 10.05.06 or in the Minutes of the Forum of Regulators. The definition of marginal cost which is now being given was nowhere in the picture when the contract was entered into. Therefore, that definition cannot be read to interpret marginal cost mentioned in the contract of

08.05.06.

9) The definition of marginal cost as provided by the majority agreement is not supported by any statutory provision or any rule of interpretation. The relief in this case depends entirely on the interpretation of the agreement. The task before us is to understand what the parties understood. The task before the court is not whether it would be fair for UPPCL to charge the marginal cost as defined by letter dated 10.05.06 and the Forum of Regulators. No law permits a court to transpose a new term in an already concluded contract because a term offered by the court is fairer than the term already existing in the contract.

10) Further I cannot but say that when UPPCL supplied the additional power, it did not have in mind the price or marginal cost as defined by the two learned Technical Members. UPPCL has offered its services hoping to recover the marginal cost as understood by it. UPPCL has been made to supply the agreed amount of electricity to NPCL by various orders of the High Court and the Commission. It will be entirely unjust to deprive the UPPCL of the price at which it intended to supply the additional 10 MW of power after having already obtained from it the entire supply.

11) The NPCL has virtually forced the UPPCL to specifically

perform the contract. Specific performance of the contract is an equitable relief. The cardinal principle of equity is that one who seeks equity must do equity. The party who seeks specific performance of the contract must always be ready and willing to perform his part of the contract. This principle is enshrined in Section 16(c) of the Specific Relief Act 1963 which says as under:

> "*16.* ***Personal bars to relief.***- *Specific performance of a contract cannot be enforced in favour of person-*
>
> *(a)* …
>
> *(b)* …
>
> *(c)* *who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant."*

This is the elementary rule of relief of specific performance. NPCL has virtually obtained specific performance without paying the contracted price. In my opinion it will be unjust and inequitable to deprive the UPPCL of the contracted price of the additional power supplied by it to NPCL. I reiterate that the contracted price is the price which

the parties understood to be the contracted price. Each party was aware of the document of 10.05.06 leaving no scope for any doubt that NPCL did not understand what was the contracted price. As stated earlier, NPCL's grievance was not related to the definition of contractual price. The grievance of NPCL was only that the price had worked out to be above its expectation. I am afraid I could not agree with the majority view in view of the position of law as understood by me.

12) Coming to the part of relief, I find that the Commission eventually allowed the UPPCL to recover the marginal cost for the additional 10 MW of power. The Commission on the other hand has reduced the bulk supply tariff which was not in challenge before it. Neither is there any rationale in reducing the bulk supply tariff nor any such jurisdiction in the hands of the Commission. I reiterate my original judgment dated 25th October 2007. In my opinion on Appeal No.26 of 2007 need to be allowed and the impugned order set aside to the extent it reduces the bulk supply tariff payable by NPCL for the original 45 MW of power. The direction to pay the marginal cost should be upheld but for different reasons. The NPCL should pay electricity dues for supply of additional 10 MW at marginal cost for the period 10.05.06 to 31.01.07 in the way explained above in addition to the bulk supply tariff for 45 MVA at Rs.2.9361 per unit.

13) The appeal No. 36 of 2007 has no merit and therefore should be dismissed.

(Justice Manju Goel)
Judicial Member