

**Before the Appellate Tribunal for Electricity
Appellate Jurisdiction**

Appeal Nos. 26 & 36 of 2007

Dated: 25th October, 2007.

**Present: Hon'ble Mr. A. A. Khan, 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

JUDGMENT

Per Hon'ble A.A. Khan, Technical Member

I have perused the judgement of the learned Judicial Member Hon'ble Mrs. Justice Manju Goel but have failed to persuade myself in aligning my views on certain aspects with that of her's and respectfully disagree with her judgment in draft, whereby she has dismissed the Appeal No. 36 filed by Noida Power Corporation Ltd. and allowed the Appeal No. 26 filed by U.P.P.C.L. Hence, I am writing my own independent judgment on these appeals.

Introduction

2. The case relates to two cross appeals No. 26 & 36 of 2007, against the impugned order dated 08 Feb. 2007 of UP Electricity Regulatory Commission (hereinafter refer to as 'Commission'), passed in Petition No. 414 of 2006 involving Noida Power Corporation Ltd. (for brevity to be called as 'NPCL'), a joint venture company of Greater Noida Authority and CESCO Ltd. for supplying electricity in Greater Noida area and U.P. Power Corporation Ltd. (for brevity referred to as 'UPPCL') a company wholly owned by the State Government of U.P., currently charged with the responsibility of bulk purchase and supply of Power within the territory of U.P. During the relevant period of the instant case, UPPCL was additionally charged with the functions of State Transmission Utility (STU). The impugned order was passed, under Section 86 of the Electricity Act 2003 (for short 'the Act') read with Section 34 of the Uttar Pradesh Electricity Reforms Act, 1999, in the aforesaid petition filed by the Appellant NPCL before the Commission. As both appeals traverse the common issues I, for convenience, have chosen Appeal No. 36 of 2007 as lead appeal. The Appellant is aggrieved by that part of the impugned order vide which the Commission has allowed Respondent, UPPCL, to charge the Appellant at the marginal cost for supply of additional 10 MW of power to NPCL,

despite holding in the impugned order itself that on account of non-allocation of the PPAs, the condition of retail supply tariff at uniform rate across the State and the denial of open access to the appellant, the imposition of burden of extremely high marginal cost on the Appellant will be unreasonable, discriminatory and unfair to it. The appellant, UPPCL has challenged the other part of the impugned order whereby the Commission has reduced the tariff of 45 MW supply, during the period of dispute, which NPCL has been availing since beginning, to the average of the pool cost of power applied to other distribution companies of the State.

Brief Background

3. On 11 December 1992 Greater Noida Authority entered into a Memorandum of Understanding with CESCO Ltd. to set up a joint venture company for the purpose of supplying electricity to the consumers in the Greater Noida area. To give effect to the provisions of the said agreement, Noida Power Company Ltd (NPCL), who is the Appellant in the present appeal before us, was floated jointly with 27% ownership held by Greater Noida Authority.

4. The Appellant entered into an Agreement on 15 November 1993 with

UPSEB (predecessor of the Respondent) for taking over distribution of power in the Greater Noida notified area. The agreement provided for UPSEB to supply 45 MVA of electricity to the appellant. The said agreement also envisaged that the Appellant has to supply electricity to its consumers at the rate which shall not be more than the tariff fixed by the UPSEB. This arrangement of having uniform tariff throughout the state of UP is still continuing. The agreement was initially for a period of four and a half years which was subsequently extended from time to time. As regards tariff for supply of electricity by UPSEB to NPCL, the agreement provided for a tentative rate of Rs. 1.66 per unit, which was required to be studied and revised by an independent authority to be nominated by the Government of UP.

5. The Appellant was granted a license by the State Government of UP on 30 August 2003 under the provisions of the Indian Electricity Act, 1910. Consequent upon the enactment of the Electricity Act, 2003 (the Act), the Appellant became a deemed distribution licensee in accordance with the First Proviso of Section 14 of the Act.

6. In pursuance to the agreement between the parties, the State Government, one after another, appointed two committees, to examine the

rate of charge of electricity to be supplied by UPSEB to NPCL. However, the Appellant and Respondent did not reach consensus in accepting any single tariff recommended by the said committees. In the meanwhile, the Uttar Pradesh Electricity Regulatory Commission was constituted and established in accordance with the provisions of the Electricity Regulatory Commissions Act, 1998 (for short 'ERC Act 1998').

7. The Lucknow Bench of the Allahabad High Court on being approached by the Appellant, directed the 'Commission' to fix the power purchase price. The Commission determined the tariff for supply of electricity by UPPCL to NPCL at Rs. 1.39 per unit for 1993-2000 and at Rs. 2.56 per unit for year 1999-2000. The High Court through its order dated 10 November 2005 approved the above rates.

8. The Appellant has submitted that on the face of the growing demand from the consumers it requested the Respondent to either provide open access so that the Appellant could import power from third party or in the alternative the Respondent may supply additional power to meet the demand. First such letter was written in September 2003. Subsequently, the Appellant approached the Commission in 2004 to direct UPPCL to allow open access. The Commission directed the Respondent to take necessary

action in the matter of providing open access to the appellant. The Respondent expressed its inability before the Commission to provide open access due to transmission constraints. It is pertinent to mention here that the Respondent during the relevant period has been performing the dual responsibility of State Transmission Utility and purchase/sale of bulk power which is repugnant to the Act. Thus, as per the provision of Section 39 of the Act providing of non-discriminatory open access to inter-State transmission system to any licensee or generating company, is the responsibility of the Respondent.

9. It has been submitted by the Appellant that the 'Commission' vide its order dated 08 Dec. 2005 directed the Respondent not to take any coercive action against the Appellant unless it (UPERC) specifies otherwise expressly by an order because such disruption in supply to the NPCL would cause unimaginable hardships to all sections of the consumers of the area. The order further directed the parties to submit a copy of the Power Purchase Agreement (PPA) signed for bulk supply of power. The Appellant states that a draft PPA was submitted to UPPCL but the same was not signed. Consequently, no PPA had been submitted to the Commission. When queried the Respondent, UPPCL answered that it has been making purchases

of over 400 MWs of power over and above through the long-term PPA, central allocation, etc. to meet the shortfalls in the demand from the distribution companies.

10. There were dialogues between the Appellant and the Respondent for supply of additional power to NPCL. Here I may refer to a letter dated 13 January 2006 written by the Respondent which stated that **“you are aware that in the last meeting we have agreed to allocate additional power to NPCL to meet the growing demand. This additional allocation would be available after 400 kv sub-station of Greater Noida, being constructed by BHEL, is commissioned which is expected to be completed by March, 2006.”**

11. Subsequently, NPCL through its communication dated 08 May 2006 agreed to supply of additional 10 MVA power by UPPCL at ‘marginal cost.’ It may be mentioned here that there is no minute or consensus between the parties as to what is ‘marginal cost’ or as to how should it be assessed or evaluated. When the bills were raised by the Respondent for supply of additional power to the Appellant it found that the rates applied are in the range of Rs. 8-9 per unit, which became a matter of dispute between the parties. NPC, thereafter, defaulted on payment for 10 MW supply from

UPPCL. Fearing disruption of supplies, as a result of non-payment of bills in time, the Appellant approached the UPERC, inter-alia, for directing the Respondent not to interrupt/diminish the supply of bulk power for any reason.

12. The Commission through an interim order dated 21 Nov. 2006 directed **‘UPPCL not to restrict the power supply of NPCL and restore it to the previous level, if already reduced, till further orders of the Commission’.**

13. NPCL through its affidavit dated 27 and 30 Nov. 2006 informed the Commission that UPPCL withdrew the additional power supply of 10 MW w.e.f. 20 Nov. 2006 midnight itself and that, even after depositing of the requisite amount by NPCL in compliance of the Commission’s order dated 21 Nov. 2006, UPPCL has not restored power supply to its previous level. As per the directions of the Commission, NPCL officials also met senior officials of UPPCL but no amicable solution could be reached. The Commission in its order dated 01 December 2006 held that:

“The Commission takes a serious note of the non compliance of Commission’s order but to provide UPPCL one more opportunity directs it to restore the supply of electricity to its earlier level in the petitioner area by 02 December 2006. In case of continued non-

compliance by NPCL, Commission will consider fixing personal responsibility of the officials concerned and initiate proceedings under Section 142 of the Electricity Act-2003”.

14. The Respondent approached the Allahabad High Court against the above order of the Commission. The High Court in its order dated 07 Dec. 2006 declined to stay the directions contained in the order dated 01 December 2006 of the Commission except the action mentioned under the last portion of the order regarding fixation of personal responsibility.

15. On 11 December 2006, the Appellant approached the Commission seeking directions to UPPCL to comply with the orders dated 21 Nov. and 01 Dec. 2006 of the Commission.

16. The High Court, on being approached by the Commission, through its order dated 19 Dec. 2006, directed UPPCL to restore power supply to NPCL within 24 hours and also directed the Commission to finalize the proceeding within four weeks. While the matter was under consideration of the Commission, UPPCL filed a contempt petition before the Allahabad High Court on 22 January 2007 for action against Chairman and Members of the UPERC for not finalizing the matter within four weeks in compliance of the order of the High Court.

17. The matter was directed by the Commission through its order 08 Feb. 2007 (impugned order). Aggrieved by the order, NPCL has preferred the present appeal before this Tribunal.

Discussion

18. NPCL has submitted that it had agreed to buy power at marginal cost because of undue influence. If the said letter is deemed to be issued under undue influence, this communication can not be treated as a valid contract keeping in view the provisions of Section 10, 13, 14 and 16 of the India Contract Act, 1872.

19. NPCL has in its submission to the Tribunal, stated that earlier in terms of the Agreement signed with the erstwhile UPSEB, it could not establish its own generating capacity as UPPCL did not agree to execute a PPA for purchasing surplus power from such new capacity. Further, it submits that UPPCL having declined its repeated requests for open access to purchase power from other sources and the public pressure for additional supply to meet the growing demand of power, it had agreed to buy additional power from UPPCL at marginal cost under undue influence.

20. Right from the inception, the existing constraints in intra-state transmission system limited the drawl of Power by NPCL to 45 MW. The Appellant has, since 1993, been making repeated requests to Respondent for providing open access to procure power for additional support from other sources. It is obvious that over a period of nearly 12-13 years, the demand in the area could not be held static at the level of 45 MW and even at the growth rate of 2% per annum the demand would have risen to the level of 60-65 MVA. This period was more than adequate to strengthen intra-State transmission system by UPSEB/UPPCL/STU. Thus, the Appellant neither was receiving the additional supply of power from UPPCL, nor due to transmission constraints was in a position to procure power from other sources to meet the ever rising demand. It was, no doubt, an unenviable situation faced by the Appellant. The Appellant has submitted that even after additional supply of power by the Respondent w.e.f. 10 May 2006, it is forced to resort to load shedding ranging from 4 to 8 hours in its area. The Appellant has averred that it had no option but to agree to the unreasonable proposal of the Respondent to supply additional power at the marginal cost. The Commission vide its order dated 15 Dec. 2005 directed the UPPCL to supply additional power of 5 MW on the existing network and thereafter

another 10 MW after commissioning of 400 KV Pali sub-station in March 2006. It is noted that 5 MW on the existing network was also not supplied to the Appellant.

21. Notwithstanding the aforesaid, in my view which is congruent to the views of the Judicial Member the above reasons do not appear to indicate existence of undue influence on NPCL to agree to purchase power at marginal cost. Shortage of power and consequent sufferings are not peculiar to the consumers in the areas catered to by NPCL. Consumers in other parts of the State of UP also face similar consequences of shortage of power. Even in these parts, certain parts witness more power shortages than others.

22. From the submissions made before us, it is clear that NPCL was aware that supply of additional power would be at a rate different than the bulk supply tariff it was hitherto paying to UPPCL for purchase of power up to 45 MW, as it agreed to buy additional power at the 'marginal cost'. The reasoning of undue influence advanced by NPCL appears to be an after-thought to avoid consequences of the contract. I am in full agreement with views of the Judicial Member that the agreement for purchase of 10 MW additional power supply continues to be valid.

23. UPPCL vide its letter dated 10 May 2006 (addressed to Pashchimanchal DISCOM, copy endorsed to NPCL) has mentioned:

“4. For the purpose of calculating the marginal cost, the highest cost for power drawn from different sources shall be treated as marginal cost”.

Besides not detailing as to how the ‘marginal cost’ is to be determined, it also does not mention the unit of time-period (whether hourly, daily etc.) during which the evaluation of the highest cost, out of all purchases from different sources by UPPCL, is to be determined.

24. This agreement would, however, mean that consumers in NPCL licensed area would always be burdened with the cost (as expressed in the impugned order) *“.....to an astronomically high figure in the name of marginal cost whereas other distribution licensees are procuring power at an aggregate average value, then it will wipe-off the revenue of NPCL thereby endangering its existence.”* One could imagine the situation wherein, as per the desired objective of promoting competition by the Act, if the present restriction of having uniform tariffs in all Distribution Areas is lifted resulting into each Distribution Company having different competitive tariffs based on the respective skill of procurement of power from

competitive sources and efficiency of its operation and effectively managing the aggregate technical and commercial losses. The aforesaid will benefit consumers, in terms of quality and tariff of the power supply, located in the area covered by the efficient distribution company. In the instant situation, however, the distribution company is not incentivised for its efficiency and the costliest power is burdened on one Distribution Company as opposed to other Distribution Companies in the State. It is contrary to the foundation of the Act as seen from the ‘statement of Objects and Reasons’ which at para 3 extracted below stated thus:

“With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the India Electricity Act 1910, the Electricity (Supply) Act 1948 and the Electricity Regulatory Commissions Act 1998 in a new self-contained comprehensive legislation arose.”(Emphasis supplied)

25. Also the preamble of the Act reads as under:

“An Act is consolidate -----and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas-----” (Emphasis supplied)

26. The case so far described above does not follow the principles of equity, justice and fairness, particularly so, when the distribution licensees are not having access to power procurement independent of UPPCL. The case so far described above does not follow the principles of equity, justice and fairness, particularly so, when the distribution licensees are not having access to power procurement independent of UPPCL. Further, according to the basic principles of interpretation of statutes, all sections in an Act are required to be harmoniously construed such that if one provision of the Act cannot be reconciled with the other, they should be so interpreted that, if possible, effect could be given to both. The Objects and Reasons and Preamble of the enactment of the Act, being very soul and spirit of the Act, in my view are at higher pedestal and should not be compromised by any interpretation of the provisions of the Act.

27. As per the available records, the Appellant appears to have repeatedly requested the Respondent to provide the calculations of the marginal cost but of no avail. The Respondent raised the demand on the Appellant to make the payment for the period May 2006 to August 2006 which contained the billing details of marginal cost. The marginal cost during the aforesaid

period varied between Rs. 8.56 to 9.54 per unit. The Appellant was served upon the notice that if the payments are not made in accordance with the aforesaid demand raised, UPPCL will restrict/reduce the supply to NPCL to 45 MW w.e.f. 21 Nov. 2006. The Appellant moved the Commission under Section 86 of the Electricity Act 2003 and Section 34 of the UP Electricity Reforms Act seeking for certain reliefs in Petition No. 414 of 2006 dated 16 Nov. 2006.

28. The Appellant has, by its Additional Submissions dated 16 Nov. 2006 in Petition No. 414 of 2006 before the Commission, invoked Section 129 of the Act seeking for the following reliefs:

“A. Appropriate orders directing the Respondent not to interrupt/diminish the supply of bulk power for any reason whatsoever.

B. Appropriate orders restraining the Respondents from taking any coercive steps as reflected in the Respondents letters more particularly their letter dated 26.10.2006.

C. Ad-interim orders in respect of prayers (A&B) above.

D. Such other appropriate order / orders as the is Hon’ble

Commission may deem fit and proper in the interest of justice.”

Analysis

29. In light of the above facts, let us analyze them from two perspectives as indicated below:

[AA] Were the roles performed by the involved dominant players in state power sector conducive to the power sector development as envisaged by the Act and how the instant case be viewed on merits?

[BB] Jurisdiction of the Commission and proceedings held before it.

30. Taking up [AA] above, it is observed earlier that the arrangement of purchase of additional power by NPCL at ‘marginal cost’ as understood by UPPCL, renders the NPCL distribution area inaccessible to competitive sources of power supply implying that consumers in NPCL licensed area would be burdened with the costliest power procured by UPPCL, for a long period of 9-10 months. In the normal course, on the one hand, if the restrictions of uniformity in the retail tariff is removed, it will directly reflect on large increases in retail tariff and on the other hand, like in the instant case, it has potential of wiping out the entire networth of the Distribution Company making its business unviable. It neither meets the intent of the

State Power Reforms Act, 1999 nor the Act itself for reforming the sector for making it conducive for investment from the private sector specially when NPCL is by far the only private distribution licensee in the state U.P.

31. Needless to mention that the above arrangement hampers competition in procurement of electricity on the one hand and places entire burden of costliest power on a single distribution licensee in the state, on the other. Before we go further we would like to refer the following provisions of the Act:

Section 39

39. (1) The State Government may notify the Board or a Government company as the State Transmission Utility:

Provided that the State Transmission Utility shall not engage in the business of trading in electricity:

(2) The functions of the State Transmission Utility shall be-

(a) to undertake transmission of electricity through intra-state transmission system;

(b) to discharge all functions of planning and co-ordination relating to intra-state transmission system with –

.....

(vi) licensees;

.....

(d) to provide non-discriminatory open access to its

transmission system for use by -

(i) any licensee or generating company on payment of the transmission charges;

or

.....

Section 40 Duties of Transmission licensees

40. It shall be the duty of a transmission licensee-

(a) to build, maintain and operate an efficient, co-ordinated and economical inter-state transmission system or intra-state transmission economical inter-state transmission system or intra-state transmission system, as the case may be;

.....

(c) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

.....

Section 41. Other business of Transmission Licensee

Last proviso to the section reads as under:

Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business to in trading electricity.

32. Section 39 of the Act does not permit state transmission utility to engage in the business of trading in electricity, which is what UPPCL has

been indulging in by procuring electricity on behalf of all distribution licensees in the state. The above provisions also lay responsibility of planning and co-ordination relating to transmission system upon the STU. The STU cannot wait for demand to emerge first and then take steps for augmenting/building the transmission infrastructure in the state, particularly when, during the period the disputes arose, the STU, the transmission licensee and bulk purchaser/supplier in the state are the same entity. The Act clearly places a responsibility upon the STU to provide open access to the licensees in the state on payment of transmission charges.

33. In terms of Section 40 of the Act, it is the duty of the transmission licensee to provide non-discriminatory open access to its transmission system for use by any licensee on payment of transmission charges. Clause 5.3.3. of the National Electricity Policy mandates non-discriminatory open access in transmission from the very beginning i.e. the date of enforcement of the Act.

34. The National Electricity Policy notified by the Central Government on 12 Feb. 2005 throws more light on the provisions of open access and the duties of transmission licensees, which I feel relevant to reproduce below:

“The Central Transmission Utility (CTU) and State Transmission Utility (STU) have the key responsibility of network planning and development based on the National Electricity Plan in coordination with all concerned agencies as provided in the Act.....The STU is responsible for planning and development of the intra-state transmission system....

- *Network expansion should be planned and implemented keeping in view the anticipated transmission needs that would be incident on the system in the open access regime. Prior agreement with the beneficiaries would not be a pre-condition for network expansion. CTU/STU should undertake network expansion after identifying the requirements in consultation with stakeholders and taking up the execution after due regulatory approvals.*
- *Structured information dissemination and disclosure procedures should be developed by the CTU and STUs to ensure that all stakeholders are aware of the status of generation and transmission projects and plans. These should form a part of the overall planning procedures.*

5.3.3 Open access in transmission has been introduced to promote competition amongst the generating companies who can now sell to different licensees across the country. This should lead to availability of cheaper power. The Act mandates non-discriminatory open access in transmission from the very beginning.

5.3.4 The Act prohibits the State transmission utilities/transmission licensees from engaging in trading in electricity. Power purchase agreements (PPAs) with the generating companies would need to be suitably assigned to the Distribution Companies, subject to mutual agreement. To the extent necessary, such assignments can be done in a manner to take care of different load profiles of the Distribution Companies.

5.3.5 To facilitate orderly growth and development of the power sector and also for secure and reliable operation of the grid, adequate margins in transmission system should be created. The transmission capacity would be planned and built to cater to both the redundancy levels and margins keeping in view international standards and practices.

5.3.6 The necessary regulatory framework for providing non-discriminatory open access in transmission as mandated in the Electricity Act 2003 is essential for signaling efficient choice in locating generation capacity and for encouraging trading in electricity for optimum utilization of generation resources and consequently for reducing the cost of supply.”
(Emphasis supplied).

35. The Electricity Policy clearly identifies a pro-active role for the STU. The STU has to play a role larger than any other commercial organization, in the sense that it has been identified as a critical link for the development of

the electricity industry. Availability of non-discriminatory open access is seen as an essential ingredient to enable developers making efficient choice while deciding the location of the generating capacity. An efficient STU is essential to introduce a fair and healthy competition in the sector. If the STU does not perform in a non-discriminatory and equitable manner, it is difficult to visualize efficient utilization of resources.

36. Like STU, the Act bars transmission licensees from undertaking trading in electricity. The idea behind such a provision is to avoid emergence of conflicting interest in allowing optimum usage of transmission network with equitable and fair treatment given to all the licensees. It is very important to note that unless the different co-ordinates of powers and responsibility perform their duties and obligations cast upon them in the Act, in letter and spirit, the objects of enacting the Act, which includes development of electricity industry and promoting competition therein, would always remain a distant dream.

37. I find that the performance of UPPCL in extending open access to NPCL leaves much to be desired. NPCL was compelled to approach the Commission to enforce its right to have open access in the transmission network owned by the UPPCL. It defies the logic that UPPCL is making

purchases from outside the State, of about 400 MW, over and above what is available through long-term PPA, central allocation, etc., to meet the additional demand of the distribution companies excluding NPCL, but when comes to NPCL's request of additional demand of 10 MW, it has to be treated differently both in terms of supply of quantum of power as well as the rate at which it is to be supplied.

38. The Commission through its letter dated 02 Sep. 2004, advised UPPCL *'to take necessary action on the proposal of NPCL to provide open access for use of its transmission system in compliance to the said statutory provisions of the Act...and submit an action taken report by 15 September 2004.'* Seeing no response from either party, UPPCL and NPCL were directed to file an action taken report by 30 Sep. 2004.

39. NPCL in its petition (206 of 2004) before the Commission, submitted that PTC and Tata Power Trading Company have offered to provide additional quantum of firm power at Power Grid Bus, on short-term arrangements from where wheeling via STU network will be necessary to access NPCL's off-take point at Surajpur. Based on the offer, approval of the Commission was sought so that modalities for formalizing necessary

arrangements for use of STU transmission network under open access can be taken up with UPPCL.

40. The Commission in its order of 22 Feb. 2005 stated that ‘UPPCL, STU, may note that it is entrusted function under section 39 of the Act,to provide non-discriminatory open access to its transmission system for use by, inter-alia, any licensee on payment of transmission charges. UPPCL in capacity of State Transmission utility has to function on commercial principles and do all such things which are expected to be done under the said provisions of the Act, 2003 and the provisions of the Open Access Regulations. It can not seek excuse for not being in good financial condition to undertake its obligations entrusted upon it by the Act.’ In the order the Commission directed that ‘UPPCL shall submit these information (as contained in the order) within one month specifying ‘time and phasing’ for meeting the short-term and long-term requirement of power to the petitioner with a copy to the Petitioner.’

41 The Commission in its order of 15 Dec. 2005 has mentioned that the Regulation 6 of the UPERC (Terms and Conditions for Open Access) Regulations, 2004 dated 07 June 2005 specifies that the existing distribution

licensees are entitled to continue to avail open access to the transmission system. The Commission further observed that *'it was possible for UPPCL to have complied with the provisions of the Act, had it initiated the comprehensive studies for expansion of the transmission system when it first received the request for open access from the Petitioner (NPCL) and subsequently as directed by the Commission. This is too late now for the UPPCL to undo what has been done but nevertheless it is in the interest of UPPCL to revamp its system and adapt to function in the capacity of STU by, inter-alia, capturing information data necessary for such function under the Act.'*(Emphasis supplied)

42. UPPCL has been reminded time and again of its statutory obligations to be performed under the Act, but it did nothing of significance to ensure compliance with the orders of the Commission and the provisions of the Act. Rather, UPPCL had instead moved the High Court for a contempt petition against the Chairman and Members of the Commission for non-compliance of the order of the High Court to finalize the proceedings within four weeks, knowing fully well that the Commission has initiated steps to resolve the dispute.

43. Considering the functions assigned to the Commission as per Section 86 of the Act it will be appropriate to extract the relevant provisions of Section 86 as under:

“Section 86 Functions of the State Commission

86. (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

.....

(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;

.....

(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3 of

the Act.”

44. Determination of bulk supply of electricity is a function mandated to the Appropriate Commissions. The above provisions also make it clear that the Appropriate Commission has to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from licensees. The above makes it clear that procurement of electricity by NPCL from UPPCL, including the price thereof, is subject to regulation by the Commission. It is observed that both UPPCL and NPCL failed in this regard as neither of them deemed it necessary to place the transaction before the Commission for their approval. NPCL approached the Commission only when they found that the purchase price demanded by UPPCL is higher than their expectations. This demand was raised after four and half months of the receipt of bills from the date of commencement of 10 MW supply from UPPCL.

45. Section 60 of the Act relating to market domination provides *suo moto* power to the Commission to issue directions as deemed appropriate to players in the power sector in order to prevent adverse effect on competition in the sector. The Section 60 is extracted below for reference:

*“60. **Market Domination:** The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company **enters into any agreement** or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.”*

(Emphasis supplied)

The import of the above provisions are that the Appropriate Commission can issue necessary directions where:

- Either the licensee enters into any agreement; or
- Abuses its dominant position; or
- Enters into a combination.

Which, is likely to cause or causes an adverse effect on competition in electricity industry.

46. The above is to be seen in the context of NPCL seeking open access from UPPCL so that NPCL can directly procure power from various other players operating in the market. The Commission vide its letter dated 02 Sep

2004 had directed UPPCL to take necessary action on the proposal of NPCL seeking grant of open access. Subsequently, vide Order dated 22 Feb. 2005 the Commission held that UPPCL was obliged under law to develop infrastructure to provide non-discriminatory open access and that it could not seek the excuse of not being in good financial condition to discharge its obligations. Considering UPPCL's continued reluctance to provide open access to NPCL, it is difficult to visualize that in such an atmosphere, NPCL would have gone ahead and finalized the offers of supply of power from other suppliers and signed power purchase agreement.

47. The above situation clearly attracts the provisions of Section 60 of the Act. Here the licensee (UPPCL) has entered into an agreement with another licensee (NPCL) which is having adverse impact on competition in the matter of procurement of electricity. In this connection National electricity Policy also lays down clearly the purpose of open access in transmission as under :

“5.3.3 Open access in transmission has been introduced to promote competition amongst the generating companies who can now sell to different licensees across the country. This should lead to availability of cheaper power. The Act mandates

non-discriminatory open access in transmission from the very beginning.”(Emphasis supplied).

48. The Commission rightly observed that *‘a valid agreement, even if approved under Section 86(1)(b) is found to be adversely affecting the competition in the sector during the course of its operations, the Commission has been mandated to issue appropriate directions to rectify the situation.’* The authorities cannot remain passive spectator.

49. The Commission has further, observed that, *‘it is an undivided responsibility of the Commission to promote competition in the electricity industry and also create an environment, which if not conducive then at least provides level playing field to the private sector entrepreneurs.....the present dispute is clearly a case of dominance abuse at the part of UPPCL as it was alone in the capacity to provide additional power to NPCL after rejecting its request of open access, which is definitely going to hamper the competition by loading the odds heavily against NPCL in form of significantly higher power purchase cost, arrived on the basis of marginal cost, with no commensurate additional revenue to support it.’*

50. By adopting the above methodology to calculate cost of additional

power supplied to NPCL, would place the consumers in the NPCL licensed area at a disadvantageous position compared to consumers situated in other parts of the state. The consumers in the NPCL licensed area would always have last priority to access power supply source, compared to other consumers in the state. This would always make them subject to adverse discrimination compared to consumers in other parts of the state, particularly so, when they are not having option to buy power from sources other than UPPCL. This is completely against the principles of fair competition and level playing field. Leave aside, providing level playing field, UPPCL is ensuring through the above agreement that consumers in the NPCL licensed area always remain dependent upon the power procuring skills of UPPCL to source power for them. For more than four months these consumers would not be aware of the cost they have to pay finally. Procuring power at Rs. 8-9 per unit demonstrates procuring skills of UPPCL particularly when it thought that all consequences of its efficiency or lack of it would be to NPCL's account.

51. In my view, the agreement between NPCL and UPPCL is throttling competition for procuring electricity and consequently placing NPCL in an adverse position, even though it is a valid contract as I have held earlier.

52. I find that the 'marginal cost' and manner of its evaluation in absolute terms has not been mentioned in the correspondence. 'Marginal cost' is generally defined as the incremental cost of each additional unit of output. Marginal cost is a function of incremental cost of output. In the case before us, marginal cost could refer to cost of incremental power purchases.

53. Hence, both the Appellant and the Respondent have to bear part of the consequences in the dispute between them.

54. As marginal cost in absolute terms has not been specified by the parties, including letter dated 10 May 2006 of UPPCL, I would now take up as to what should be the applicable marginal cost. Marginal cost per unit in its strictest sense would mean the costliest power purchases by UPPCL for each procurement during each unit of time period it procured and supplied additional power to NPCL. This has not been determined by the Commission.

55. Since the retail supply tariff has been kept at a uniform level throughout the state and determination of bulk supply tariff and retail supply tariff

are linked to each other, it would be fair to treat all licensees and consumers in the state equally while working out the applicable marginal cost in the case before us. Hence, there is no reason in UPPCL billing NPCL for additional 10 MW supply at Rs. 8-9 per unit.

56. UPPCL has been supplying to all distribution licensees in the State. It is also true that the supplies available from all long-term PPAs are not adequate to meet the demands of the licensees in the State and UPPCL has been meeting the demand by additional procurement from short-term or spot purchases of over 400 MW. If that is so, on merit, NPCL's additional demand of 10 MW should also have been treated as one of such demands.

57. UPPCL has primarily two sources of power supply available to it:

- (a) Firstly, those identifiable sources which it takes into consideration while balancing its Annual Revenue Requirements. Based on this the Commission has determined the BST for supply of 45 MW to NPCL.
- (b) Secondly, power purchased by UPPCL other than that mentioned in (a) above to meet the deficit in meeting demand. This should again be equitably distributed over all the licensees

to ensure that they are not discriminated. It should have been ensured by the Commission that UPPCL has actually incurred such costs without resorting to procurement of power by paying UI charges, particularly when the grid frequency is dipped below the minimum specified limit. For this purpose it is essential that UPPCL submits necessary details, including the bills raised by its suppliers, for scrutiny of the Commission for evaluating the costs of purchases to determine marginal cost.

58. Hence, for the supply of 45 MW, NPCL should be charged tariff at the rate already fixed by the Commission and approved by the High Court based on (a) above. Any additional supply of electricity consequent to the letter dated 08 May 2006 of NPCL, should be billed at the average pooled cost applicable for power purchases at (b) above. However, care should be taken to ensure that such costs do not include the power procured through the mechanism of UI (Unscheduled Interchange), when the grid frequency has deteriorated below the specified minimum limit. As per the scheme of UI mechanism, procurement of power beyond scheduled allocation is not encouraged, when the grid frequency is low. When the grid frequency is deteriorating, the UI charges per unit for excess drawl (beyond the scheduled

allocation) is imposed to avoid danger to grid collapse. Hence, any such procurement of power by paying UI charges, which assumes the form of levy of penalty, should not be **allowed to be passed on to NPCL and its consumers**. It is better for NPCL to resort to load shedding than the UPPCL to supply power by endangering the grid collapse.

59. Accordingly, the impugned order of the Commission is liable to be set aside with direction to the Commission for *denovo* determination of cost of 10 MW additional supply to NPCL.

60. I will now take up all issues in the light of point (BB) relating to jurisdiction of the Commission and proceedings held before it.

61. As mentioned earlier at para 28 above, the Appellant has made an Additional Submission on 16 Nov 2006 under Section 129 of the Act in petition no. 414 of 2006 seeking certain reliefs. From the records it is prima-facie observed that UPPCL Respondent had not filed objection to it, even though the arguments were advanced before the Commission on behalf of UPPCL opposing the petition. It is pertinent to point out that neither objection in writing has been set out nor the minimum requirement of fair procedure or directing the UPPCL to set out its objection in terms of para 51

of Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations 2004, were followed.

62. It is also not proper on the part of the UPPCL in raising oral objections and highlighting the earlier proceedings or certain letters in apposing the request of NPCL. In fairness, UPPCL should have set out its stand and material particular. However, it is to be pointed that not only the parties but also the Commission have not chosen to project the issues in the proper perspective and to put it mildly the proceedings went on a tangent. Every one connected with the proceedings has contributed for such situation.

63. On a consideration of the entire matter the following points arises for consideration in these appeals:

- A.** Whether the Commission has jurisdiction and authority to entertain and to resolve the disputes raised before it by NPCL?
- B.** Whether the directions issued to UPPCL to maintain supply of power to UPPCL is sustainable?
- C.** Whether the directions issued to UPPCL with respect to tariff or cost of supply of power by UPPCL to NPCL is legally sustainable?

D. Whether the procedure adopted by the Commission is in terms of the statutory provisions?

64 **Point A.** Primordical question that falls and requires to be considered relate to the jurisdiction of the Commission in passing the order appealed against. The statutory provisions of the Electricity Act 2003, which is relevant to decide the jurisdictional issue, being Section 86(1)(b) and Section 86(1)(f) reads thus:-

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

(b) regulate electricity purchase and procurement process of distribution of 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;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration”.

65. While construing Section 86, the Hon’ble Supreme Court in **Maharashtra Electricity Regulatory Commission Vs Reliance Energy**

Ltd. reported in 2007 (10) SCALE 279 reads thus:-

“12. It may be noted from a perusal of Section 86(1)(f) of the Act that the State Commission has only power to adjudicate upon disputes between licensees and generating companies. It follows that the Commission cannot adjudicate disputes relating to grievances of individual consumers. The adjudicatory function of the Commission is thus limited to the matter prescribed in Section 86 (1) (f)”.

66. Thus, on a consideration of Section 86(1)(b) and 86(1)(f) there is no doubt that the Commission has the jurisdiction to adjudicate upon the disputes which has arisen between the parties herein or it may refer any dispute for arbitration. In this case the Commission has chosen to adjudicate upon the dispute arisen between the parties herein. Hence, it cannot be held that the Commission has acted beyond its jurisdiction or authority. The aforesaid answers Point A.

67. **Point B.** Admittedly, NPCL is a distribution licensee and it is a public utility which has to maintain continuous distribution of power in terms of Part-VI of the Act. So also UPPCL is obliged to maintain supply of power in public interest. In the larger interest of consumers, though there are many differences and contentious issues between the parties, directions

issued to maintain supply of power as was hitherto supplied namely initial supply of 45 MW and additional supply of 10 MVA is just, essential and statutory obligation of UPPCL as well. Hence the directions issued by the Commission to UPPCL to maintain supply to NPCL till the disputes between them are resolved, is not liable to be interfered with. However, for such maintenance of supply at the same time sufficient safeguards are required to be issued by taking a balance view. Point B is answered as above.

68. **Point C** Concedingly, the earliest PPA expired long time back. The parties have been litigating between themselves with respect to the differences that arose viz. tariff. After the expiry of the first PPA no further PPA has been entered as brought up earlier. However, UPPCL and its predecessors continued the supply of 45 MW to NPCL and apparently there is no dispute with respect to the cost/price of the said 45 MW. It is not the case of either party that there is dispute with respect to payment towards 45 MW supply.

69. The problem arose when NPCL demanded more and sought for open access. There has been various proceedings with respect to open access and

the additional demand of 10 MW. UPPCL after much persuasion agreed to meet the portion of increased load. So far, NPCL has not been successful in procuring power from any other source.

70. While agreeing to supply additional load UPPCL expressed that the additional load would be at “marginal” cost. The crux of dispute or difference that arose between the parties relate to the rate at which additional load of 10 MW is to be paid and not for reduction of tariff for 45 MW. That being so the order of the Commission re-fixing tariff for 45 MW is not warranted and it is required to be set aside.

71. Taking up 10 MW additional load, disputes between the parties relate to the rate at which it is to be paid. UPPCL merely stated that 10 MW additional power will be supplied at marginal cost. There is no minute or consensus between the parties as to what is marginal cost or as to how it should be assessed or evaluated. The dispute as to the rate at which NPCL should pay for 10 MW additional power should have received due consideration in the hands of the Commission. The proper course for the Commission is to ensure either party to file their respective stand as to how the cost of said power is to be determined. UPPCL should have been called

upon to set out details or factuals or materials to ascertain the cost of its purchase of 10MW and the same should have been ensured. Be it actual cost of purchase by UPPCL or marginal cost or fair cost, NPCL should have been asked to respond to such statement or details. After collecting the required particulars as a regulator, it is well open to the Commission to resolve the dispute. This is the minimum requirement which the regulator should have followed. This being the illegality and irregularity the appeals deserve to be remanded to the Commission for *denovo* proceedings.

72. However, pending final adjudication to safeguard the interest of UPPCL, which is directed to maintain the supply, it would be just and fair to direct NPCL to pay provisionally for additional power of 10 MW at the rate, fixed with moderate increase of 20% over and above per unit tariff rate being paid by it for the supply of 45 MW of power so far availed and so long as it continues without prejudice to its contention and ultimate orders. Pending final adjudication by the Commission all arrears shall be paid by NPCL within two weeks from the date of communication of fresh demand from UPPCL at the provisional rate. UPPCL is directed to provisionally charge and collect from NPCL for the supply of additional 10 MW power at the rate of 20% over and above per unit tariff rate being paid by it for the

supply of 45 MW of power till adjudication is finalized by the Commission.

73. Considering the convergence of the outcomes of the consideration of perspectives at [AA] and [BB] above, the impugned order of the Commission dated 08 Feb. 2007 is set aside, and the case is remanded back to the Commission for *denovo* consideration with directions to resolve the dispute between the parties under Section 86(1)(f) for additional supply of 10 MW of power by UPPCL to NPCL, based on the validation of data submitted before it and the observations made herein above. Further, pending final disposal by the Commission under Section 86(1)(f), NPCL to provisionally pay to UPPCL for additional power of 10 MW so far availed and so long as it continues to avail at the rate of 20% over and above per unit tariff rate being paid by NPCL for the supply of 45 MW of power, without prejudice to its contentions and ultimate orders. All arrears shall be paid by NPCL within two weeks from the date of communication of a fresh demand from UPPCL.

74. It is also made clear that no opinion is expressed with respect to quantum of reward arising out of the dispute which is required to be resolved by the Commission.

75. This disposes of Appeal No. 26 of 2007 and 36 of 2007, but with no order as to costs.

(A.A. Khan)
Technical Member

25th October, 2007