

**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

Order under section 123 of Electricity Act 2003

The two appeals viz. the appeal Nos. 26/2007 & 36/2007 arise out of the same impugned order viz the one dated 08 Feb. 2007 passed on a petition filed by the Noida Power Company Ltd (NPCL for short). The detailed facts of the case are available in the two judgments of the two members of the bench. For the purpose of the present order under section 123 Electricity Act 2003, we need to place only the basic facts.

2. NPCL contracted to purchase 10 MW of power from UPPCL on marginal cost. The UPPCL commenced supply of 10 MW w.e.f. 10 May 2006 and raised the bill for this supply for the first time in September 2006. Subsequently in November 2007 UPPCL revised the bill. The NPCL found the rate charged being higher than its expectations and defaulted in paying the bill. UPPCL vide its letter dated 04 Nov. 2001 threatened to discontinue the additional supply of power and restrict the power supply to the original 45 MW for which the parties had an existing power purchase agreement. This led to filing a petition No.414 by NPCL to UPERC under Section 86 of the Electricity Act 2003 and Section 34 of the U.P. Electricity Reforms Act 1999. In the proceedings before the Commission, the NPCL made Additional Submissions on 16 Nov. 2006 seeking certain reliefs.

3. The Commission despite having found the transaction being costliest proceeded to consider it as a 'sunk cost' as it was *fait accompli*, and directed vide impugned order that NPCL should compensate the cost incurred by the UPPCL by making payment to it at the rate of marginal cost as claimed by the UPPCL. However, in order to balance the higher cost for 10 MW to be borne by the NPCL it further directed that for the original 45 MW of power bulk supply tariff fixed earlier should be reduced and the NPCL should pay for the bulk supply of 45 MW at the rate of 1.987 per unit. While UPPCL is aggrieved of the

order reducing the bulk supply tariff rate for the 45 MW power the NPCL is aggrieved with the order directing it to pay for the 10 MW of additional power at marginal cost for being 'sunk cost'. Both the members are of the opinion that the Commission could not have altered the bulk supply tariff for the original 45 MW of power which had been fixed by an earlier tariff order. However, they are at divergence about the price to be paid for the additional 10 MW.

4. One of us, the Judicial Member, has found that the appeal of UPPCL has to be allowed and that of NPCL dismissed. The rationale for such finding is as under.

5. NPCL challenged the impugned order on the following grounds:

- i) *The agreement dated 08.05.2006 was obtained by UPPCL from NPCL by undue influence as defined under Section 16 of the Contract Act and did not amount to a contract under Section 10.*
- ii) *The claim of UPPCL to charge power supply to one distribution company in the State @ Rs.8.80 per unit while it is supplying to all other distribution companies in the State at the rate of Rs.1.897 per unit is clearly discriminatory and unconstitutional.*

- iii) *The agreement dated 08.05.2006 was contrary to law and therefore not binding and enforceable under Section 23 of The Contract Act.*
- iv) *UPPLC being a State transmission utility is not permitted to trade in electricity.*
- v) *There is no clear concept of marginal cost. Therefore so called agreement dated 08.05.06 could not amount to a valid contract”*

6. The Judicial Member finds that order dated 08 May 2006 was a valid contract and not hit by either Section 16 or by Section 23 of the Contract Act. She also finds that the marginal cost contract was not discriminatory. So far as UPPCL's function as a trader is concerned, the Judicial Member finds it to be irrelevant to the controversy. She finds the concept of marginal cost generally understood and clear and particularly defined by the letter of dated 10 May 2006 of the UPPCL and that the parties fully understood what they were agreeing to and hence the contract was not bad for uncertainty. The Judicial Member also holds that dominant position heretofore enjoyed by UPPCL being the transmission utility and by denying open access had come to an end in January 2006 when open access was made available to NPCL as evidenced by letter of 13 Jan. 2006 of the UPPCL. She finds that NPCL, despite availability of open access as well as offers from other suppliers for additional electricity, opted to enter into the agreement with UPPCL for supply of 10 MW at marginal cost. The Judicial Member also

holds that NPCL was not a company which could be entitled to succeed to any of the power purchase agreements held by the erstwhile UP State Electricity Board. The Judicial Member further holds that the transaction in question is not hit by Section 60 of the Electricity Act 2003.

7. The Judicial Member further finds that NPCL never alleged that the impugned agreement had any adverse effect on competition and that the presumed dominant position of UPPCL had no adverse effect on competition so far as the transaction in question is concerned. Further she finds that no 'directions' under Section 60 of the Electricity Act 2003 can be issued to deny the seller the contracted price after the sale is complete and the product consumed. The conclusion of the Judicial Member is as under :

“73. To summarise the above discussion, I say that the contract of 08th May, 2006 was legal and valid and for the purchase of power under the agreement, NPCL is legally bound to pay the agreed price. Even if the objections to the validity of the contract are sustained, the NPCL has to compensate the UPPCL and such compensation would be the same as marginal price as held by the Commission. No mistake in the calculation of marginal cost having been pointed out, the NPCL is bound to pay the amount for which UPPCL raised the bill. The impugned order to this extent has to be upheld. The part of the order which amends the bulk supply tariff for 45 MW cannot be sustained and has to be set aside”.

8. One of us (Technical member), on the other hand, in a separate judgment has taken a view that the 'marginal cost' as defined by the Forum of Regulators deals with a view to establish surcharge for open access and is applicable to distribution licensees to supply power to consumers and not to a bulk supply of power to licensees, as in the instant case, particularly when the distribution licensees are not having access to power procurement independent of UPPCL. Even otherwise, he opines that the said definition of '*the marginal cost of purchase of electricity to be equated to the highest purchase cost of utility including fixed and variable costs*' does not make us any wiser and cannot be implemented unless it is further qualified by differentiating the purchases in terms of cost; peaking/non-peaking hours; UI purchase, etc. On the contrary, he holds that the 'marginal cost' per unit is the costliest power purchased by UPPCL for all procurement (excluding the UI charges when the grid frequency has dipped below minimum permissible limit) aggregating over 400 MW during each unit of time-period, it procured and supplied additional power to UPPCL, thus, deciding that the fair price of 10 MW should be at the average pool rate of incremental procurement of over 400 MW by UPPCL. He further holds that the supply of additional power of 10 MW at the rate of Rs. 8-9 per kwhr for meeting the growing demand of the NPCL distribution area that continued for a period of 9-10 months was in the nature of long-term arrangement and discriminately burdens the consumers in that area with the

costliest power and militate against the very spirit of the U.P. Electricity Reforms Act, 1999 and the Electricity Act 2003 as it would hamper the investment from the private sector. He also finds that such an arrangement has potential of wiping out the net-worth of the NPCL making its business unviable and hampers competition in procurement of electricity and is violative of the Clause 5.3.3. of the National Electricity Policy and clearly attracts the provisions of Section 60 of the Act providing *suo motto* power to the Commission to issue directions to prevent adverse effect on competition, even if the agreement is valid.

9. The judgment of the Technical Member sets-aside the impugned order and remands the matter to Commission for de-novo proceedings for determination of cost of 10 MW power supply under Section 86(1)(f) on account of illegality and irregularities in the conduct of the proceeding in that, firstly, due to the Commission's failure in not following the minimum requirement of fair procedure in dealing with the Additional Submissions of NPCL filed on 16 Nov 2006 under Section 129 of the Act in Petition No. 414 of 2006, not being in accordance with the UP Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and secondly, it has failed not only by not ensuring either parties to file their respective stand as to how the cost of additional power is to be determined but also for not requiring UPPCL to set out details, factuals or materials to

ascertain the cost of its purchase of 10 MW and NPCL's response thereupon. He also holds that till the final determination of cost of 10 MW by the Commission, the NPCL shall make a provisional payment additionally at the rate of 20% of the existing tariff for availing 10 MW from UPPCL with effect from the date it commenced receiving the supply (i.e. 10 May 2006).

10. As per Section 123 of the Electricity Act we are to set out the points on which we have differed. The two judgments of the two members of this Bench have taken two entirely different routes and have arrived at two different conclusions. Accordingly, the Honorable Chairperson or the Member who will now have to rule on the points of divergence will have to look at these two routes and decide which of the two courses adopted is the correct one. The Members could not reach agreement on common points of divergence. The points of divergence as perceived by them are separately indicated hereunder.

11. Some of the important points of divergence according to Justice Manju Goel are as under:

- I) Does the marginal cost payable by NPCL for the additional bulk supply of 10 MW of power under the impugned agreement means the marginal cost as mentioned in the letter dated 10 May, 2006 and the Minutes of the Meeting held on 17 & 18 December, 2004 of the Forum of

Regulators or as defined by the Technical member i.e. *“incremental cost of each additional unit of output”*.

II) Whether any fresh computation of dues is required in view of the fact that NPCL had not disputed the accuracy of the bills or whether fresh computation is required in view of the definition of marginal cost relied upon by the Technical Member.

III) Is the transaction in question hit by Section 60 of the Electricity Act and if so what relief can be given to NPCL?

IV) The Technical Member has also raised the following points:

(x) UPPCL has discriminated between the distribution licensees in the State in terms of quantum of power supplied and that this does not promote the reform in the power sector and encourage private investment in the sector.

(y) The Commission has conducted the proceedings in deviation of Uttar Pradesh State Electricity Regulatory Commission (Conduct of Business) Rules 2004.

It will be necessary to consider whether these two points at all arise for consideration and have any bearing on the disposal of the two present appeals.

12. The points of divergence as culled out by the Technical Member are as under :

(a) Does the marginal cost payable by NPCL for the additional bulk supply of 10 MW of power under the impugned agreement mean the marginal cost as mentioned in the letter dated 10 May, 2006 and the Minutes of the Meeting held on 17 & 18 December, 2004 of the Forum of Regulators **or** the cost of 10 MW to be computed at the average rate of the rates of incremental power purchases of UPPCL aggregating to over 400 MW (sans UI charges when the grid frequency dips below the minimum specified limit) to meet the deficit of the Discoms in the State?

(b) Has the proceedings conducted by the Commission been vitiated due to non-adherence to the provision of the Uttar Pradesh State Electricity Regulatory Commission (Conduct of Business) Rules 2004? If so to what result, particularly when the Commission is the sole authority to determine tariff in terms of law?

(c) Does the transaction in question hamper competition in procurement of electricity and is violative of Clause 5.3.3 to NEP and hit by Section 60 of the Electricity Act? If so, what are the possible remedies to mitigate the adverse effects on the competition in the electricity sector? Can the Commission invoke its *suo moto* power under Section 60 of the Act without being approached by the NPCL?

(d) Is the discrimination between the distribution licensees in the State in terms of quantum and cost of power supplied by UPPCL conducive to promote the reform in the power sector and encourage private investment in the sector?

(A.A. Khan)
Technical Member

(Justice Manju Goel)
Judicial Member

Dated : 25th October, 2007.