

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 01 of 2024 (Suo-Motu)

In the matter of:

Suo-moto proceedings in the matter of Supplementary PPA for revised payment terms for release of gas payments.

In the matter of:

Uttarakhand Power Corporation Ltd.

M/s Sravanthi Energy Pvt. Ltd.

M/s Gama Infraprop (P) Ltd.

... Respondents

CORAM

Shri D.P. Gairola Member (Law)-Chairman (I/C)

Date of Order: January 02, 2024

The Order relates to the suo-moto proceedings initiated by the Commission in the matter of Supplementary PPA submitted by Uttarakhand Power Corporation Limited alongwith its letter dated 20.12.2023 for revision of payment terms for release of gas payments to M/s Sravanthi Energy Private Limited and M/s Gama Infraprop Private Limited in line with the direction issued by the Commission in its Order dated 16.08.2023 and 17.10.2023.

1. Background and submissions

- 1.1 Uttarakhand Power Corporation Limited (hereinafter referred to as "UPCL") vide its letter dated 20.12.2023 submitted before the Commission that it has prepared a Supplementary PPA incorporating the changes suggested in the Commission's Order dated 16.08.2023 and 17.10.2023 with respect to payment terms of Gas based generators.
- 1.2 UPCL submitted that it called both the Gas based generators namely M/s Sravanthi Energy Pvt. Ltd. (hereinafter referred to as "SEPL") and M/s Gama Infraprop Pvt. Ltd.

(hereinafter referred to as “GIPL”) for signing of the Supplementary PPA on 18.12.2023, however, both the Gas based Generators refused to sign the same. UPCL also enclosed a copy of the communication with both the Gas based Generators wherein they had given reason for not signing the aforesaid Supplementary PPA.

- 1.3 UPCL also submitted a copy of the aforesaid Supplementary PPA vide its letter dated 201.12.2023 and sought further directions from the Commission in the matter.

2. Respondent's submission, Commission's views and decision

- 2.1 *Regulation 59 of the UERC (Conduct of Business) Regulations, 2014 specifies as under:*

“59 Inherent power of the Commission

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

Similar provisions are also provided in the UERC (Terms & Conditions of Multi Year Tariff) Regulations, 2021 namely, Regulation 103, 104 and 105. Apparently, the Commission has powers to issue such orders as may be necessary for ends of justice and also to deal with any matter or exercise any power under the Central Act or State Act, for which no Regulations have been framed, and the Commission may deal with such matters or exercise such powers and functions in a manner as it thinks fit.

- 2.2 The Commission analysed the submissions made by the UPCL, M/s SEPL and M/s GIPL and observed that UPCL in the Supplementary PPAs to be executed with M/s SEPL and M/s GIPL respectively has mentioned as follows:

“ ...

1. The Clause 9.2.1 & 9.3.6 of the Original Power Purchase Agreement shall be kept in abeyance and payment terms shall be in accordance with Hon'ble UERC Order dated 16-08-2023 and 17-10-2023....

...

The condition as set hereinabove and the Supplementary Agreement as signed will be subject to the Order or any stay passed by Hon'ble ATE, New Delhi or higher courts on the Petition to be filed by UPCL against the Order dated 16.08.2023 and 17.10.2023 passed by Hon'ble UERC.

The terms and conditions set hereinabove in the Supplementary Agreement executed now will be effective from the date of signing of this Agreement.

...”

- 2.3 The Commission analysed the submissions made by M/s SEPL and M/s GIPL for refusing to sign the Supplementary PPA and observed that both the Gas based Generators have reasoned that as the Commission has settled the matter in relation to clause 9.2.1 and 9.3.6 of the original PPA, therefore, the said clauses should be amended rather than be kept at abeyance.
- 2.4 Further, M/s SEPL and M/s GIPL also reasoned that any action that UPCL may want to undertake should not form part of the amendment and the directions of the Commission with respect to clauses of the original PPA should not be made subjective and contingent on the outcome of the actions that UPCL may want to undertake.
- 2.5 Further, M/s GIPL also stated that in the Commission's Order dated 16.08.2023 and 17.10.2023, there is no mention to comply with any Orders of Hon'ble ATE in future or implementation of this Supplementary PPA from the date of signing of this agreement, therefore, such type of conditions in the Supplementary PPA is unacceptable.
- 2.6 On an analysis of the draft supplementary PPA submitted by UPCL and inputs of both M/s SEPL and M/s GIPL it can be observed that UPCL has made the supplementary PPA subjective to future contingent event as against the views given by the Commission in its Orders dated 16.08.2023 and 17.10.2023. UPCL in the draft Supplementary PPA has mentioned that the conditions in the supplementary PPA will be subject to the Order or any stay passed by Hon'ble ATE or higher Courts on the

Petition to be filed by UPCL against the Order dated 16.08.2023 and 17.10.2023 issued by the Commission. From a plain reading of the above condition, it can be safely interpreted that UPCL is laying the foundation of Supplementary PPA on a future contingent event for which UPCL is yet to take action, i.e. an Appeal is yet to be filed by UPCL against the aforementioned Orders of the Commission.

In this regard, Section 32 of the Indian Contract Act, 1872 reads as under:

“32. Enforcement of contracts contingent on an event happening. — Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.”

- 2.7 The Commission observed that in the instant case UPCL is yet to file an appeal before the Hon’ble ATE against the Orders passed by the Commission for which the Electricity Act, 2003 provides a time period of 45 days, which has already elapsed. Moreover, UPCL has not been able to file an appeal before Hon’ble ATE even after lapse of more than 120 days from the Commission’s Order dated 16.08.2023. The available legal recourse until exercised within the stipulated time frame, should not be a ground for delaying compliances of the Orders or directions of the Commission.

In this regard, the Commission is of the view that the inclusion of condition related to future contingent event in the Supplementary PPA, for which UPCL is yet to take action, appears to be bad in law. Moreover, the conduct of UPCL in the instant case appears to be inclined towards the delaying of the matter related to signing of the Supplementary PPA on some pretext or the other.,

- 2.8 Further, the proposal of UPCL in the draft Supplementary PPA regarding keeping in abeyance the Clauses 9.2.1 and 9.3.6 of the original PPA, does not seem to align with the direction of the Commission as given in the Order dated 16.08.2023 and further affirmed in the Order dated 17.10.2023, as the Commission in the aforesaid Order had clearly directed UPCL, M/s SEPL and M/s GIPL to carry out the necessary changes in the PPA, and there was no mention of keeping any clause in abeyance or otherwise.

In this regard, the Commission is of the view that there is no merit in keeping any of the clause in abeyance, rather it would be appropriate to suitably modify the relevant clause to align with the directions issued by the Commission.

2.9 Further, the Commission observed that UPCL in the Supplementary PPA has included the provision that the conditions set in the Supplementary Agreement will be effective from the date of signing of the Agreement. The Commission analysed the same and is of the opinion that the said condition could have been part of the Supplementary PPA had the same been executed between the parties within the time frame given in the Commission's Order dated 16.08.2023, i.e. within 10 days of the date of the Order. However, UPCL has not been able to carry out the same within the timeframe allowed by the Commission.

In this regard the Commission is of the view that it would be inappropriate to justify the inaction of UPCL, and accordingly, the aforesaid Supplementary PPA shall be applicable from 01.09.2023 as the Order dated 16.08.2023 also required to carry out the necessary amendment to the PPA within 10 working days from the date of the Order and hence, it would be appropriate to fix the applicability of the supplementary PPA from the 1st day of the month.

2.10 The Commission, in view of the above, directs UPCL to carry out the modification in the Supplementary PPA before executing the same with M/s SEPL and M/s GIPL as enumerated below:

- i) The lines "for seeking its approval and" appearing in the second para of the Supplementary PPA shall be deleted. Further, in the end of second para of the Supplementary PPA the words "and 16.08.2023" shall be added.
- ii) First Para of Clause 1 of the Supplementary PPA be amended as follows:

Existing Clause:

"1. The Clause 9.2.1 & 9.3.6 of the Original Power Purchase Agreement shall be kept in abeyance and payment terms shall be in accordance with Hon'ble UERC Order dated 16.08.2023 and 17.10.2023 as reproduced below:-

..."

Modified Clause:

"1. The Clause 9.2.1 and 9.3.6 of the Original Power Purchase Agreement shall be modified and replaced and read in accordance with the following Sub-clause a. and Sub-clause b. respectively as reproduced herein below:-

...”

iii) The clause “The condition as set hereinabove and the Supplementary Agreement as signed will be subject to the Order or any stay passed by Hon’ble ATE, New Delhi or higher courts on the Petition to be filed by UPCL against the Order dated 16.08.2023 and 17.10.2023 passed by Hon’ble UERC” shall be removed.

iv) The clause “The terms and conditions set hereinabove in the Supplementary Agreement executed now will be effective from the date of signing of this Agreement” shall be modified and replaced as follows:

“The terms and conditions set hereinabove in the Supplementary Agreement executed now will be effective from 01.09.2023.”

2.11 The Commission directs UPCL, M/s SEPL and M/s GIPL to carry out the necessary changes in the respective Supplementary PPA and submit the compliance before the Commission within 10 days of this Order.

2.12 The Commission also expresses its extreme displeasure in the lackadaisical approach of UPCL in complying with the directions of the Commission and cautions UPCL not to repeat the same in future. The Commission would like to further state that the legal remedy available with UPCL does not absolve it from its duty to comply with the directions of the Commission, merely on some pretext or the other, unless and until an injunction is brought from a higher court.

3. Ordered accordingly.

(D.P. Gairola)
Member (Law) - Chairman (I/c)