

**BEFORE THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

IN THE MATTER OF: Seeking direction for the respondent to make payment of bills for the power supplied by the petitioner. Petition no.534/08

AND

IN THE MATTER OF: M/s Dhampur Sugar Mills Ltd.
Dhampur, Bijnore
UP
: Petitioner

Vs.

UP Power Corporation Ltd.
(Through its Chairman & MD),
Shakti Bhawan, 14th Ashok Marg,
Lucknow
:Respondent

The following were present:

1. Mr S.C Rathi, Consultant, M/s Dhampur Sugar Mills Ltd.
2. Mr D.D Chopra, Advocate, M/s Dhampur Sugar Mills Ltd.
3. Mr S.N Dubey, CE(UPPCL)
4. Mr Amarjeet Rakhra, Advocate & Counsel for UPPCL
5. Mr S.P Pandey, EE(PPA), UPPCL
6. Mr Satish Chandra, EE(ETD), UPPCL, Bijnore

**ORDER
(Date of hearing 25.8.08 & 5.1.09)**

1.(a) This petition has been filed for direction to the Respondent to make full payment as per bill raised by the Petitioner, refund excess rebate deducted from the bills and change of date of commissioning of the 1st phase of the project to 25.6.07 on the ground that the Petitioner was not responsible for delay in commissioning of the plant. In fact, this petition is an offshoot of a bill of Rs.76,54,968.00 raised by the petitioner on the Respondent for supply of electricity for the month of June-July,07, which was paid after deduction of Rs.4,10,919.00. As per the Petitioner, the deduction from the bill has been attributed to the weighted average tariff which the Respondent considers not admissible on them.

The brief facts in the matter are as below:

The Petitioner, M/S Dhampur Sugar Limited, is a company having co-generation plant; at Dhampur, Bijnor (U.P) having a Power Purchase Agreement (PPA) signed with UPPCL, on 07.08.06 for supply of 30 MW surplus power. As per clause 16 of PPA, the

plant was to be commissioned on 28.2.07 but it delayed to 25.6.07 due to non-availability of the connecting transmission system by the said scheduled date of commissioning.

The Petitioner has stated in the petition that the plant was commissioned as per scheduled date but power could not be supplied because the transmission system was not ready. The dedicated transmission line was being constructed by the Petitioner under supervision of State Transmission Utility (STU) on payment of agreed supervision charges. The construction of bay at 132kv substation for interfacing of the dedicated line was to be done by STU as per terms of PPA. For commissioning for the 1st phase of the project on 28.2.07, the Petitioner had placed orders of the plants and machineries, civil works, appointed consultants and contractors and generator and its protection system was tested on 20.1.07, steam turbine commissioned and contract declare generating plant ready for commissioning on 19.2.07, 11/32 Kv, 43 MVA S/s completed on 23.2.07 and installation in commissioning of 30 MW co-gen plant along with 11/132 KV S/s was completed on 23.2.07.

The Petitioner states that the dedicated transmission line and bay at sub-station of STU got delayed which ultimately affected the commissioning of generating plant and supply of power to the Respondent.

The Petitioner requested the Executive Engineer, ETD, Bijnore to complete the 132 KV bay by Feb,07. The Petitioner states that the work on the bay did not commence due to non-availability of the equipment, the Chairman of the Respondent was appraised of the fact by letter dt.30.11.06 in order to avoid delay. The Petitioner has cited following reasons for delay in construction of the bay:

- (i) Lightning arrestor for the bay was delivered in the end of April,07 by the supplier;
- (ii) The Current Voltage Transformers (CVT) which was to be supplied by BHEL could not be supplied. On authorization conveyed by letter dt.10.4.07, the petitioner procured 132 KV PTs instead of 132 KV CVT. The bay at 132 KV S/s Dhampur was commissioned on 30.5.07

The Petitioner has further stated the reason for delay, not being in its control, in construction of dedicated transmission line as enumerated below:

- (i) Railways withheld the permission for crossing the railway line due to some outstanding dues on the Respondent no.1. However with persuasion, the

permission from railways for construction of transmission line crossing over the railway track between Dhampur and Chakraj could be obtained only on dt. 25.4.07.

- (ii) The Court case and dispute in erection of tower at location 11-12 could be resolved in March, 07.
- (iii) There was re-routing of transmission line and shifting of tower no. 8 by SDMs order dt. 10.3.07.

The Petitioner states that the 30 MW 1st phase capacity of the plant could be synchronized with the State grid on 25.6.07, although the co-gen plant was ready on 23.2.07.

So far as the deduction of bill is concerned, the petitioner admits in the petition that bill was made by it at rate corresponding to COD on 25.6.07 instead of 28.2.07 vide Para 32 of the petition.

The petitioner is relying on clause 26 of PPA to justify the reasons for delayed commissioning of the project being beyond its control and to claim tariff corresponding to the actual date of commissioning 25.6.07 instead that of agreed in PPA as 28.2.07.

- (b) In its supplementary to the petition, the Petitioner has stated that the bills were raised on the basis of actual date of Commissioning i.e. 25.6.07, FY 2007-08 @ Rs. 3.11/unit but the Respondent made payment applying tariff @ Rs. 3.02/unit on the basis of scheduled date of Commissioning i.e. 28.2.07, FY 2006-07.

The petition states that it is seen that the procedure for change of date of commissioning as provided under clause 30 of the PPA was not invoked and although, Managing Director of the Respondent Corporation was approached on 16.9.08 stating the reasons of delay for amendment of date of Commissioning and payment of bills accordingly, but it has been refused by letter dt. 23.9.08 on the ground that the matters related to the issues raised are subjudice before UPERC. The petitioner prays to extend the date of commissioning from 28.2.07 to 26.6.07 and amend the PPA dt.7.8.06

- 2. The Respondent in its written reply has submitted that the Petitioner, realizing mistake in issuing incorrect bills had issued amended bills on tariff calculated based on Commissioning year 2006-07 and as such there is no dispute regarding payment of bills

or date of Commissioning. Moreover if there is any dispute, it should be addressed under cl. 23 of Power Purchase Agreement (PPA) provided for dispute resolution. It is pointed out that the estimated cost of construction of 132 KV bay and supervision charges for construction of transmission line charges were deposited by the Petitioner after delay of 2 months on 22.6.06 from the date the estimate was furnished upon the generating company. It is further stated that the generating company has never submitted the status report regarding progress of the work despite several reminders. It is also stated that petitioner's claim of pre-commissioning testing of generator and protection system on 20.1.07 and of 23 MVA S/s at mill on 23.2.07 is totally unfounded because as per clause 8.6 & 8.7 of PPA the protection system was to be checked by STU and these are afterthoughts of the petitioner and the generating company did not give any notice of such activities. The Respondent argues that bay construction was done by UPPTCL on deposit work basis and not by Discom who is the buyer of electricity as such the Petitioner could not claim for lapses in construction of bays. However, the work on transmission line could be completed only on dt. 30.5.07 much beyond the date of Commissioning prescribed under PPA. The duty of obtaining authorization, permits and licences including right of way clearances rests squarely upon the generating company and the date of commissioning according to PPA. The Respondent states that the clause 16 read with clause 26 leads to conclusion that the tariff for sale of electricity shall always be as per rate corresponding to scheduled commissioning and the conditions and reasons described by the generating company do not fall under force majeure. It further states that clause 26 of the PPA gives limited protection to a party that such party will not be liable to pay any damage, sanction or laws for not performing its obligations and in no way protects the commercial profits, gains of the hearing party as such it could not be allowed to be benefited for its own faults. On bill, it says that it was not according to the tariff mentioned in the PPA and under clause 5.6 (2) where there is obligation to pay bill in full provided the bills are claimed as per tariff referred to in clause 2 of PPA.

The respondent further referred to letter dt.28.10.06 (Annexure CA2 of reply) that it had informed the petitioner if there is any delay in commissioning of plant beyond the date fixed by PPA the tariff for sale of electricity shall be the rate corresponding to the year in which the commissioning of the plant was agreed to and pointed out that it is due to clause 26 of PPA, the Respondent is not claiming damage from the generating company

for delay in production of power and breaching the COD even though the Licensee has suffered losses for non supply of power from the generating company.

3. In rejoinder, the petitioner has generally denied the averments made by the respondent in its counter affidavit. It is clarified that the cost of construction of 132 KV bay and transmission line was determined at Rs.126.04 lacs by the Respondent and intimated to the Petitioner on 26.6.06 without furnishing the details which were later revised after several rounds of meeting to Rs.81.67 and this amount was deposited on 22.8.06 and the period of 6 months is sufficient to complete 132 KV line bay at the S/s. The petitioner further states that various reports under clause 18 of PPA are applicable only after commissioning of the plant and not during erection of the plant. And since construction was being done under supervision of UPPCL and thus day to day progress of interconnection facility was well in the notice of nodal office and authorities of UPPCL and the readiness of generating facility at mill and bottlenecks in construction of line and bay were regularly intimated to authority of UPPCL through various letters vide Annexure 3,5&6. By letter dt. 6.4.07(Annexure RA2A to the rejoinder), the nodal officer was informed that its generation plant was ready for commissioning but interfacing facility at 132 KV S/s are still to be completed. The petitioner has also submitted commissioning reports of TG plant and 11/132 KV S/s at their end on 9.2.07 and 23.2.07 respectively. For interconnection, it states further that, UPPCL officers alongwith the staff visited installation on 25.6.07 and power plant was synchronized with the grid in their presence. The Petitioner has further informed that line was completed on 30.4.07 and energized on 30.5.07 after completing and commissioning of 132 KV line bay at the S/s of UPPCL. Regarding provision-26 of PPA, the Petitioner states that this clause has been wrongly interpreted by the Respondent. The said clause protects the interest of the party and the generating company shall not be held responsible for any loss on account of force majeure conditions.
4. Sri D.D.Chopra, Advocate and Counsel for the petitioner submitted that the clause 30 of the PPA signed with the Respondents permits amendments in the PPA subject to approval of the Commission. The Petitioner had earlier informed UPPCL regarding change in COD vide letter dt.16.9.08 & 23.9.08 (Annex-SA1 & SA2) to the supplementary submissions. Replying to query he informed that as per clause 16 of PPA the date of COD of generation facility and synchronizing it with STU system was 28.2.07 for the 1st phase and 31.10.07 for the 2nd phase. Sri. Chopra submitted that the generation project could not be commissioned on time because of delay caused

in construction of the line and the bay at 132 KV STU S/s at Dhampur, Distt-Bijnore. Elaborating the cause of delays in completion of transmission line and 132 KV bay , Sri. Chopra reiterated the contents of the petition, additional submission and rejoinders filed by the Commission and submitted that such causes were beyond the control of the petitioner which had caused commissioning of the project on 25.6.07 against the schedule date of commissioning of 28.2.07. in the backdrop of stated reasons for delay, Sri. Chopra submitted that cl.16 of PPA did not apply if the delay in commissioning of the plant for reason beyond the reasonable control of the generating company is established and in such event the cl.26 of PPA protects the interest of the petitioner. Sri. Chopra referred to Para 29 of the petition and stated that the delay in completion of the transmission line was on account of the Court cases in which one case was settled outside the court and under another, the tower location no.8 was shifted on order dt.10.3.07 passed by SDM resulting in re-routing of tower no.9&10 also and work could be completed in April,07 only. Anex-11,12 & 13 filed with the petition substantiated the stated facts.

Sri Amarjeet Rakhra, Counsel for the Respondent submitted that there was no dispute on payment until the Petitioner raised a bill at higher rate which was subsequently amended by the petitioner and paid accordingly. On delayed work, Sri. Rakhra informed that the petitioner did not submit timely reports as required under PPA despite UPPCL kept asking for the progress of the plant and that creates doubt as to the intention of the party as it informed of the commissioning of the generating plant for the first time in March,07 and stated that the details of activity mentioned under Para 17(1) of the petition was not in their knowledge and that the delay had never been because of UPPCL. Sri. Rakhra asserted that cl.26 of PPA did not apply to the case of the petitioner for claiming tariff corresponding to actual date of commissioning. The contention of Sri. Rakhra was that under cl.16 of PPA, the generating company was under obligation to commission and synchronise the plant with the facility of the transmission company by the date of commissioning as stipulated in and in case it is delayed the rate corresponding to the agreed date of commissioning should apply, how ever, para-26 of PPA comes to rescue if the petitioner prevented from performing under situations like calamities such as earth quake, roit, invasion or other causes beyond reasonable control of the petitioner. He further argued that cl.26 absolves the petitioner from damage sanction or loss to which he could be liable to other party and in no case it allows the higher tariff related to the actual date of commissioning. Citing example, Sri. Rakhra stated that cl.26 (Force Majeure) of PPA prevented the petitioner in cases where provisions of cl.21 (Events of Default and Termination) were invoked. He invited attention to clause 26.2 of the PPA and stated that this clause cast a legal obligation on the petitioner to have informed about the occurrence of such an event but they preferred to keep quite. On absolving from damage or loss, Sri. D.D Chopra informed that the petitioner had to pay

incentive to their suppliers as per conditions of supply for timely completion of plant but they had to suffer that amount by not generating electricity due to non-availability of line.

Sri. D.D Chopra informed that the supervision charged for construction of the transmission line was paid vide letter dt.22.8.06 (Annex-3 to the petition). He submitted that the permission for railway crossing was withheld by railways because the respondent owed payment to them and took enormous time in making positive progress in construction of the transmission line besides the litigation that ensued as a result of objection of parties in which one case was settled by outside court settlement and another one where three towers had to be shifted resulting in to re-routing of the line with commensurate involvement of time and as such on the cited account, the petitioner was prevented from commissioning of the project in time and thus the case is well covered under cl.26 of PPA.

Sri. Chopra invited the attention of the Commission to Annex-6 to the petition which is a letter written by the petitioner to Bharat Heavy Electrical Ltd. on 1.3.07 stating that their co-gen plant was ready for commissioning since long and interfacing facility for co-gen is still incomplete at UPPCL grid S/s for the want of 132 KV CVT for completion of 132 KV line bay and requested them for supply of 9 nos. such CVT. A copy of this letter is endorsed to CE(PPA). Sri. Chopra further referred to Annex-11, which is concerned with suit no.32/07 before the Civil Judge(Jr. Div.) Nagina, and stated that in that case UP Power Corporation Ltd had been also impleaded and it would not be correct to say that the delay being caused by the litigation was not in the knowledge of the Respondent.

5. Before we discuss the dispute in the matter, it is essential to mention that the petitioner had of its own tried to change the date of commissioning on being fully aware of the fact that the Cl.30 of the PPA prevents any party to change any condition of the agreement unless approved by the Commission and still it went ahead raising a bill on the respondent at rate higher than that agreed with the respondent in the PPA. This act of the petitioner is being pardoned for the present with the stern warning that in future it might be liable for appropriate action.

In nutshell, the dispute in this petition is with respect to the date of commissioning of the project and the tariff applicable on such date of commissioning. The argument of the petitioner is that he was prevented from synchronizing its generation facility with the grid of STU due to delay in completion of line for various reasons including litigations in the matter of right of way, permission withheld by railways for crossing of line and delay in completion of the 132 KV bay at 132 KV S/s Dhampur by STU for which the petitioner had deposited

the money long back. The petitioner asserts that the reasons for delay in construction of line and bay are in the nature of force majeure conditions covered under cl.26 of PPA and for that reason the petitioner was entitled for tariff which was applicable as per the actual date of commissioning of the project. The contention of the respondent is that the completion of line is the responsibility of the petitioner as such it can not be allowed higher tariff due to such delay as they are not in the nature of force majeure conditions instead it is the respondent who has not claimed any loss or damage from the petitioner. The Respondent further claims that cl.16 of PPA does not allow benefit of higher tariff as per actual date of commissioning while the intention is to protect the petitioner from any damage or claim made against it in the event of force majeure conditions.

The first question that emerges from the rival contentions of the parties is the interpretation of cl.16 and 26 of PPA that read as below:

“Cl.16, Commissioning of Generation Facilities

The generating plant shall commission the generation facility and synchronise it with STU system grid in following phases:-

Phase-i: 1st unit 30 MW by 28.2.07

Phase-ii: 2nd unit 30 MW by 31.10.07

In case, the plant is commissioned beyond the said dates of commissioning, the tariff applicable for sale of electricity from the plant to DISCOM shall be the rate corresponding to the year in which the Commissioning of the plant was agreed to as above in case of delay. However, in the case of delay in commissioning of the plant for reasons beyond the reasonable control of the generating company, the provisions of para 26 of the agreement shall apply.”

“26. Force majeure

26.1 If any party hereto is wholly or partially prevented from performing any of its obligations under this agreement by reason of or due to lightning, earthquake, riots, fire, floods, invasion, insurrection, rebellion, mutiny, tidal wave, civil unrest, epidemics, explosion, the order of any court, judge or civil authority, change in State or National law, war, any act of god or a public enemy or any other similar or dissimilar cause reasonably beyond its exclusive control and not attributable to its neglect, then in any such event, such party shall be excused from whatever performance is prevented by such event, to the extent so prevented, and as such

party shall not be liable for any damage, sanction or loss for not performing such obligations.

26.2 The party invoking this clause shall satisfy the other party of the occurrence of such an event and give written notice explaining the circumstances, within seven days to the other party and take all possible steps to revert to normal conditions at the earliest.

26.3 Any payments that become/have become due under this agreement shall not be withheld, on grounds of force majeure conditions developing.”

As the Cl.16 reads that *“the generation plant shall commission the generation facility and synchronise it with STU system grid”* means that the generation plant, the dedicated transmission line and the bay at the S/s of STU is a composite project for which the schedule of commissioning have been agreed by the parties under this clause. Further, the proviso to this clause states that in case of delay, ordinarily, the sale rate of electricity shall correspond to the year in which the Commissioning date has been agreed. This proviso further carves out an exception to the said “ordinary delay” saying *“however in case of delay in commissioning of the plant for reasons beyond the reasonable control of the generating company, the provisions of para-26 of the agreement shall apply.”*

Cl.26 specifies several events that constitute force majeure conditions and states, *“.....enemy or any other similar or dissimilar cause reasonably beyond its exclusive control and not attributable to its neglect, then in any such event, such party shall be excused from whatever performance is prevented by such event, to the extent so prevented, and as such party shall not be liable for any damage, sanction or loss for not performing such obligations”* conveys two aspects of the provision. First, that the party so prevented shall be excused from whatever performance so prevented if the conditions were reasonably beyond its exclusive control and does not attribute to negligence by the party so prevented and secondly, it provides that the party so prevented shall not be made liable for or subject to any damage, sanction or loss for not performing such obligations.

The obligation under cl.16 is to commission the composite project by the time as specified therein and in case of delay, due to conditions beyond control of the generating company (not attributable to its negligence), the provisions of clause 26 applies and the generating company is excused from such specific performances and after having so excused, natural consequences shall follow. It may be clarified that under such events of

force majeure, the other party is prevented from raising any damage, sanction or laws for not performing. Therefore, under force majeure conditions, a generating company shall be excused from specific performance under clause 16 of the agreement and the actual date of commissioning shall be considered as the date of commissioning and the tariff for the corresponding year shall be applicable.

The second question now before the Commission is to know whether the relevant facts put up by the party fit in within the interpretation of the cl.16 and 26 made as above. The Commission has weighed the grounds forwarded for delays of line and bay. Among various reasons cited for delay, the Commission finds that the permission withheld by railways and order of SDM for shifting of a tower resulting into re-routing of the line are the reasons beyond the control of the petitioner because the railways accorded permission, vide letter dt -/4/07(Annex-10 to the petition), subject to deposition of supervision charges with the railways and order of the SDM passed on 10.3.07 (Annex-13 of the petition), a date falling after the date of commissioning 28.2.07. Regarding bay at 132 KV S/s Dhampur, The petitioner had written, letter dt.30.11.06 vide Annex-5, to the the Chairman, UPPCL to issue necessary instructions to concerned officer for allotment of equipments and completion of work at site so as to match with commissioning of the co-gen projects by 15.1.07. On 1.3.07, vide Annex-6 to the petition, the Petitioner requested BHEL for immediate supply of CVTs. Again, by letter dt.9.4.07 vide Annex-7 to the petition, the Petitioner requested CE(Transmission),UPPCL to authorized them to purchase 9 nos. PTs of accuracy as per UPPCL specifications. All above facts taken together suggest that the line could not be completed by 28.2.07 within short time left after SDM passed Order for shifting of the tower on 10.3.07 and railways accorded permission in the month of April, 07and also because the issue of procurement of CVT could not be settled until the Petitioner requested for its purchase of its own on 9.4.07. Hence we are convinced that the petitioner was prevented from commissioning the line for various reasons as discussed above which resulted in not synchronizing the generation facility with the STU system grid by 28.2.07. As such the petitioner is liable to be excused under cl.26 (1) from specific performance as agreed under cl.16 of PPA. As aforementioned, that if excused natural consequences shall follow, means in this case that the petitioner shall be allowed the tariff applicable for sale of electricity corresponding to the date of actual of commissioning. In this case, the plant has been commissioned on

25.6.07 i.e. during financial year 07-08 as such the sale rate of Rs.3.11/unit shall apply in the case of the petitioner. Accordingly, energy supplied during 07-08 shall be billed at the rate of Rs.3.11/unit and correspondingly for year 08-09 at the rate of Rs. 3.15/unit and the respondent shall pay without demur.

Before parting with the order we wish to clarify further that obligation under cl.21 are post commissioning of the project under the agreement.

6. The petition is disposed of.

(R.D Gupta)
Member

(P.N Pathak)
Member

Lucknow; Dated: 27th Jan, 2009