



Petition No. 1722 and 1717 of 2021

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

Date of Order: 25.06.2021

PRESENT:

Hon'ble Shri Raj Pratap Singh, Chairman
Hon'ble Shri Kaushal Kishore Sharma, Member
Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

Petition No. 1722/2021

IN THE MATTER OF Review Petition under Section 94(1)(f) of Electricity Act'03 read with Regulation 51 of the Conduct of Business Regulations 2019 seeking review of order dated 19.03.2021 in Petition No. 1611/2020

Uttar Pradesh Power Corporation Limited
Through its Chief Engineer (PPA)
14th Floor, Shakti Bhawan Extension
14, Ashok Marg, Lucknow

..... **Petitioner**

Lalitpur Power Generation Company Limited,
Electric Sub-Station, Knowledge Park - IV,
Gautam Buddha Nagar,
Greater Noida - 201 310

..... **Respondent**

AND

Petition No. 1717/2021

IN THE MATTER OF Petition seeking action against UPPCL under section 142 and 149 of the Electricity Act'03 for non-compliance of this Commission's order dated 19.03.21 in Petition No. 1611/2020.

Lalitpur Power Generation Company Limited,
Electric Sub-Station, Knowledge Park - IV,
Gautam Buddha Nagar,
Greater Noida - 201 310

..... **Petitioner**

Uttar Pradesh Power Corporation Limited
Through its Chief Engineer (PPA)
14th Floor, Shakti Bhawan Extension
14, Ashok Marg, Lucknow

..... **Respondent**



The following were present:

1. Shri Siteesh Mukherjee, Counsel, UPPCL
2. Shri Abhishek Kumar, Counsel, UPPCL
3. Shri J P S Gangwar, CE-PPA, UPPCL
4. Shri Amit Kapur, Counsel, LPGCL
5. Shri Akshat Jain, Counsel, LPGCL
6. Shri Raghav Malhotra, Counsel, LPGCL
7. Shri Amit Mittal, LPGCL
8. Shri Sanjeev Kumar Singh, LPGCL
9. Shri Surendra Sharma, LPGCL
10. Shri Upendra Prasad, LPGCL

Order

(Date of Hearing: 23.06.2021)

1. The Commission has passed consequential order dated 19.03.2021 in Petition No. 1611/2020 in the limited remand order of Hon'ble APTEL dated 01.05.2019. The Commission had directed UPPCL to pay an amount of Rs. 2183.61 Crs on account of Fixed charges, ROE and carrying cost. UPPCL has filed review Petition no. 1722/2021 for review of the Commission's order dated 19.03.2021 in Petition No. 1611/2020. LPGCL has filed Petition No. 1717/2021 for initiating action against UPPCL under section 142 and 149 of EA, 03 for failure to comply with directions of this Commission. These two Petitions being arising from same cause of action i.e., "non-payment by UPPCL", are clubbed and being heard together.

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2. UPPCL has filed the instant Review Petition regarding computation of fixed charges of Rs. 1126.10 Crs vide the Commission's order dated 19.03.2021 stating that coal stock data was not made available to UPPCL and that the same has not been corroborated by coal purchase invoices. Further, UPPCL has contended that it was not provided opportunity to comment upon the SLDC report dated 14.01.2021.
3. UPPCL has made following prayers in the Petition:
 - a) Direct Respondent to furnish coal purchase invoices for the coal procured between 01.10.2015 to 31.03.2017 to demonstrate build-up of adequate coal stock in support of claim qua declared capacity for the payment of fixed charges.
 - b) Provide an opportunity to the Review Petitioner to provide its view and comments on the data as well as the UPSLDC report dated 15.01.2021.



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- c) Redetermine fixed charges taking into consideration the documents above.
4. LPGCL vide its reply dated 21.06.21 has contested the maintainability of the Petition and submitted the following:
- (a) UPPCL having exhausted all judicial remedies against the judgement dated 01.05.2019 of Hon'ble APTEL, the Commission after detailed analysis has passed the order dated 19.03.2021.
 - (b) Despite clear direction of the Commission and in the absence of any stay order, UPPCL has failed to make payment of even approved amount of first three instalments due on 19th April, May and June 2021.
 - (c) The review Petition is not maintainable as UPPCL is trying to bring new issue in the guise of "error apparent". The error must be the one which is apparent on face of record and not the one which is to be fished out.
 - (d) UPPCL's reply dated 19.10.2020 states that UPPCL does not have access to data pertaining to LPGCL technical availability and coal stock position as it was never required to keep track of such information.
 - (e) During final hearing on 03.12.20, UPPCL had agreed that LPGCL has to prove its claim and is to be verified by the Commission by setting up appropriate protocol such as Statutory Auditor's certification / SLDC verification based on technical and fuel availability.
 - (f) UPPCL, earlier on the pretext of filing of review petition in Hon'ble Supreme Court has attempted to delay the proceedings. The Commission vide order dated 06.11.2020, has held that mere filing of review Petition does not entitle UPPCL any benefit in terms of time/liability. UPPCL, through engaging in litigations, has already incurred huge carrying cost burdening the consumers.
 - (g) The Commission is rightful to direct UPSLDC, being a neutral and authorized body, to verify declared capacity. LPGCL has submitted quarterly statutory Auditor's certificate of opening stock. Coal received, coal consumption and closing stock.
 - (h) UPPCL has filed the present Review Petition only seeking review of payment of fixed charges to LPGCL, without any grievance for payment of RoE and carrying cost. Therefore, the amounts withheld by UPPCL on account of RoE and carrying cost on RoE ought to be paid to LPGCL forthwith since admittedly, UPPCL is not contesting the RoE issue.
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5. Subsequently, on 23.06.21, UPPCL has filed an IA placing additional facts and documents stating that even ROE along with carrying cost is not payable to LPGCL since in terms of SPPA dated 04.01.2017, approved by the Commission vide order dated 18.01.2017, has expressly surrendered / waived the claim of ROE from the Petitioner. It has also been contended that the Hon'ble APTEL did not at all go into the question of waiver of ROE which was accepted by LPGCL in terms of SPPA dated 04.01.2017. UPPCL has also contended that UI account for the relevant period were also required to be considered while computing fixed charges.
 6. UPPCL has prayed the following in the IA dated 23.06.21:
 - a. allow the Applicant to place on record the additional facts and submissions hereinabove and the documents hereto.
 - b. Review and thereafter reject the claim for ROE of INR 394.90 crores along with carrying cost of INR 142.84 crores or any amount whatsoever allowed to Respondent / Generating Company during the period from 18.01.2017 to 16.03.2018.

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7. UPPCL has failed to comply with the directions of the Commission though on 20.3.21, it had written to UPPCL seeking payments of amount as directed by the Commission. On no response from UPPCL, it raised supplementary bill for first, second and third instalments. LPGCL has filed the instant Petition to initiate proceedings under section 142 and 149 of EA, 03 against UPPCL for failure to comply with directions of this Commission.
8. LPGCL has prayed the following:
 - a. Initiate proceedings under section 142 and 149 of EA, 03 against UPPCL for failure to comply with directions of this Commission.
 - b. Direct UPPCL to pay the total amount of Rs. 2183.61 Crs in six equal instalments as directed by the Commission on 19th April-May-June-July-August-September
 - c. Direct UPPCL to pay LPS/ carrying cost on the amounts directed to be paid the Commission till the date of actual payment

These matters came up for hearing today.

9. The Commission asked Sh. Siteesh Mukherjee, Counsel of UPPCL to prove that the review Petition is maintainable as the scope of review is very limited. The Counsel referred to Hon'ble Supreme Court judgement on



natural justice and argued that there were "**error apparent on face of record**" as it did not get chance to respond to the LPGCL submission dated 15.12.2020 and SLDC report dated 14.01.2021 as these documents were submitted after final hearing held on 03.12.2020. He also argued that UPPCL didn't have onus to compute the payable amount, but it was the responsibility of LPGCL to prove its claim.

10. He further argued that Statutory Auditor's certificate is not sufficient, but purchase invoice of coal should have been placed on record. He also argued that as per UI accounts, in some cases, the scheduled daily generation was also not met and these would have impact on fixed charges claim. In addition, he submitted that Hon'ble APTEL has not gone into the aspect of SPPA dated 04.01.2017 though it has ruled that ROE would be payable as per PPA 10.12.2010 and UPERC Generation tariff Regulations. Further, he pleaded that LPGCL, itself has given waiver to the claim of ROE and therefore, ROE amount as held by the Commission to be payable to LPGCL is not payable.
11. Sh. Amit Kapur, Counsel of LPGCL argued that the one of the reasons pleaded in application dated 23.06.21 by the Petitioner is "*Change of Lawyers*" for examining the matter in detail. The Counsel referred to Hon'ble Supreme Court judgment holding that change of lawyer could not be the ground of review. He argued that UPSLDC vide letter dated 12.11.2020 referring to UPPCL earlier letters had provided UPPCL the State Energy accounts verifying the availability of LPGCL plant for the period of dispute. The same have been placed on record of the Commission by UPPCL. Subsequently, on 24.11.2020, these accounts were uploaded on EASS portal of SLDC. In either of the case, UPPCL was to respond in 15 days for any discrepancy as per UP Grid Code.
12. He argued that this was not a de novo hearing, and the Commission has conducted all hearings in the matter giving ample opportunity to either side. He also argued that in terms of Section 32(2) of Electricity Act'03, UPSLDC is an independent and authorised statutory body entrusted with optimum scheduling and despatch in terms of contracts between the parties. He submitted that the Commission has been prudent and judicious to delegate SLDC for the computation of fixed charges.
13. He further argued that UPPCL, having not released any amount to LPGCL despite there being no stay to the Commission's order, has always been making attempts to not comply with the Commission's order. He submitted that LPGCL has filed Petition No. 1717/2021 for non-compliance of the Commission's Order. He pleaded before the Commission that the Review Petition may not be admitted unless they release upfront payment



of already due three instalment and come up with payment plan to liquidate balance three instalments.

14.The Commission observed that UPPCL has already exhausted all judicial remedies before the matter came up before this Commission. The Commission has passed order dated 19.03.2021 in remand order of Hon'ble APTEL dated 01.05.2019. In the present Petition most of the grounds sought for review do not lie within the limited scope of review except that related to Unscheduled Interchange account for few days.

15.Also, it was observed that though UPPCL was specifically directed by the commission vide its order dated 06.11.2020 to file reply to the claim of Petitioner, however, it left the onus on the Commission to verify and compute the payable amount, as they were not required to keep coal stock details for it was not use to them. UPPCL has also submitted during the final hearing on 03.12.2020 that claim of LPGCL is to be verified by the Commission by setting up appropriate protocol such as certification of Statutory Auditor / SLDC verification based on Technical and Fuel availability.

16.The Commission also observed that while the Petitioner is seeking natural justice to plead his case, it is also causing injustice to the other party by not complying with the Commission's order. Moreover, the context of the judgement referred to for natural justice was not analogues for it referred to "*notice serving situation*" to one of the parties.

17.The Commission also observed that amount payable on account of ROE and carrying cost of Rs. 663 Crs is small as compared to the total amount payable of Rs. 2183 Crs. Any computation error can be considered by the Commission in the True-up of FY 2014-19 / FY 2019-24 as all these computations are provisional for the Petitioner is being paid provisional tariff only as of now. The final tariff of the Petitioner is yet to be determined by the Commission post final capital cost determination. Further, the "balance of convenience" lies in favour of Discom.

In view of the above, the Commission directs as follows:

18. a. Petition No. 1722/2021:

Issue notice to LPGCL to file comprehensive reply to the Petition and also the IA dated 23.06.21. However, the Commission keeping in view compliance of its order dated 19.03.21 is necessary, therefore, before further proceeding in the matter the Commission directs UPPCL to come up with payment plan, on or before next date of hearing, of upfront release of three instalments due amounting to Rs. 1091Crs and payment plan for release of balance three instalments to LPGCL.



b. Petition No. 1717/2021:

Issue show cause notice to UPPCL as to why Proceedings under Section 142 and 149 should not be initiated for non-compliance of the order of the Commission. Non-compliance of the Commission's order vitiates the Regulatory framework of Electricity Act 03, therefore, the Commission directs UPPCL to come up with payment plan on or before next date of hearing, of upfront release of three instalments due amounting to Rs. 1091Cr and payment plan for release of balance three instalments to LPGCL. Else the Commission may initiate appropriate proceedings under the provisions of the Electricity Act 03.

List the matter on 28th June 2021 A/N.

(Vinod Kumar Srivastava)
Member

(Kaushal Kishore Sharma)
Member

(Raj Pratap Singh)
Chairman

Place: Lucknow

Dated: 25.06.2021

