

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.160/GT/2012**

Subject: Determination of Tariff of Udupi Thermal Power Station for the period from COD of Unit-I i.e from 11.11.2010 to 31.3.2014 and from COD of Unit-II i.e. from 19.8.2012 to 31.3.2014

Date of hearing: 10.9.2013

Coram: Shri V.S.Verma, Member  
Shri M.Deena Dayalan, Member

Petitioner: Udupi Power Corporation Ltd (UPCL)

Respondents: Power Company of Karnataka Ltd & others

Parties present: Shri J.J. Bhatt, Senior Advocate, UPCL  
Shri L. Vishwanathan, Advocate, UPCL  
Shri Murali, UPCL  
Shri Parthasarathy, UPCL  
Shri Soumyanarayanan, UPCL  
Shri M.G.Ramachandran, Advocate, PCKL  
Shri Anand Ganesan, Advocate, PCKL  
Shri Padamjit Singh, PSPCL  
Shri S.K.Kansal, PSPCL  
Shri Rajesh Gupta, PSPCL  
Shri Rohit Rao, Advocate for Objector

**Record of Proceedings**

At the outset, the learned Senior counsel appearing for the petitioner submitted that additional information sought for by the Commission and all documents in the matter have been filed as directed by the Commission, with copies to the respondents/objector. Pointing out that the pleadings in the matter have been completed, the learned Senior counsel summarized the issues raised in the petition as under:

(a) The Power Purchase Agreement (PPA) was signed under protest and only after assurances provided by the respondents and the Govt. of Karnataka (GOK) that the PPA terms would be modified at a future date, the petitioner proceeded to implement the project.

(b) The PPA is only for 1015 MW. Since the petitioner proposed to augment the project based on an in-principle approval of the GOK, which stated that the tariff would be determined based on CERC norms, the provisions relating to cap on the capital cost no longer apply. Moreover, the PPA provided for capital cost based on the then existing 2004 Tariff Regulations.

(c) The contention of the respondents 1 to 7 that they are not bound by the directives of the GOK is not tenable, since the Board Members have endorsed the decisions/ directions of GOK and have also acted in furtherance of such directions/decisions.

(d) The respondents have never raised any objection as to the change in the EPC contractor nor the change in the foreign currency component of the project during the period the petitioner had made its investment and commissioned the project. The petitioner has awarded the EPC

contract and the respondents had recommended to GOK for issuing essentiality certificate for project imports after examining contract documents.

(e) The EPC contract with Lanco Infratech was for 1015 MW only and only after necessary approvals, the EPC contract was amended. The contract documents submitted by the petitioner clearly establish that the terms and conditions and obligations of the parties were for a 1015 MW plant in 2006 which was later augmented to a 1200 MW plant in 2009.

(f) Notices on occurrence of Force Majeure on 17.7.2008 as regards massive earthquake in China affecting the manufacturing facilities of OEM supplier of BTG and on 26.12.2009 as regards change in Visa policy of the Govt. of India relating to Chinese nationals had been issued to respondents contending *inter alia* the delays in the commissioning of the project. Detailed justifications have been submitted in the petition and the additional information as directed by the Commission.

(g) Force Majeure has been claimed by the respondents due to alleged delay in obtaining Ministry of Environment & Forests (MOEF) clearance for laying 400 kV line through forest land. The contention of the respondents that despite non availability of 400 kV lines, Unit-II achieved COD on 19.8.2012 on existing 220 kV lines is not correct since synchronization permission for Unit-II was withdrawn and was given only when the respondents were confident that the 400 kV line would be commissioned shortly. Unit-II was synchronized using 220 kV lines by shutting down Unit-I as the 400 kV line was not ready. Thus, the evacuation facility to evacuate full power of 1200 MW was not ready even on 19.8.2012 (COD of Unit-II).

(h) Various factors which have impacted the IDC costs have been explained by the petitioner which may be considered.

(i) The Gross Station Heat Rate (GSHR) of 2400 kcal/kWh shall be considered for the project. The GOK had acknowledged the existence of dispute and had appointed a Committee which had made its recommendations, wherein, the GOK had conveyed that the tariff parameters including Heat Rate would be determined by the Appropriate Commission. The principles laid down under the 2004 Tariff Regulations may be applied while determining the Heat Rate for this project.

(j) Auxiliary consumption rate of 7.5% which includes consumption at captive jetty and external CHP, desalination plant, FGD, impervious layer in coal and ash handling plant shall be considered.

(k) O&M expenses and Return on Equity shall be considered as per the provisions of the 2009 Tariff Regulations.

(l) Renegotiation of Fuel Supply Agreements was due to circumstances which were beyond the control of the petitioner and the respondents are bound by the same.

(m) The tariff of the generating station may be determined taking into account the actual cost of the project incurred by the petitioner and as per the norms specified under the 2009 Tariff Regulations other than the Gross Station Heat Rate and Auxiliary Consumption rate.

(n) Detailed submissions made in the petition/replies filed and additional information along with the documents filed by the petitioner and written submissions may be considered for determination of tariff of the generating station.

2. The learned counsel for the respondents 1 to 7 referred to the written submissions filed in the matter and submitted as under:

(i) Even though the petitioner has relied upon the report of Justice Gururajan Committee, the Commission during the hearing on 9.4.2013 had observed that the parties shall make its submissions uninfluenced by the report of the said Committee.

(ii) The Commission in its orders dated 25.10.2005 and 7.8.2006 had decided the principle upon which the capital cost of the generating station should be allowed and it is not open to the petitioner to seek variation from the above said orders now. The capital cost of ₹ 4299.12 crore which had been agreed to by the petitioner for 1015 MW should not be allowed to be reopened at this stage. The question of signing PPA under protest does not arise since the PPA has been signed by the parties pursuant to the said orders of the Commission and there has been no compulsion for the petitioner to sign the same.

(iii) The petitioner has specifically agreed that no IDC over and above what is included in the frozen capital cost of ₹ 4299.12 crore shall be claimed. There can be no increase in capital cost, except only when the petitioner is able to show that specific 'change in law' has increased the outflow of the petitioner. The claim for IDC for the period applicable to the scheduled COD on account of Force majeure conditions is liable to be ejected.

(iv) The respondents as well as the petitioner are not concerned with the Force Majeure events of sub-contractors/sub-suppliers. It is the responsibility of Lanco Infratech to arrange the completion of the project at its cost and within the time frame required. The time overrun and cost overrun is attributable to the petitioner and Force Majeure condition can only be governed by the PPA between the parties.

(v) There is no reason for increase in capital cost due to augmentation of capacity from 1050 MW to 1200 MW for the following reasons:

(a) The CPRI report filed by the respondents confirms that the infrastructure envisaged for plant capacity of 2 x 507.5 W is capable of generating 2 x 600 MW.

(b) The contract with BHEL, Simplex and Navyuga was cancelled and the entire contract was given to Lanco Infratech on the basis that the total capital cost will be less than the capital cost of BHEL, Simplex and Navyuga. Moreover, the respondents have also stated that no additional tariff would be given on account of the competitive bidding process.

(c) The contract between the petitioner and Lanco Infratech prior to 16.12.2006 (though the contract dated 16.12.2006 refers to the said agreement) has not been produced by the petitioner.

(d) Even before inviting fresh bids for selection of EPC contractor during November, 2006, there was some arrangement by the petitioner for its generating station in October, 2006 itself for a total capacity of 1200 MW.

(e) The capital cost and financials of the contract dated 16.12.2006 for 1200 MW and the contract dated 21.4.2007 for 1015 MW are the same and hence there is no justification for reduction in capacity at the same cost and then claiming additional cost for increase in capacity after two years.

(vi) The grant of essentiality certificate was only for the purpose of customs duty and the Government neither required the perusal of contracts entered into by petitioner/contractors or otherwise to give consent to the same for purpose of determination of tariff.

(vii) The financial and operational norms, like, Interest on loan, O&M expenses, Station Heat Rate, Auxiliary Consumption etc were all agreed to in the PPA and hence no deviation can be prayed for by the petitioner. Detailed justification for the same has been submitted by the respondents which may be considered.

(viii) Neither the petitioner nor the EPC contractor, M/s Lanco Infratech were affected by the earthquake in China or the Visa restrictions. These are Indian companies and Lanco Infratech is to supply equipments from the company in China (M/s Dongfang). There is no privity of contract between the petitioner and the sub-contractor of Lanco Infratech and the company in China.

(ix) Subsequent to the earthquake in China in the year 2008, an amendment to the agreement to the supply contract was signed by Lanco Infratech with petitioner on 3.10.2008. This amendment did not make any change in the commissioning schedule of the plant for Units-I and II. If Dongfang was affected by earthquake, this issue would have been raised with Lanco Infratech and would not have committed for scheduled date of completion. The petitioner has also sought for extension of time for only two months much after the earthquake in China. Accordingly, earthquake was not a reason for the delay in the completion of the project.

(x) The petitioner has also not claimed earthquake as a Force Majeure condition against the fuel suppliers due to which project has been delayed as contended. Instead the petitioner has allowed the fuel supplier to terminate the contract for fuel supply on the ground that the project is not commissioned by the date set forth.

(xi) The restriction of Visa applicable to Chinese workers does not constitute force majeure event. It was open to Lanco Infratech to arrange work force in India. The force majeure event by sub-contractor cannot a ground to release Lanco Infratech from its obligations or otherwise allow increase in cost. The Govt. of India only specified that unskilled and semi-skilled workers should not be brought from outside India. The visa was to be granted for skilled and qualified professionals' upto a particular limit and for additional skilled workers the details were required to be forwarded to Govt. of India to justify the requirements. Merely stating that there was Visa restrictions cannot make the claim maintainable for additional costs by the petitioner.

(xii) The bidding documents made available now by the petitioner clearly provides that it is the duty and obligation of the bidder to arrange for alternative start up power at its own cost and expenses.

(xiii) The delay in the commissioning of the generating units by the petitioner was not on account of the delay in evacuation facilities as narrated by the respondents in the written submissions dated 2.8.2013. The petitioner cannot take advantage of its own defaults and actions.

(xiv) The petitioner has chosen to operate only one unit at a time to offset its default in construction of ash pond and not due to no-readiness of 400 kV evacuation line by the respondents. The contention of the petitioner that Unit-II was ready for achieving COD during March, 2011 is incorrect since the petitioner does not have a valid NOC from KPSCB for commissioning Unit-II as is evident from its letter dated 6.4.2011.

(xv) The petitioner having accepted the order dated 25.10.2005, achieved financial closure for the project, executed the PPA and established the generating station, cannot claim additional capital expenditure for ₹182.73 crore at this stage. Moreover, the amounts claimed by petitioner with respect to Rehabilitation & Resettlement (R&R) and Corporate Social Responsibility (CSR) is not maintainable since these amounts have not yet been paid by the petitioner.

(xvi) PPA is the binding agreement between the parties and it is always open to the parties to agree to better norms and parameters as applicable, so long public interest is served.

(xvii) The PPA entered into by the parties provides for the rate of interest as 7.25%. The said PPA has not been amended or modified. The petitioner is bound by the stipulations contained in the orders dated 25.10.2005 and 7.8.2006 passed by this Commission.

(xviii) Return on Equity, O&M expenses specified in the PPA being better norm as compared to those provided under the 2009 Tariff Regulations shall be adopted.

(xix) The claim of the petitioner towards Station Heat Rate (SHR) is 2400 kcal/kWh for gross generation and the SHR as per PPA is 2400 kcal/kWh for 'net generation'. The GSHR demonstrated during performance test is 2188 kcal/kWh for Unit-I and 2193 kcal/kWh for Unit-II. The GSHR considering the Auxiliary consumption of 7.5% as claimed by the petitioner is 2220 kcal/kWh. This may be considered for determination of tariff.

(xx) Auxiliary consumption of 6% needs to be considered since the said norm is inclusive of the various auxiliaries and based on CEA recommendations and views of various stakeholders.

(xxi) The copies of the judgments of the Supreme Court as regards the 'sanctity of contracts' as referred by the respondent may be permitted to be filed.

(xxii) Detailed submissions made in the rejoinder/written submissions filed by the respondents 1 to 7 may be considered by the Commission for determination of tariff of the generating station.

3. The representative of respondent, PSPCL mainly submitted as under:

(a) PPA was signed by the respondent based on the assumption that the fuel rates tied up would remain firm for 5 years, the capital cost of the project would be ₹ 4299.12 crore and tariff would be for determined by the Commission. Some of these assumptions are sought to be deviated by the petitioner.

(b) As per provisions of the Electricity Act, 2003, the Commission should encourage competition, efficiency etc., A comparison of Mundra UMPP with that of this generating station would indicate that the per unit cost for this generating station is higher.

(c) Auxiliary consumption rate as per CERC norms or PPA whichever is lower, shall be considered.

(d) The SHR of 2220 kcal/kWh shall be considered.

(e) The submissions made on behalf of the respondents 1 to 7 as above are adopted by this respondent. The reply filed in the matter may be considered.

4. The learned counsel for objectors adopted the submissions made on behalf of the respondents 1 to 7 and mainly submitted as under:

(a) The delay in commissioning of the project is attributable to the petitioner. The claim made by the petitioner on account of foreign exchange may be restricted to the ceiling provided in the PPA. Since the petitioner has alleged that the delay in providing evacuation lines is attributable to KPTCL, any adjudication may be made only after KPTCL is made a respondent in these proceedings.

(b) The claim regarding infirm power shall be guided by Article 2A.4.6 of the PPA.

(c) This Commission cannot ignore the norms and parameters provided for in the PPA and determine tariff independent of the same, till approval of PPA by the State Regulatory Commission.

(d) The claims towards CSR etc., are welfare activities and the same cannot be passed on to the consumers.

(e) The legality of this project has been challenged by this objector. The Environmental clearance granted by the Ministry of Environment & Forests has been disputed and the same is pending before the National Green Tribunal, (NGT) Chennai now for adjudication. The Commission may consider issuing orders only after the decision of NGT in this case. In addition, the objector has also challenged the order of NGT permitting KPTCL to lay down 400 kV transmission lines, before the Hon'ble Supreme Court of India and the same is pending.

(f) The written submissions/reply filed by the objector may be considered.

5. The learned Senior counsel for the petitioner clarified that the issues raised by the respondents have been dealt with in detail in the rejoinder/written submissions filed by the petitioner. While pointing out that the order dated 25.10.2005 was an in-principle approval order, he submitted that Justice Gururajan Committee was set up only after the parties had failed to agree on certain issues as regards tariff of the generating station. The learned counsel further submitted that the respondents 1 to 7 having accepted the directives of GOK cannot now say that the same are not binding. He further prayed that tariff for the generating station may be determined considering the submissions and the documents available on record.

6. The Commission directed the learned counsel for the respondents 1 to 7 to file copies of the judgments of the Supreme Court, as desired, within one week, if not already filed. Subject to this, order in the petition was reserved.

### **Petition No. 12/MP/2013**

During the hearing, the learned Counsel for the respondents 1 to 7 urged that the petition may not be clubbed with tariff petition (Petition No.160/GT/2012) and prayed that the same may be heard separately. This was not objected to by the learned senior counsel for the petitioner.

2. Based on the above submissions and due to paucity of time, the hearing of the petition was adjourned.

3. The petition shall be listed for hearing on **24.9.2013 at 2.30 p.m.**

By order of the Commission

**Sd/-**  
(T. Rout)  
Chief (Law)