

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal Nos. 26 & 36 of 2007

Dated this **25th** day of **October**, 2007

**Coram: Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Mrs. Justice Manju Goel, Judicial Member**

IN THE MATTERS OF:

Appeal No. 26/2007:

Uttar Pradesh Power Corporation Ltd.

Shakti Bhawan, 14, Ashok Marg,
Lucknow

... Appellant

Versus

1. M/s. Noida Power Company Ltd.

Commercial Complex, H-Block,
Sector Alpha – II,
Greater Noida – 201 308.

2. Uttar Pradesh Electricity Regulatory Commission

Kisan Mandi Bhawan, IInd Floor,
Gomti Nagar,
Lucknow (U.P.)

... Respondents

Appeal No. 36/2007:

M/s. Noida Power Company Ltd.

Commercial Complex, H-Block,
Alpha-II Sector,
Greater Noida

... Appellant

Versus

1. **Uttar Pradesh Power Corporation Ltd.**
Shakti Bhawan, 14, Ashok Marg,
Lucknow.
2. **The Uttar Pradesh Electricity Regulatory Commission**
Lucknow (through its Secretary) ... Respondents

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J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

This judgment is to decide two appeals being Appeal No. 26 of 2007 and Appeal No. 36 of 2007. Both the appeals arise out of the same impugned order namely the order of the Uttar Pradesh Electricity Regulatory Commission (UPERC or Commission for short) dated 08.02.2007. The order was passed on a Petition by M/s. Noida Power Company Ltd. (NPCL for short), appellant in Appeal No.36/07, under Section 86 of The Electricity Act 2003, read with Section 34 of Uttar Pradesh Electricity Reforms Act 1999, seeking a direction from the Commission restraining the UP Power Corp. Ltd. (UPPCL for short) from taking any coercive action by withdrawing 10 MW of additional power that was being supplied by the UPPCL to the NPCL under an agreement arrived at in May, 2006.

Facts:

2. From the facts available on record it appears that the parties, namely NPCL and UPPCL, have been in perpetual conflict over the rate on which NPCL had been getting bulk supply of electricity from UPPCL. NPCL obtained a license from Govt. of Uttar Pradesh for carrying out distribution in the area of Greater Noida as a private sector player in the distribution of electricity on 30th August, 1993. Its entire power requirement was met by UP State Electricity Board (UPSEB or Board for short) and there after by UPPCL, a successor of UPSEB. UPPCL allowed NPCL to draw power load up to 45 MW only in view of power constraints. The two entered into an agreement on 15.11.1993. UPPCL agreed to supply power of 45 MW for a maximum period of 4 ½ years. Under the terms of the agreement, the stipulated tentative power purchase price was Rs.1.66 per unit. This rate was to remain operative for only six months. The agreement included a term that the rate would be subject to revision as extracted below:

“The above rates of Company are tentative which will be studied and revised after six months by an independent authority to be nominated by State Government and mutually acceptable to NPCL and Supplier for this purpose. If during the period of these six months this Body fixes more/less charges on the basis of the above, it will be adjusted accordingly.”

3. An un-certainty about the rate of tariff payable to NPCL by UPPCL was left in the agreement at the very inception of the business of NPCL. The agreement was thus pregnant with the possibility of conflict between the two parties over the rate to be applied for power purchase. Since the parties could not arrive at any mutually acceptable rates, the Govt. appointed first a Committee known as a Nair Committee and then another known as Beg Committee. The report given by Beg Committee was challenged by the NPCL before the High Court of Allahabad in Writ Petition No.1048/2000. In the meantime, UP Electricity Reforms Act 1999 had also come into being and UPERC was constituted vide gazette notification dated 10.09.1998. The UPERC had the responsibility of determining the tariff for retail as well as bulk supply of electricity. The High Court passed an interim order on 31.03.2000 directing UPERC to fix the power purchase price for NPCL within ten days. The UPERC vide an order dated 05.02.2001 fixed rates for the period 1993-94 to 1999-2000. NPCL also paid certain amounts as per this determination under the order of the High Court. The High court heard the parties before accepting the report of the Commission. The Commission, for determining the tariff payable by NPCL, had applied the principles of VIth Schedule of The Electricity (Supply) 1948. Since the retail tariff at which NPCL supplied electricity to its consumers was fixed (NPCL being made to supply electricity at the same rate at which all other consumers of the

State were entitled to electricity) the principles of VIth Schedule could be applied in reverse only. Shri Shanti Bhushan, Sr. Advocate then appearing for NPCL vehemently supported application on VIth Schedule by reverse process. The application of VIth Schedule ensured reasonable return to the distributing companies. It was submitted on behalf of NPCL that following the principles laid down in the VIth Schedule, the UPSEB would get a reasonable price towards the cost of supply and NPCL would also get reasonable return by making the determination on taking into account various heads under VIth Schedule, which would balance the equity between the two namely Board and NPCL and none would remain in loss. The High Court observed that the VIth Schedule may not be applicable in literal form but the NPCL was entitled to retain reasonable return or otherwise it will not be possible for NPCL to survive. The High Court approved the application of VIth Schedule by reverse application and accepted the report of the Commission vide judgment dated 10th November, 2005. The Agreement between NPCL and UPPCL was for a period of 4 ½ years which would have ended in 1998. It was however extended from time to time till 10th November, 2005. However, the tariff determined by the UPERC and approved by the High Court was for the period 1993-94 to 1999-2000. The tariffs for the subsequent period also have been fixed by reverse application of the VIth Schedule. The Tribunal is informed that with the latest tariff order for the current year 2006-07 (the period in which controversy

has arisen), the bulk supply tariff payable by NPCL to UPPCL has again been fixed by reverse application of the VIth Schedule.

4. The present controversy which arises out of contract dated 08th May, 2006 may be independent of the above chronology but I feel it necessary to mention the above chronology because it has been referred to by both the parties and because the impugned order also affects the bulk supply tariff payable by NPCL to UPPCL determined as above. The present controversy is based on the contract between the parties arrived at in May, 2006 over additional supply of power to NPCL over and above 45 MW for which the earlier power purchase agreement had been entered into. The power requirement for NPCL having increased, the NPCL for sometime has been making efforts to procure more power through open access since 2003-04. By a letter dated 13th January, 2006, the UPPCL informed that additional allocation of power would be possible after 400 kV s/s Greater Noida, being constructed by M/s.BHEL, was commissioned which was expected to be completed by March, 2006 and that the NPCL could apply for open access to State Load Dispatch Centre in the prescribed format. The NPCL however, entered into the agreement in dispute for purchasing additional power of 15 MVA at marginal cost. The relevant document in this regard issued by the NPCL is as under:

“Ref: E-9/06-07/
Ashok Khurana, IAS

May 8, 2006

Principal Secretary (Energy) & Chairman
UP Power Corporation Limited
Shakti Bhawan, 14, Ashok Marg
Lucknow-226 001

Dear Sir,

Additional Supply of 15 MVA

This has reference to our various meetings and correspondences resting with our letter No. E-9/06-07/002 dated April 5, 2006 [Copy enclosed for ready reference] on the captioned subject.

In this connection, we refer to our meeting of date, wherein you have offered to supply 15 MVA additional power at marginal cost to UPPCL, which we accept and will appreciate if necessary instructions are issued to make this additional power available forthwith.

Kind regards,

Yours faithfully,
For Noida Power Company Limited

(R. C. Agarwala)
Chief Executive

Encl: As above”

5. Pursuant to this agreement between the parties, UPPCL started supplying power of additional 10 MW to the NPCL from 10th May, 2006. The first bill for the additional power supply was raised by UPPCL on 20th September, 2006 for Rs.14.7 Crores of which Rs.4 Crores had already been paid by NPCL. The bill was subsequently revised to Rs.11.6 Crores vide a letter dated 04th November, 2006. Vide a letter dated 15th November, 2006, UPPCL

reiterated its demand and threatened to restrict the power supply to the original 45 MW if the payment was not received by 21st November, 2006.

6. NPCL approached the Commission, with Petition No. 414 of 2006 for an order to restrain UPPCL from withdrawing this supply of 10 MW of power. The Commission directed the UPPCL not to restrict the power of NPCL and simultaneously directed NPCL to make the provisional payment of Rs.5 Crores. The Commission further directed the parties to find an amicable solution. It also directed NPCL to arrange for alternative sources of power by 31st January, 2007. The matter was taken to the High Court and under the orders of the High Court, NPCL deposited further sum of Rs.5 Crores and UPPCL continued the additional supply of 10 MW. The impugned order was passed under the direction of High Court requiring the Commission to finalise the proceedings and to pass an order on the Petition of the NPCL within a period of four weeks. By the impugned order, the Commission directed that the NPCL shall pay to the UPPCL the price for the additional 10 MW of power at marginal cost. It also simultaneously directed that for the period of additional supply i.e. 10th May, 2006 to 31st January, 2007, the bulk supply tariff payable by NPCL instead of being at the rate of Rs.2.9361 as fixed by the tariff order of the UPERC would be reduced to Rs.1.897 per unit. Both the parties are aggrieved with the order.

Impugned Order:

7. The impugned order has gone into various aspects beyond controversy in question, namely whether the NPCL was bound to pay for the marginal cost for 10 MW of power. It holds that NPCL was bound to pay the UPPCL at marginal cost but simultaneously holds that the tariff for NPCL for the original 45 MW of power would be reduced. While UPPCL is aggrieved with that part of the order which reduces the tariff for the original 45 MW of power, the NPCL is aggrieved with the direction to pay the marginal cost for the 10 MW of power. The impugned order and the conclusions deduced can be summarized as follows :

- a) The order virtually starts with the portion captioned “UPPCL’s role as STU”. It emphasizes that UPPCL as a transmission utility has to grant non-discriminatory open access to all the distributing companies but it is discriminating against NPCL by putting the entire cost burden of costliest power purchase on NPCL while the other distributing companies are getting power on average cost basis. It opines that the contract in question is in the nature of long term commitment whereas such procurement at marginal cost would most certainly be done on account of some other happening in

the overall system connected with the UPPCL grid at a particular time.

- b) The order then proceeds to discuss the validity of the contract and narrates the pleas of the respective parties in this regard. This part of the judgment is captioned “Validity of the undertaking in terms of contract Act”. It observes that there was an element of uncertainty inasmuch as ‘marginal cost’ was not disclosed. The UPPCL submitted that ‘marginal cost’ has an unambiguous connotation in the field of electricity economics and electricity cost accounting while the NPCL submitted that it never expected the marginal cost to be so high and that it came to know of it only at the end of four months when the first bill was raised. This part of the judgment ends with the remark “*The issue of validity of “marginal cost agreement” with respect to Section 29(e) of the contract Act will be analyzed further after discussing the structural responsibilities cast upon the parties to this dispute under Electricity Act 2003 in order to examine the validity of the agreement vis-à-vis the provisions of Electricity Act 2003 which is a requirement of Section 23 of the Contract Act.*”

- c) In part 3 of the order the Commission has proceeded with discussions on “Allocation of PPA’. It recalls that the “Tariff Policy” which is itself based on the National Electricity Policy requires assignment of the Power Purchase Agreement by the Electricity Boards to the Distribution Companies. The PPAs in U.P. have not been allocated in accordance with the load factors of the distributing companies which, the Commission observes, was strangulating the NPCL. It recalls further that retail tariff for NPCL being the same as in the rest of the States the power purchase cost could be ascertained only by reverse calculation. The Commission then recalls the following part of High Court’s order dated 10.11.2005:

“The principle enunciated in the Sixth Schedule to govern such determination of tariff by the licensee for its consumers. Since the Board is not the licensee within the meaning of Section 57 and NPCL is though a licensee but is not to determine the tariff for its consumers, the provision of Sixth Schedule can only be applied by reverse application. Even if the price or the rate of tariff is to be fixed on the basis of through rate, this also would have to be done in substance by keeping in mind the rate on which the NPCL is supplying electricity to its consumers. Final rate of supply to consumers being fixed by the Board, any formula made for

determining the power purchase price would necessarily mean reverse application.”

The Commission then observes that if the power purchase price is allowed to rise to astronomically high figure the NPCL's existence will be endangered.

- d) In the following Section of the order subtitled 'Denial of Open Access', the Commission considers the denial of open access to NPCL despite NPCL's repeated request to UPPCL. It recalls Commission's letter of 02.09.04 directing UPPCL to take necessary action in accordance with the statutory provision of the Act.

By a letter of 22nd Feb. 2005 the Commission had reminded the UPPCL of its obligation to provide non-discriminatory open access and opined that the excuse of UPPCL being not in good financial condition was not acceptable. On 15th Dec. 2006 the Commission directed the UPPCL to allow 5 MW open access to NPCL through 220 kV transmission network emanating from 400 kV sub station Muradnagar and connecting to 132 kV sub station at Surajpur immediately and thereafter 10 MW through new transmission system with commissioning of 400 kV Pali sub station. The Commission then remarks that instead of giving open access to

NPCL, the UPPCL compelled NPCL to give the undertaking without even giving a hint as to what would be the marginal cost.

- e) In part 5 of the order sub-titled “Power Procurement Agreement & Jurisdiction of the Commission”, the Commission reflects on the provisions of Section 86(1)(b) of The Electricity Act 2003 read with Section 60 of the Act and observes that the power procurement rate has to be approved by the Commission which was not done in this case and that the Commission has the authority to issue appropriate directions if a company enters into an agreement by abusing its dominant position causing adverse effect on competition.
- f) What is the impact of the contract, in question on competition is considered in part 6, which is captioned “Impact on Competition”. The Commission concludes that the UPPCL had abused its dominant position by rejecting the request for open access and offering 10 MW at marginal cost and this will hamper competition by loading the odds heavily against NPCL which had no additional source of revenue to support it.
- g) The part 7 of the order “Validity of the Undertaking under Electricity Act’ then says that the contract in question

lacks approval of the Commission and in view of Section 86(1)(b) of the Act the agreement is void being hit by Section 23 of the Contract Act. It further observes that it is difficult to ascertain the marginal cost in view of swift changes in demand. Hence, it holds that the contract in question was bad also on account of uncertainty.

- h) In the subsequent part of the order the Commission then proceeds to pay attention to “Other Concerns”. It found that although the contract is violative of Sections 23 & 29 of the Contract Act, the UPPCL has to be compensated for the ‘sunk cost’ since UPPCL had already incurred the cost on account of additional 10 MW power allegedly at ‘marginal cost’, it would not be appropriate to disregard this cost. Secondly, the NPCL had also not acted in accordance with law by failing to submit the agreement in question before the Commission for its approval.

The Commission then sets the following task before itself :

- “a) Compensation of additional power procurement by UPPCL on marginal cost*
- b) Balancing the commercial interest of both NPCL and UPPCL*
- c) To ensure that the consumers of both UPPCL and NPCL area get a fair deal and accordingly*

burden of the dispute should be spread thin and uniform, as far as possible.”

- i) The concluding part of the order is captioned ‘Upshot’. The order recalls that bulk supply tariff for NPCL, by reverse application of the VIth Schedule (i.e. by deducting total prudent cost element of NPCL from total revenue of NPCL) had been determined at Rs.2.9361 for 2004-05. The bulk supply tariff continued to be so for the subsequent years namely for 2005-06 and also for the ensuing years 2006-07 which is in question. The Commission observes that the bulk supply cost was Rs.1.897 per unit as per UPPCL tariff order for 2004-05 whereas bulk supply tariff paid by NPCL was Rs.2.9361 and in this manner NPCL was transferring its “efficiency gains” to the tune of Rs.1.03 per unit to UPPCL for the existing supply of 45 MW. The Commission feels constrained to work out the tariff for 2006-07 in order to dissolve dispute between the parties. It came out with a solution that the NPCL should compensate the UPPCL for the entire 60 MW of power and thus while for the additional 10 MW the payment would be made at the marginal rate, for the original 45 MW payment would be made at the rate of Rs.1.897 per unit. To this extent it amended the bulk supply tariff of NPCL, against 45 MW

demand, for the disputed period and allowed the UPPCL to charge for the 10 MW at a marginal cost at which power was procured by NPCL.

The Grounds of appeal:

8. During the arguments before this Tribunal, the challenge to the impugned contract has gone far beyond the findings of the Commission. The Commission found the contract bad because in the offer and acceptance neither the marginal cost was disclosed nor any cost band was specified but it hastened to add that the agreement would not be void if marginal cost was ascertainable. The order does not say that the NPCL did not understand what was marginal cost. Nor does it say that NPCL had assailed the contract to be bad on that ground. The ground on which NPCL had assailed the contract can be found from the following sentence: *“The Petitioner, however, argued that he never expected marginal cost of power to be so high and that he became aware of such high cost of additional power at marginal cost when UPPCL for the first time raised the bill after a gap of four months.”*

9. Before this Tribunal the NPCL has come out with further challenges to the contract in question and to the decision of the Commission in imposing the marginal cost on NPCL. Mr. Shanti Bhushan has supplemented his oral arguments with a written submission wherein he has crystalised the challenges to the

transaction in question. His challenges, in his language are as under:

- 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 which is clearly discriminatory and unconstitutional.*
- iii) The agreement dated 08.05.2006 was contrary to law and therefore not binding and enforceable being hit by 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*

10. The challenge of UPPCL to the part of the order reducing the bulk supply tariff for the 45 MW originally contracted is based on

applicable procedure for altering tariff and jurisdiction of the Commission.

Findings with reasons:

11. The contract in question and of Section 23 of the Contract Act: I will first take up the third submission of NPCL and examine whether the contract is void because it is hit by specific provision of statute. Section 23 of The Contract Act says that the consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law or its fraudulent or involves or implies injury to a person or property of another or the Court records it as immoral or opposed to public policy. It says further that in each of these cases the consideration would be unlawful and the contract void. The challenge to the present agreement is based on Section 86(1)(b) of The Electricity Act 2003 which is to be read along with Section 62(1) of the same Act. Both the Sections are extracted below:

*“86. **Functions of State Commission** – (1) The State Commission shall discharge the following functions, namely:-*

(a) ...

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from

the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

C) ...”

“62. Determination of tariff – (1) *The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-*

(a) *supply of electricity by a generating company to a distribution licensee:*

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) *transmission of electricity;*

(c) *wheeling of electricity;*

(d) *retail sale of electricity:*

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting

competition among distribution licenses, fix only maximum ceiling of tariff for retail sale of electricity.”

12. On behalf of NPCL it is contended that the State Regulatory Commission has to regulate the procurement and purchase of electricity of the licensee including the price at which electricity can be procured from any source through agreement of purchase power for distribution of power within a State. It is contended further that in view of the above provisions a distribution company cannot enter into an agreement to purchase power without approval of price of purchase of power by a Regulatory Commission. This proposition is extended by saying that no one can supply power to a distribution company without price having been approved of by the Regulatory Commission. It is contended that the present agreement to purchase power at marginal cost without approval of the Regulatory Commission was illegal and not enforceable.

13. On behalf of UPPCL it is submitted that Section 86 requires the Commission to regulate the price for procurement of electricity, but Section 86 is to be read with 62 which requires the Commission to fix the tariff for supply of electricity by a generating company to the distribution licensee, for transmission of electricity, for wheeling of electricity as well as for retail sale of electricity. According to him the UPPCL has been functioning as a trading company vis-à-vis the contract and neither Section 86 nor Section 62 makes any provision

for determining the tariff for such a trading concern. Section 64 which lays down the procedure for fixing the tariff also only mentions that an application for determination of tariff under Section 62 shall be made by a generating company or licensee and makes no provision for determining the tariff of a trading company. Section 64 is reproduced below:

*“64. **Procedure for tariff order** – (1) An application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.”*

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under subsection (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

- (4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licenses and to the person concerned.*
- (5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefore.*

(6) *A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.”*

14. I am unable to locate any provision in The Electricity Act which controls the price at which a trader in the market of electricity is required to get his schedule of price approved by an appropriate commission. This Tribunal, in Petition No. 1 of 2005, decided on 22.12.06 held that the Electricity Act does not impose any restriction of tariff on the generating company or the distribution licensee to sell electricity to a trader or an intermediary or on a trader to sell electricity to any person.

15. In order to examine the validity of the contract in the light of Section 23 of The Contract Act, I have to examine whether the contract is forbidden by any law or whether it would defeat the provisions of any law. It is submitted; on behalf of UPPCL that the contract is neither forbidden by any law nor does it defeat the provisions of any law.

16. Do the above provisions of Section 86(1) (b) or Section 62 of The Electricity Act bar any agreement between a distribution company and a trader / transmission utility / generator to fulfill an urgent requirement for power? Do the above provisions mean that no agreement can be entered into between the distributing company

and the electricity supplier without first obtaining the approval of the Regulatory Commission? The two provisions do not categorically say so.

17. I am unable to see how these provisions make the contract barred by law. The provision of Section 86 actually lays down the functions of the State Commission. Clause (b) of subsection 1 quoted above merely states that one of the functions of the State Commission is to regulate the price at which the electricity would be procured from the generating companies or a licensee or from other sources and through agreements for purchase of power for distribution and supply within a State. Section 62 of The Electricity Act also entrusts the function of the determination of tariff on the appropriate commission. The procedure for determination of tariff has been prescribed in Section 64 of the Act. Tariff has to be fixed on an application made by a licensee in the manner prescribed. Regulation of procurement of electricity does not necessarily mean seeking prior approval of all power purchases by a distribution licensee. The nature of business of supplying electricity is such that the licensees have to take decision on real time basis regarding procurement and supply of electricity. If prior approval of the Commission is to be mandatorily taken for all power purchases, the licensees would be severely constrained to make use of the surplus power available in the market to meet their load requirement. This inherently would require availability of flexibility in procurement

and supply of electricity by the licensees. The extent of flexibility would, however, depend upon the policy framework put in place by the appropriate Commission. The Commission had notified UPERC (Conduct of Business) Regulations, 2004 and Guidelines for Load Forecasts, Resource Plans and Power procurement process, 2001 laying the procedure for procurement of power by the licensees. The requirement of approval by the Commission of any power purchase agreement does not find any mention in Section 86 (1) (b) which has been quoted above although the impugned order says that Section 86 (1) (b) requires such an approval. The requirement for approval is shown to exist in the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations 2004 which is issued on 06th February, 2004 by the Uttar Pradesh Electricity Regulatory Commission. Chapter VI of these regulations deals with fixation of tariff. It is further submitted by the counsel for UPPCL that the approval of the Commission in the matter of fixing of tariff is required only when the purchase of power is on a long term basis and not on a short term basis.

18. Regulation 132 prescribes that the Commission shall notify the methodology and procedure for calculating expected revenue for the period which a licensee shall be permitted to recover in line with National Electricity Policy and Tariff Policy issued by the Central Government. Regulation 133(1) (e) of Uttar Pradesh Electricity Regulatory Commission's (Conduct of Business) Regulations 2004

prescribes that “no distribution licensee within the State shall purchase electricity from a generating company or a licensee under a long term supply agreement without the general or specific approval of the Commission.” No provision could be shown to the Tribunal which compulsorily requires approval of the Commission to enter into a power purchase agreement before an agreement is actually executed. Nor is any provision brought to our notice which requires a short term power purchase contract needing approval of the Commission. In this connection, one may also refer to the Guide Lines for Load Forecasts, Resource Plans and Power Procurement Process, 2001 notified by the Uttar Pradesh Electricity Regulatory Commission. Para 4, the Guide Lines deal with power procurement. Para 4 mentions long term procurement and Para 4.1.2 deals with short term procurement.

“4.1.1 Except as otherwise permitted by paragraphs 4.1.2 and 4.1.3 the Licensee shall not enter into a power purchase agreement or purchase or solicit offers for supply of power until 60 days after it has notified the Commission of its intention to do so and its compliance with requirements laid down in paragraphs 4.2 and 4.3, after complying with requirements of 4.4.3.

4.1.2 *Licensee may make short-term purchases of power for emergency support and to realize short-term operating cost saving, without first notifying the Commission and providing the information required by paragraphs 4.3 and 4.4.2.”*

19. The above provisions shows that for short term procurement no prior intimation was required to be given to the Commission although such intimation was required for long term procurement. Obviously the NPCL wanted the additional 10 MW at marginal cost only for a short term, that is, to meet the summer season shortage although in the written terms the same was silent. In the absence of any specified period, the contract can be interpreted as one on day today basis, which will again make it a short term contract.

20. The above provisions indicate that the distribution licensee shall not purchase electricity under a long-term supply agreement without the general or specific approval of the Commission. However, for short-term purchases of power, the licensee may make purchase without first notifying the Commission. We observe from the correspondence exchanged between NPCL and UPPCL that the NPCL needed additional power to meet the growing demand of the consumers of the distribution area of NPCL. Thus the growing demand of NPCL was to be met either from other suppliers through

open access provided by UPPCL or from the UPPCL itself. It is true that the correspondence exchanged between them do not specifically use the words as 'long-term' or 'short-term' for indicating the nature of supply. It was incumbent on NPCL to approach the Commission for seeking approval of the agreement for purchase of power from UPPCL if its intention was to enter into a long term agreement and since it did not approach the Commission, it appears NPCL itself considered the deal with UPPCL to be of 'short-term' nature.

21. On behalf of the NPCL it is submitted that it was a long term contract and it was so treated as by UPERC in the impugned order. On behalf of UPPCL it is vehemently submitted that this contract could not have been a long term contract as neither party could ever be believed to have purchased or sold at marginal cost on long term basis. It is submitted that marginal cost agreements are meant for meeting short term emergency situations whereas for long term situations the cost of power could depend upon the average cost of production and supply or on tariff fixed by the Commission. On behalf of NPCL, it is submitted that NPCL's demand was being pressed for a long time and hence it could not but have purchased the power of additional 10 MW on a short term basis. The NPCL has drawn attention of this Court to a letter by NPCL to UPPCL in the years of 2004-05 and the application made by NPCL to the Commission asking for open access so that it could

meet the requirements for power by purchase from other sources. It is true that the demand for power was long term. This does not necessarily mean that the arrangement for the additional supply of 10 MW was a long term arrangement. In fact the arrangement of this 10 MW of power continued only till 31st January, 2007 i.e. for nearly nine months. The agreement itself does not specify the period for which the 10 MW would be purchased at such marginal cost. In fact NPCL itself must have treated the purchase as a short term purchase as NPCL itself did not proceed to take the approval of the Commission for this purchase price. In the NPCL's counter affidavit it said *"Since, by that time due to full onset of the summer season the consumer unrest had grown to huge proportions and the Respondent No.1 at that stage was left with no option but to concur under duress for marginal cost."* So it is clear that NPCL entered into the contract of additional 10 MW to meet the emergent need for the summer season.

22. Before classifying the power purchases under consideration as of 'long-term' or 'short-term' nature, it is relevant to observe that NPCL did not approach the Commission before entering into such power procurement arrangement as is required of distribution licensee under Regulation 133, while making long-term purchases. Prior approval of the Commission is not essential when the power purchases are of 'short-term' nature. Therefore, it is deduced that the NPCL itself treated the purchases as of 'short-term'. Also, the

price of electricity at Rs. 8-9 per kWh in the case of long-term purchases is not sustainable.

23. The Regulation does not anywhere say that unless approved by the Commission the agreement to purchase electricity between a distribution licensee and a generating company or some other licensee will become void. The general or specific approval mentioned in this clause has reference to only fixation of tariff. The VIth Schedule of The Electricity (Supply) Act 1948 *inter alia*, prescribes that tariff has to be fixed by keeping a clear profit which should not exceed the reasonable return. Clear profit is defined as difference between income and expenditure. Expenditure properly incurred includes the cost of purchase of electricity. It is only in order to determine as to what should be the expenditure properly incurred that the regulator has to take into consideration, the cost of purchase of energy. It is in this context that one has to read the provisions relating to fixation of tariff as given in Regulation 133, mentioned above. Non adherence to clause (e) in case of a long term supply agreement may result in the Commission treating the expenditure as not properly incurred and therefore not recoverable through tariff. The approval or disapproval of the Commission to a power purchase agreement has no bearing on the validity of the agreement under the Contract Act. The Electricity Act does not make such a contract void. The impact the aforesaid Regulation will be only on the revenue recoverable by the distribution licensee.

It is a total fallacy to say that the contract of 08th May, 2006 is forbidden by any law and so void as per Section 23 of the Contract Act.

Concept of marginal Cost – Is it vague?

24. I now come to the fifth contention of NPCL that no contract came into existence as there was no clear concept of marginal cost leading to want of consent. Consent is meeting of mind of the two contracting parties. The question is whether the parties had the same concept in mind while using the term marginal cost. Here the parties did understand what is meant by marginal cost. NPCL only complained that it did not expect the marginal cost to be so high.

25. In elaboration of this point one can refer to Para 7, 14 and 20 of NPCL's "Additional Submission" before the UPERC. In Para 7 the NPCL stated as under :

"7. That, thereafter, in the meeting in Lucknow where the representative of the Petitioner and Respondent were present. Petitioner was offered the additional power at the marginal cost and keeping in the view the acute shortage in Greater Noida, the Petitioner was left with no option but to agree to the unreasonable proposal of the Respondent keeping in mind the supreme interest of the consumers. The

aforesaid proposal of the Respondent was also contrary to their letter No. 4483/CGM (T) dated November 8, 2005 referred in Para 6 of the petition.”

8. ...

9. ...

10. ...

11. ...

12. ...

13. ...

14. *That in the meantime, the Petitioner attempted to workout the cost of additional power supply based on the letter of Respondent and was shocked to find that such cost is abnormally higher at Rs.10.73 per unit approx. as against its average side rate of Rs.3.56 per unit.*

15. ..

16. ...

17. ...

18. ...

19. ...

20. *That, if the rates sought to be imposed by the Respondent are actually applied, it will create serious imbalance and hardship on the Petitioner financial position and derail its entire operations in view of the fact that the Petitioners' average rate of*

sale is only Rs.3.56 per unit as against abnormally high rates claimed by the Respondent.

21.”.

The mistake or misconception on the part of NPCL was thus not in respect of the meaning of marginal cost but in respect to its quantum.

26. Is the term marginal cost vague and not generally understood by the different stake holders in the electricity market? The answer is clearly no. The learned counsel for the UPPCL has drawn our attention to the minutes of a meeting held on 17th & 18th December, 2004 of the Forum of Indian Regulators. The UPERC is one of the members of this Forum. In the Minutes the method of computation of marginal cost was discussed. At Para ‘C’, it deals with marginal cost, which is as under:

“c. Marginal Cost Method:

An alternative method of computing the quantum of surcharge is by taking the difference between the average realization for the respective consumer and the Marginal cost of supply by the Distribution Company. The different assumptions involved and the methodology adopted are:

1. *The Marginal cost of supply by a distribution company is equivalent to the sum of -*
 - (i) *Marginal cost of purchase of electricity by the distribution Company*
 - (ii) *Applicable Transmission and Wheeling charges*
 - (iii) *Applicable system losses*

2. *The Marginal cost of purchase of electricity to be equated to the highest power purchase cost of the utility including fixed and variable costs”*

27. It is not understood as how, despite marginal cost having been a frequently used term in the electricity market and it having been properly defined by the Forum, the Commission could remark in the impugned order “*it is bizarre to talk about marginal pricing*”. Nor it is understood, how in the context of Uttar Pradesh the marginal cost was not ascertainable. The Commission has also introduced the concept of lack of demand response. There was no occasion to look for demand response in the present case. Nonetheless, it was only the demand for power that required purchase by the UPPCL which in turn called for extra production or procurement of power which was available at the cost higher than the average cost of production and supply. In any case marginal cost is an ascertainable concept.

28. As stated earlier, NPCL itself did not claim that it is not ascertainable and therefore contract was bad on account of any ambiguity or uncertainty. All it said was that the marginal cost was too high and beyond what it had expected. This misconception on the part of NPCL will not make the contract void or voidable.

29. The UPPCL took care to notify to the NPCL the manner in which marginal cost would be calculated. The letter of UPPCL in this regard is the one dated 10.05.06 which reads as under:

“U.P. Power Corporation Ltd
(A. U.P. Govt. Undertaking)

Shakti Bhawan
7th Floor, 14, Ashok
Nagar, Lucknow.

No.678/PASMD/2006

Dated 10th May, 2006

The Dy. General Manager
E. Distribution Division, NOIDA
Paschimanchal Vidhyut Vitran Nigam Ltd.,
NOIDA (Ghaziabad).

Subject: Regarding making available additional Electricity to
NOIDA Power Co. Ltd.

Sir,

Keeping in view, the increased demand of electricity in Greater NOIDA, it has been decided to provide 10 MV additional electricity to Greater NOIDA Authority and NOIDA Power Company Ltd. with immediate effect. This additional electricity will be made available subject to following terms and conditions:-

1. The Noida Power Company Limited shall make payment of electricity rate for additional electricity through letter of credit which rate will be worked out after adding marginal electricity cost,

transmission expenses and losses of each month incurred by Power Corporation.

2. Power Corporation shall make all efforts to provide 10 MV additional electricity. However, in case, it is not possible to provide additional electricity due to availability of power in the grid and grid frequency or for any other reason, the Power Corporation shall not be responsible for any liability whatsoever on this account.

3. The information required by the Power Corporation regarding electricity rates will be provided to Dy. General Manager, Electricity Distribution Division, NOIDA and he will do the billing at old rate for the power allotted in past and billing for this additional electricity at the rate to be worked out as stated in para 1 above.

4. For the purpose of calculating the marginal cost, the highest cost for power drawn from different sources shall be treated as marginal cost for additional 10 MV power.

You are requested that for the time being Rs. 4.00 crore additional L.C. may be obtained from Noida Power Company for supply of 10 MV additional electricity and after deducting the amount received as L.C. from the Bill at the end of the month, the balance amount of Bill may be received in cash. The supply of electricity will be commenced immediately on receiving L.C.

You may please immediately inform the undersigned of the action taken in this context.

Yours faithfully,
Sd/- Illeg.
(Avneesh K. Awashti)
Managing Director

30. In view of this letter, it does not lie in the mouth of NPCL to allege that there was any uncertainty in the term 'marginal cost' and so the contract was void or that there was no consent and hence the contract never came into being. Mr. Shanti Bhushan

contends that UPPCL is claiming a rate from NPCL in which it is including the transmission and wheeling charges and system losses also, which is not to be included while determining the marginal cost of purchase of electricity by the distributing companies even as per the above definition. I do not think so. The letter of 10.05.2006 clearly says that the highest cost for power drawn from different sources shall be treated as marginal cost for additional 10 MW power. But, more importantly, this was not the grievance of the NPCL at any stage. NPCL never even offered to pay the amount billed sans those charges. Nor is the dispute between the parties related to transmission wheeling charges.

31. Be that as it may, so far as existence of a contract is concerned, the same is not at all in doubt as the parties fully understood what they were agreeing to.

32. Can the contract be said to be void on account of uncertainty? Section 29 of the Contract Act says:

“29. Agreements void for uncertainty:

Agreements, the meaning of which is not certain, or capable of being made certain are void.”

The Commission is of the opinion that the contract in question was void on application of Section 29. In the written submission

Mr. Shanti Bhushan has not pressed his plea under Section 29 of the Contract Act. Marginal cost of electricity supplied could not be ascertained in advance and could not be mentioned in the agreement but it was ascertainable and hence the contract could not be void. In *Khivraj Chortia & Others Vs. Esso Standard Eastern Inc AIR 1975 Madras 374*, the High Court dealt with a similar defence in a suit for specific performance of contract in which the consideration i.e. rent was “to be mutually agreed between the parties hereto regard being paid to the rents then prevailing in the same locality.” It was held that “it cannot be said that such rent can not be found or it would be impossible for the parties to agree upon the just rent found. The judgment, on the basis of earlier precedents, held “in determining objections founded on the alleged uncertainty of a term in a contract the test is not whether the term is in itself certain but whether it is capable of being made certain. The case in hand is much better where the UPPCL had actually spelt out the method of calculating marginal cost. Marginal cost was actually ascertainable. Hence the contract was not void under Section 29 of Contract Act.

Undue influence:

33. I can now examine the first contention viz. whether there was any undue influence used by UPPCL in the transaction in question which can make the transaction void or voidable. In order to establish any undue influence the NPCL has to show that UPPCL

was in a position to exert undue influence. The impugned order does not use the word 'undue influence'. It uses the term 'abuse of dominant position'. In order to establish undue influence the NPCL has to establish that (1) UPPCL was in a dominant position and (2) it abused the dominant position. The dominant position, according to the impugned order, was secured by (1) refusal to allocate power purchase agreement theretofore held by the erstwhile UPSEB and (2) by withholding the open access. So far as allocation of power purchase agreement is concerned, the UPPCL can be blamed if it or its predecessor was liable to allocate any of its power purchase agreement to the NPCL. Our attention has been drawn by Mr.Sitesh Mukherjee, counsel for UPPCL, to the provisions relating to allocation of power purchase agreements. Section 131, of The Electricity Act, 2003, deals with reorganization of the Boards. Section 131(1) provides that on reorganization of the Board, the properties and interest in the property as well as rights and liabilities would vest in the State Government. Section 131(2) thereafter prescribed how such property has to be re-vested. The opening Clause of Section 131(2) is as under:

“131(2). Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies, in accordance with the

transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be”.

Provided....

- (3)
- (4)
- (5)
- (6)
- (7)

Explanation – For the purposes of this Part, -

- a) *“Government company” means a Government company formed and registered under the Companies Act, 1956 (1 of 1956);*
- b) *“company” means a company to be formed and registered under the Companies Act, 1956 (1 of 1956) to undertake generation or transmission or distribution in accordance with the scheme under this Part.”*

34. NPCL is neither a Government Company nor a company formed to undertake transmission, distribution and supply in accordance to the scheme of unbundling (i.e. reorganization). NPCL is an independent company and its origin has nothing to do with the reorganization of electricity sector or of the UPSEB under The Electricity Act, 2003. Therefore, NPCL could not legitimately claim to be entitled to succeed to any of power purchase agreement held by the UPSEB or the UPPCL. Therefore, this part of the plea that UPPCL unduly secured the dominant position by not allocating any power purchase agreement to NPCL is not a valid proposition.

35. The Commission had directed UPPCL vide its letter dated 02nd September, 2004 to take necessary action on the proposal of NPCL for grant of open access and UPPCL was directed to submit an action taken report. UPPCL then had expressed its inability to provide open access to NPCL in view of the transmission constraint. Subsequently, vide order dated 22nd February, 2005, the Commission said that the UPPCL was obliged under law to develop infrastructure to provide non discriminatory open access and that it could not seek the excuse of not being in good financial condition to discharge its obligations.

36. The Commission again made an order on 15th December, 2005 directing UPPCL to allow 5 MW of open access to NPCL through 220

kV transmission network emanating from 400 kV sub station at Muradnagar and connecting to 132 kV sub station at Surajpur till the commissioning of 400 kV sub station at Pali. Admittedly UPPCL did not provide open access then. The Commission does not appear to have taken any punitive action to enforce the compliance of this order for immediate supply of 5 MW open access. However, UPPCL, by January 2006, became sufficiently efficient to provide open access and made an offer accordingly which is evident from the letter written to Mr. Rakesh Bahadur, Chairman of Greater Noida Development Authority, dated 13th January, 2006. The letter has been placed on the record and the same is reproduced below:

“Ashok Khurana, IAS
Principal Secretary (Energy) & Chairman
UPPCL

D.No. 696/PSCHM/2006

Dated: 13.01.2006

Dear Rakesh,

Reference your letter No. Proj/WC-7/05/722 dated 09.01.2006 regarding open access to NPCL. You are aware that in the last meeting, we have agreed to allocate additional power to NPCL to meet the growing demand. This additional allocation would be available after 400 kV S/S Greater Noida, being constructed by M/s. BHEL, is commissioned which is expected to be completed by March, 2006.

Regarding open access, UPERX has already announced the open access regulation for intra-state wheeling of energy. As per these

regulations, the wheeling charges, State Load Despatch Centre Charges, Surcharge and reactive energy charge is payable as determined by UPERC on year to year basis. The applicant for open access will have to bear the transmissions losses also. For FY 05-06 the wheeling charge is expected around 22 paise per Kw/H. The details can be obtained by NPCL from UPERC and SLDC of UPPCL. They will have to apply to State Load Despatch Centre in the prescribed format.

Yours sincerely,

Sd/-
(Ashok Khurana)

Shri Rakesh Bahadur,
Chairman, NOIDA
Chairman cum CEO, Greater Noida
169, Chitvan Estate, Sector Gamma
Greater Noida – UP”

37. Thus by this letter UPPCL not only offered to allocate additional power to NPCL but also informed that open access was available and if the NPCL so wanted it could apply for the same to the State Load Despatch Centre in the prescribed format. So far as the additional allocation of power was concerned the same was to be available after 400 kV substation of Greater Noida, being constructed by M/s. BHEL, was commissioned and which was expected to be completed by March, 2006.

38. It appears that the Commission totally lost sight of the fact that it itself had announced availability of open access to NPCL. It also ignored that NPCL after such availability of open access did not make the demand for the same in the prescribed format. Yet the NPCL continued to blame the UPPCL for denial of open access and the Commission accordingly held that UPPCL denied open access and there by secured the dominant position.

39. Mr. Shanti Bhushan has submitted that NPCL had offer from Power Trading Corporation for additional power but the contract could not be signed because open access was not available. This cannot be true. In fact to obtain open access a power purchase agreement has first to be signed.

40. On 07th June, 2005 the UPERC had announced Regulations called “Uttar Pradesh Electricity Regulatory Commission (Terms & Conditions for open access) Regulations 2004. I am extracting here the regulations 11, 12 & 13 of the Regulations –

“11. Procedure for Long term Open Access customer

- (1) *A long term intra state open access customer shall file an application to the Nodal Agency, with details such as capacity needed, generation planned or power purchase*

contracted, point of injection, point of drawal, duration of open access, peak load, average load and any other additional information that may be required by the Nodal Agency;

- (2) A consumer may also approach the Commission of his intention of availing open access as per the procedure prescribed under UPERC (Conduct of Business) Regulation, in case charge for open access not determined or there is a dispute with the Nodal Agency, and also provide a copy of his application to the distribution licensee who is supplying electricity to him as well as to state transmission utility;*
- (3) The relevant Nodal Agency shall issue guidelines, procedures and prescribe an application form for applying for open access, both short-term and long-term, within 90 days of issue of these regulations;*
- (4) The application shall be accompanied by a non-refundable fee of Rs.50,000/- 1.0 Lac or as determined by the Commission from time to time payable in the name and in the manner laid down in the guidelines by the Nodal Agency;*
- (5) The Nodal Agency shall, in consultation with State Load Dispatch Centre, Transmission and Distribution licensees and based on system studies by the concerned licensee or otherwise, assess the capacity*

available and communicate the decision to the applicant within 60 days of the receipt of the application;

- (6) If, in the opinion of the Nodal Agency, further system strengthening is essential before providing long-term access, the applicant may request the Nodal Agency to carry out system studies and preliminary investigation for the purpose of cost estimates and completion schedule for system strengthening;*
- (7) The Nodal Agency shall carry out the studies immediately on receipt of request from the applicant under sub regulation (6) and intimate results of the studies within 90 days of receipt of request from the applicant;*
- (8) The applicant shall also reimburse the actual expenditure limited to Rs.1.0 Lac or as determined by the Commission from time to time incurred by the Nodal Agency for system strengthening studies.*

12. Procedure for Short-term open access Customer

- (1) A short-term intra state open access customer shall submit an application for open access to the Nodal Agency;*

- (2) A consumer shall also furnish a copy of his application to the State Transmission Utility and distribution licensee who is supplying electricity to him;
- (3) The application shall contain the such details, like capacity needed, point of injection, point of drawal, duration of availing open access, peak load, average load and such other additional information that may be laid down by the Nodal Agency in its guidelines issued under regulation 11;
- (4) The application shall be accompanied by non-refundable fee of Rs.5000/- or as determined by the Commission from time to time payable in the name and in the manner laid down in the guidelines by the Nodal Agency;
- (5) State Load Dispatch Centre, in consultation with the State Transmission Utility and distribution licensee, as the case may be, shall take a decision on the application based on the following schedule:

S. No.	Tenure of the contract	Maximum Processing Time (from end of the calendar month of submission)
	<i>Up to one day</i>	<i>12 hours</i>
	<i>Up to one week</i>	<i>Three days</i>
	<i>Up to one month</i>	<i>Seven days</i>
	<i>Up to six month to one year</i>	<i>Fifteen days</i>

- (6) *The reserved capacity shall not be transferred by a short-term customer to any other customer.*

13. Open Access Agreement

- (1) *An open access customer shall enter into commercial agreements with the transmission and distribution licensees, generators, traders and others, as the case may be, for use of their transmission and distribution systems;*
- (2) *The agreement shall provide, amongst other things for the eventuality of premature termination of agreement and its consequences on the contracting parties,*
- (3) *After agreements have been entered into and copies furnished to State Load Dispatch Centre, the State Load Dispatch Centre shall inform the open access customer the date from which open access will be available which will not be later than 7 days from the date of furnishing of agreements.”*

41. Regulation 11 of these regulations prescribed the procedure for long term open access customers and Regulation 12 prescribed the procedure for short term open access customers. Regulation 13 provide for open access agreement. As per these regulations an application is required to be filed to the nodal agency with details such as capacity needed, generating plant or power purchase agreement,

contract, point of injection, point of drawal, duration of access, peak load, average load and any other additional information that may be required by the nodal agency. For short term access also a customer is required to make an application to the nodal agency with similar details. Regulation 13 prescribes that an open access customer was required to enter into an agreement with transmission and distribution licensees, generators and traders for use of their transmission and distribution system. Copies of such agreements were required to be furnished to the State Load Despatch Centre before open access could be granted. It appears, however, that NPCL did not actually enter into a contract with any other company and did not submit any application for open access.

42. The learned counsel for NPCL perhaps presumed that every licensee has absolute right to open access and no constraints in the system can prevent a licensee from getting open access. This belief is certainly not true, as can be seen from the correspondence between the Commission and the UPPCL. On 02nd September, 2004, the UPPCL was asked to take necessary action on the proposal of NPCL for grant of open access and UPPCL was directed to submit an action taken report. The next letter in this connection dated 22nd February, 2005 only exhorted the UPPCL to develop infrastructure to provide non discriminatory open access. It

was only in the order dated 15th December, 2005 that the Commission made the categorical order to grant open access to the extent of 5 MW after examining that the system was capable of providing such open access. Further facility was to be provided only after Pali substation was to be completed.

43. The Uttar Pradesh Regulatory Commission, Terms and Conditions of open access, Regulation 2004 lays down various criteria for obtaining open access. The capacity in the system is one important criterion for sanction of open access.

44. In view of this situation, it was for NPCL, after the UPPCL had acquired the capacity for open access, to apply to the appropriate agency in the prescribed format with all the required details along with open access agreement, if any, and obtain the facility on payment of charges. NPCL is totally silent as to why NPCL did not adopt this course. If the UPPCL held any dominant position on account of denial of open access, it came to an end in January, 2006. UPPCL did not hold any dominant position on 08th May, 2006 when the contract in question was entered into.

45. In view of the above, it is clear that the Commission had totally gone on incorrect assessment of facts and law on holding that the UPPCL was in any dominant position at the

time of the contract of 08th May, 2006. The NPCL was not entitled to allocation of any of the power purchase agreements erstwhile held by the UPSEB nor was open access withheld from NPCL. With open access being available in early 2006 the NPCL was no longer compelled to buy power exclusively from UPPCL. Therefore, if the NPCL still enters into an agreement with UPPCL, NPCL must have done it voluntarily keeping its interest in view.

46. Further, even if it is assumed that UPPCL was in dominant position the contract would be voidable only if the dominant position was abused or undue influence was exercised. Section 16 of the Contract Act defines undue influence and the same is extracted below for ready reference:

“16. ‘Undue influence’ defined – (1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.”

47. It is not the case of NPCL that UPPCL had exerted pressure on NPCL either to buy power or to agree to buy power only at the marginal cost. UPPCL offered an additional 10 MW at the marginal cost. There is nothing to show that UPPCL

exerted any pressure on NPCL to buy power at the marginal cost.

48. The illustrations added to Section 16 can be seen to understand the ambit of the expression “undue influence”.

“Illustration: a) A having advanced money to his son, B, during his minority, upon B’s coming of age obtains, by misuse of parental influence a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

b) A, a man enfeebled by disease of age, is induced by B’s influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employs undue influence.

c) A, being in debt to B, the money-lender of his village, contracts a fresh loans on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is transaction in the ordinary course of business, and the contract is not induced by undue influence.”

49. The illustration 'C' is the case between the moneylender and the debtor where the moneylender is in a dominant position on account of debt owned by the debtor. Even then the fresh agreement of loan would not be voidable on account of undue influence unless transaction was based on un-convincing terms. In the present case, if the UPPCL, having obtained power at a marginal cost, had charged much more than the marginal cost the terms could be said to be un-convincing. Even the Commission accepts in the impugned order that UPPCL had actually incurred such costs in order to supply additional 10 MW to NPCL. The illustration (d) is a case where in a stringent money market a loan is advanced at an unusually high rate. Even this is not induced by influence. The terms of the contract were not un-convincing. The supplier, i.e., UPPCL, agreed to supply at the cost that was incurred by it for making such supply. I am unable to see any undue influence in the contract of 08th May, 2006.

50. Further, Section 19A of Contract Act, only makes the contract induced by undue influence voidable (not 'totally void' as claimed by Mr. Shanti Bhushan). The provision is extracted below:

“19A. Power to set aside contract induced by undue influence

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefits thereunder, upon such terms and conditions as to the court may seem just.”

51. If NPCL was not willing to abide by the contract it was open for it to rescind the contract. The voidable contract can be rescinded at the instance of the party whose consent has been secured by fraud coercion or undue influence. The mode of communication of revocation or rescission is provided in Section 66 of the Contract Act. In the present case, at no point of time NPCL revoked or rescinded the contract. Assuming that NPCL came to know of the very high marginal cost on obtaining the first bill on 20th September, 2006, it should have immediately rescinded the contract by asking the UPPCL to stop the supply. Instead of doing so, NPCL approached the Commission seeking an order of restraint on the UPPCL so that UPPCL could be compelled to continue the supply. This cannot be the conduct of the contracting party who considers the contract to be voidable. In fact, NPCL intended to force the UPPCL to specifically perform the contract when UPPCL threatened to withdraw. Thus even the NPCL did not consider

the contract to be voidable. It only looked for receiving the same amount of power at a lesser cost.

52. In view of the above analysis, the contract of 08th May, 2006 is neither void nor voidable. The contract is capable of being enforced in law. Accordingly, UPPCL has the right to recover the amount due to it under the contract, in question as contained in the letter of 08.05.06.

Discrimination:

53. So far as the second plea namely the contract being discriminating and unconstitutional is concerned NPCL can only assert its point if it is able to show that while at a same point of time another distributing company was given additional power on emergent circumstances at average cost, NPCL was charged at marginal cost. The plea of discrimination can be substantiated only by showing different treatment to similar or equal transactions. Only equal deserve equal treatment. Unequals cannot be compared for examining the question of discrimination. The NPCL wants to compare the price for the additional 10 MW of supply with the average pooled cost which is the price for the long term power supply on regular basis controlled by the tariff order issued by the Commission. This is not the correct application of the principle of equality. It cannot be said that simply because

the pooled cost is Rs.1.897, the UPPCL is bound to supply to everybody at the pooled cost at every situation. Even going by simple arithmetic, if UPPCL itself has to buy additional power at the cost higher than the average cost the average cost would increase. If the UPPCL was not entitled to charge beyond the average pooled cost of Rs.1.897 then the UPPCL would not have bought the additional power for NPCL and would not have sold the same to NPCL. Further it was a question of additional power supply and as mentioned earlier on emergent circumstances. UPPCL had purchased power to supply to NPCL and UPPCL therefore, charged the NPCL for the same. It can be seen that even Section 62(3) of The Electricity Act 2003, says that differential tariff can be fixed keeping in view the nature of supply. In the present situation, the nature of supply itself was so different from the usual supply that a different price was chargeable. If the contention of NPCL is accepted, all purchases at marginal cost would have been discriminatory. So far as the contract of the additional 10 MW of power is concerned, one has to examine whether charging of marginal cost itself is discriminatory. It is not the contention of NPCL that all marginal cost contracts are by themselves discriminatory. Marginal cost will always be above the pooled average cost. If charging any price above pooled average cost is discriminatory, the Act or rules or regulations framed thereunder would have barred any agreement of sale of

electricity by any trader on producer at price above the pooled average cost. All agreements of sale at marginal cost would then have been barred as discriminatory. The electricity market however, recognizes marginal cost agreements and they have not been branded as discriminatory.

54. In this connection, Mr. Shanti Bhushan has also referred to a judgment of this Tribunal, in Petition No. 01 of 2005, in which this Tribunal ruled that a generator can sell power directly to the traders and intermediaries at a mutually agreed price but that such price should not exceed the base price plus 4% there of. The judgment also stated that the distributors and traders while trading in electricity should ensure that they abide by the trading margin fixed by an appropriate Commission. I do not see how this finding comes to the benefit of NPCL. The UPPCL has charged the marginal cost namely the cost at which it purchased, as per the given calculations. It is not the case of NPCL that UPPCL, for the purpose of additional 10 MW of poer, has made a profit which is violative of the directions of this Tribunal. In fact Memorandum of Appeal makes out no such case.

55. So far as bulk tariff for the original 45 MW of power supply is concerned, NPCL has been paying more than other distributing companies. NPCL had not approached the

Commission for setting aside the bulk tariff rate. In fact, NPCL all along accepted the bulk tariff fixed by the Commission. Whether such tariff was violative of the Article 14 of the Constitution was not a subject for decision before the Commission when it considered the Petition 414 of 2006 in which the impugned order was passed. The rate was fixed by the Commission itself by application of accepted principles for tariff fixation vis-à-vis NPCL. Since the NPCL itself did not challenge it the Commission could not have gone into the question while determining the amount to be paid by NPCL for the additional 10 MW of power. The question of violation of Article 14 was not at all an issue before the Commission. If NPCL wants to challenge the tariff payable by it on ground of discrimination, it may take appropriate steps to do so. The issue in any case was totally foreign for the purpose of disposal of petition before the Commission. So far as the marginal cost is concerned, I have already said that the NPCL has failed to show that there was any discrimination. A copy of the 'Additional Submissions' of NPCL before the Commission in the matter which the impugned order is passed has been filed by NPCL as Annexure A-11 to its appeal petition. After the introductory paragraph, the NPCL says in its petition that in order to growing demand it approached the respondent, i.e. UPPCL, for additional power supply over and above the 45 MVA that it had been supplying to the NPCL,

that on November 08, 2005 the respondent agreed that once a new 400/132 kV Pali sub station was commissioned the supply of 15 MVA would be made available to the petitioner, that in the meeting in Lucknow the petitioner was offered an additional power at marginal cost and keeping in view the acute shortage in Greater Noida, the petitioner was left with no option but to agree to the “unreasonable proposal” of the respondent keeping in mind the supreme interest of the consumers. It then proceeds to say that on May 10, 2006, the UPPCL advised DGM, Paschimanchal Vidyut Vitran Nigam Ltd., Noida to supply 10 MVA power as against 15 MVA agreed to the petitioner, after the Pali sub station was commissioned. The petitioner then narrates that the petitioner NPCL asked the respondent UPPCL vide its letter dated September 26, 2006 and September 29, 2006 for the calculation of the cost of the additional power and on receiving no response the petitioner attempted to work out the cost of additional power based on the letter of the respondent and was shocked to find that such cost was abnormally higher at 10.73 per unit as against the average side rate of 3.56. The NPCL then proceeds to narrate the correspondence related to the bills. It then alleges that if rates offered to be imposed by the respondent were actually applied, it would create serious imbalance and hardship on the petitioner’s financial position as the petitioner’s average rate of sale was 3.56 per unit as against

abnormally high rates claimed by respondent. In the penultimate paragraphs, the NPCL alleged that it perceived a genuine threat that the UPPCL may stop trading the additional power which will jeopardize all economic and domestic activities and cost irreparable damage to the consumers in Greater Noida which would be against the objectives of Uttar Pradesh Electricity Reforms Act 1999 and Electricity Act 2003. The NPCL made the following prayer in the petition:

- “A. Appropriate orders directing the Respondent not to interrupt / diminish the supply of bulk power for any reason whatsoever.*

- B. Appropriate orders restraining the Respondents from taking any coercive steps as reflected in the respondents letters more particularly their letter dated 26.10.2006.*

- C. Ad-Interim orders in respect of prayers (A and B) above.*

- D. Such other appropriate order / orders as this Hon’ble Commission may deem fit and proper in the interest of justice.”*

Thus NPCL did not make any grievance of the bulk supply tariff what to talk of it being discriminatory. Nor did it claim any relief regarding the bulk supply tariff.

UPPCL not allowed to trade:

56. Coming to the fourth contention, about UPPCL not being permitted to trade, I only have to say that this question has no relevance to the point in issue. I now understand that UPPCL is no more a State transmission utility and is presently engaged in trading.

Amount payable for the supply of 10 MW of additional power:

57. The impugned order grants the marginal cost despite having found the contract to be bad in law. It has done so on the basis of 'sunk cost'. Even when the contract is void or voidable Section 64 and 65 of the Contract Act provides that the person who has received any advantage under such agreement is bound to restore it or make compensation for it to the person from whom he has received the same. Section 70 of the Contract Act also provides similar compensation to the person who has received some obligation from other person enjoying the benefit of non-gratuitous act. Even Section 19A quoted above lays down the same principle. Although, the impugned order does not directly employ the provisions of Section 64, 65 or 70 of the Contract Act, it has used the same

concept of compensation for providing some benefit under a void or voidable contract. The Commission has arrived at the conclusion that the amount that has to be paid is equal to the marginal cost, namely the cost at which the additional power has been purchased by UPPCL for the purpose of supplying to NPCL. NPCL wants the same supply at the cost at which power is supplied, by UPPCL, to other distribution companies in normal circumstances. NPCL does not allege that any other party has received such additional power during the same period at a lesser cost which could justify the NPCL's claim for supply at lesser price or compensation at lesser rate. At the time of arguments, the learned counsel for NPCL disputed even the accuracy of marginal cost calculations submitted by the UPPCL. No such plea was raised before the Commission. Even before this Tribunal, the NPCL could not come out with an alternate figure as to what would have been the marginal cost, if not the amount at which the UPPCL billed the NPCL. The UPPCL is therefore, entitled to an amount for which it has billed the NPCL whether under the contract or under the provisions of Sections 64, 65 or 70 of the Contract Act.

Nature of NPCL's prayer:

58. It is to be noticed that the NPCL itself wanted the 10 MW of power to be supplied to it continuously. The Commission issued an order directing the UPPCL to do so. This was done

only by way of specific performance of the contract. If the NPCL wanted the contract to be specifically enforced it has to remain ready and willing to perform its part of the contract. The NPCL cannot be entitled to receive the additional supply of power and yet be exempted from paying the agreed cost of such additional supply of power.

Bulk Supply Tariff:

59. The question that is required to be answered now is whether the Commission was right in reducing the bulk supply tariff for the original 45 MW, for the period in question, to the pooled cost of UPPCL's procurement. The above discussion is sufficient to show that the normal tariff at which NPCL would pay the UPPCL had no connection of any kind with the price at which the additional 10 MW of power was being traded. The Commission observed that although the cost of procurement was Rs.1.897 per unit it was actually getting Rs.2.9361 per unit on account of the reverse calculation on application of principles of VIth Schedule and this the Commission termed as efficiency gain. The Commission found that although the marginal cost was the amount necessary to be paid to compensate the UPPCL for the additional 10 MW of power, the UPPCL should return the 'efficiency gain'. In this process, the Commission perhaps felt, that real compensation could be worked out. Unfortunately, this type of adjustment

was not at all warranted. There is a procedure to fix the tariff for any utility or licensee. Once the tariff is fixed it can be altered only in accordance with the prescribed procedure and on grounds available for review or amendment. In the present case, the tariff at the relevant time for the normal supply of 45 MW had been fixed by none other than the Commission itself for the year 2004-05, which continued to be in force at relevant time. Neither the tariff order, nor the principles on which it was based was ever challenged by NPCL. The principles on which this tariff was fixed had been approved by High Court of Allahabad. The Commission could not reduce such tariff without following the prescribed procedure and without taking into account the relevant principles. It was not within the jurisdiction of the Commission to reduce the tariff lawfully fixed that too in such perfunctory manner.

60. The UPPCL contends that it had to make payment to NTPC and other central organizations for supply of additional 10 MW of power and accordingly, it is entitled to recover the amount spent by it for supplying additional 10 MW of power. By reducing the bulk supply tariff the Commission has caused a loss of Rs.28.33 Crores to the UPPCL. Thus the UPPCL in effect has to suffer a loss of Rs.28.33 Crores for having supplied additional power to NPCL part of which was supplied under the very direction of the Commission which the

Commission passed only by way of specific performance of the contract. Had the NPCL not entered into the contract with UPPCL, there was no legal obligation for the UPPCL to supply the additional 10 MW of power. Nor did the Commission have any authority to direct the UPPCL to supply such power to NPCL that too on average pooled cost. Having held that UPPCL had sunk the cost of 10 MW of power and therefore was entitled to recover it, the Commission proceeded to reduce the bulk supply tariff in the name of removing discrimination. This is a confused understanding law.

61. The Commission in the impugned order justifies the reduction of tariff by saying that the tariff had not been fixed after 2004-05 on account of default attributable to UPPCL. Nonetheless, the Commission also acknowledges that meanwhile fuel cost has gone up. The Commission was thus aware that even if the tariff had been fixed for the year 2005-06, it would have been more than Rs.1.897 per unit.

62. The reason for changing the tariff given in the impugned order is as under:

“keeping in view, the non allocation of PPAs, the condition of uniform retail tariff and the denial of open access, imposition of the burden on account of

the extreme high cost on NPCL would be unreasonable, discriminatory and unfair to the petitioner. Therefore, in order to rectify the position and also looking into the facts that the respondents are themselves not adhering to the statutory structural requirements and are also not submitting the tariff filing, leading to no revision in NPCL's tariff, the Commission under this extra ordinary situation, has amended bulk supply tariff of NPCL, against its 45 MW demand for the disputed period by bringing it down to the cost of supply at 33 kV as indicated above"

63. The conclusion of the Commission totally lacks logic. Having first held that marginal cost was required to be paid to compensate the UPPCL for the 10 MW of additional power supply it cannot say that paying such marginal cost would be unreasonable, discriminatory or unfair. Further such payment cannot become unreasonable, discriminatory or unfair because of absence of allocation of power purchase agreements or because of condition of uniform retail tariff and on account of alleged denial of open access. Similarly, there is no rationale in saying that because the UPPCL is not adhering to the statutory requirements and has not submitted to tariff filing the Commission can amend the bulk supply tariff of

NPCL. The Commission has to use appropriate measures to compel the UPPCL to adhere to statutory requirements or to force filing of the tariff petition. It has no power to reduce the tariff which has been fixed according to law because of such non-compliance.

64. Be that as it may, the propriety or reasonableness of tariff order in force at that time was not at all in question before the Commission. It was not the lis before it so to say. Thus the Commission has shot entirely wide the mark.

65. It can be added here that the first contract for 45 MW of power dated 15.11.1993 and the agreement in question for 10 MW of power dated 08.05.06 are two entirely distinct contracts. The two could not be combined to assess the compensation that became payable under the second contract. I have already held that the contract in question was neither void nor voidable and hence the UPPCL is entitled to its dues under the contract.

Section 60 Electricity Act 2003, Market domination / competition:

66. The Commission has referred to Section 60 of the Electricity Act and to the effect of the transaction in question on competition. Neither of the two parties have referred to

section 60. During arguments NPCL has submitted “written submissions” to comprehensively summarise the oral argument addressed in court. No mention to section 60 is at all made in the “written submissions” either. However, it will be proper to make a reference to section 60 of the Act in order to comprehensively deal with the impugned order. The relevant section is reproduced below:

“60. Market domination – *The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.”*

67. As can be seen from a plain reading of the section, several concepts have been rolled into one section without any aid of definition or explanations. The Act does not define:-

- (a) dominant position,
- (b) abuse of dominant position,
- (c) combination,
- (d) competition,

- (e) adverse effect on competition,
- (f) when and what kind of directions can be 'issued' in case an occasion arises U/s 60

68. Can the impugned order be saved on the touch stone of section 60? In the first place 'directions' are for compliance in the future. Can the power to issue direction include the power to deny the seller the contracted price after the sale is complete and the product consumed? In my considered opinion, the answer is 'NO'.

69. Secondly, has the UPPCL abused its dominant position (assuming that it has a dominant position)? It is alleged that UPPCL has abused its dominant position by selling to NPCL at a price higher than that at which it has sold to other distributing companies. Now, there are two contracts. The long term power purchase agreement for 45 MW is subject to tariff orders made by the Commission in compliance with the direction of the High Court and on principle approved by the High Court. Grievance of the NPCL for the procurement price of the 45 MW of power has to be addressed to the appropriate quarters and the Commission could not have exercised any such jurisdiction while disposing of the application of NPCL being No. 414 of 2006. This price cannot be interfered with by applying Section 60 of the Electricity Act 2003.

70. UPPCL as a trader has purchased and sold power. For this additional power, UPPCL has made actual purchase over and above the purchase made by it immediately before entering into the deal with NPCL of 08.05.06. It is not the case of NPCL that the UPPCL obtained the last 10 MW of power at average pooled cost what it now offers to pay. Nor is it the case of NPCL that UPPCL is making any abnormal profit viz. selling to NPCL above the price at which the final 10 MW power is obtained by UPPCL.

71. On the relevant date open access was available. The NPCL itself claims that it had offers from other producers of power. If the others were willing to sell additional power to NPCL at any lesser price, it should have entered into the deal with those other producers. Its plea, that such contracts with other producers could not be entered into for want of open access, does not hold any water. The only conclusion that can be drawn from this situation is that the term offered by UPPCL were not worse than those offered by other producers. Hence I am unable to see any abuse of dominant position by UPPCL.

72. Further Section 60 requires the appropriate Commission to issue direction where the abuse of dominant position causes adverse effect on competition. NPCL has never alleged,

nor is there anything on record to show, that the impugned agreement has had any adverse effect on competition so far as NPCL is concerned. UPPCL and NPCL are not competitors. The agreement in question is not assailed by the competitors of UPPCL. So far as NPCL is concerned, it was not in competition with other discoms in the sense it is understood in economic theory as each distribution company has its area of operation duly defined and the distribution companies do not compete with each other to increase their sale or profit. I have already observed that the contract in question was not discriminatory. Therefore, it cannot be said that any presumed abuse of dominant position by UPPCL has had any adverse effect on competition. Nor can the impugned order be justified as one passed under section 60 of the Electricity Act 2003.

Conclusion:

73. The Commission set before itself the following objectives while coming to the solution to the problems before it:

- “(a) Compensation of additional power procurement by UPPCL on marginal cost,*

- (b) balancing the commercial interest of both NPCL and UPPCL,*

(c) to ensure that the consumers of both UPPCL and NPCL area get a fair deal and accordingly burden of the dispute should be spread thin and uniform as far as possible.”

74. I have no quarrel on the high objectives set by the Commission before it. But such objective could not have absolved the Commission from adhering to the legal regime. The Commission is to act within the legal framework in the country. It could not overlook the area of its jurisdiction or the law of contract or the Constitution or power and jurisdiction of the High Court in order to balance the commercial interest of NPCL and UPPCL or to spread the burden of the marginal cost on all the consumers.

75. 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.

76. My draft judgment was submitted to my brother Hon'ble Shri.A.A.Khan for his perusal. I also had an opportunity of perusing the draft of his judgment. The assumption and inferences drawn generally and particularly in relation to non-adherence to the provisions of Uttar Pradesh State Electricity Regulatory Commission (Conduct of Business) Rules 2004 are not borne out from the material available on record. The NPCL has succinctly set up its case in its written submissions which have been dealt with in entirety in my judgment whereas the conclusions of my brother are based on entirely different premises. In view of this and material existing on record, in my view, the conclusions reached by my brother are not sustainable or warranted. I regretfully differ with him and reach my own conclusions for the reasons set out in the above judgment.

77. In the result I dismiss the appeal of NPCL being Appeal No. 36 of 2007 with cost and allow the appeal filed by UPPCL being 26 of 2007 with cost. The impugned order is set aside in part to the extent it reduces the bulk tariff payable by NPCL

for the original 45 MW of power. The part of the order directing payment of marginal cost is upheld but for different reasons.

Pronounced in open court on this **25th** day of **October, 2007**.

(Justice Manju Goel)
Judicial Member

The End