

**IN THE HON'BLE UTTAR PRADESH ELECTRICITY
REGULATORY COMMISSION
AT LUCKNOW**

PETITION NO. ^{1200/} OF 2017

IN THE MATTER OF:

**Petition for approval of Capital Cost & determination of Tariff of 2x500
MW Anpara 'D' TPS for FY 2016-17 to 2018-19.**

Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited

.....PETITIONER

Versus

U.P. Power Corporation Limited & Ors.

.....RESPONDENTS

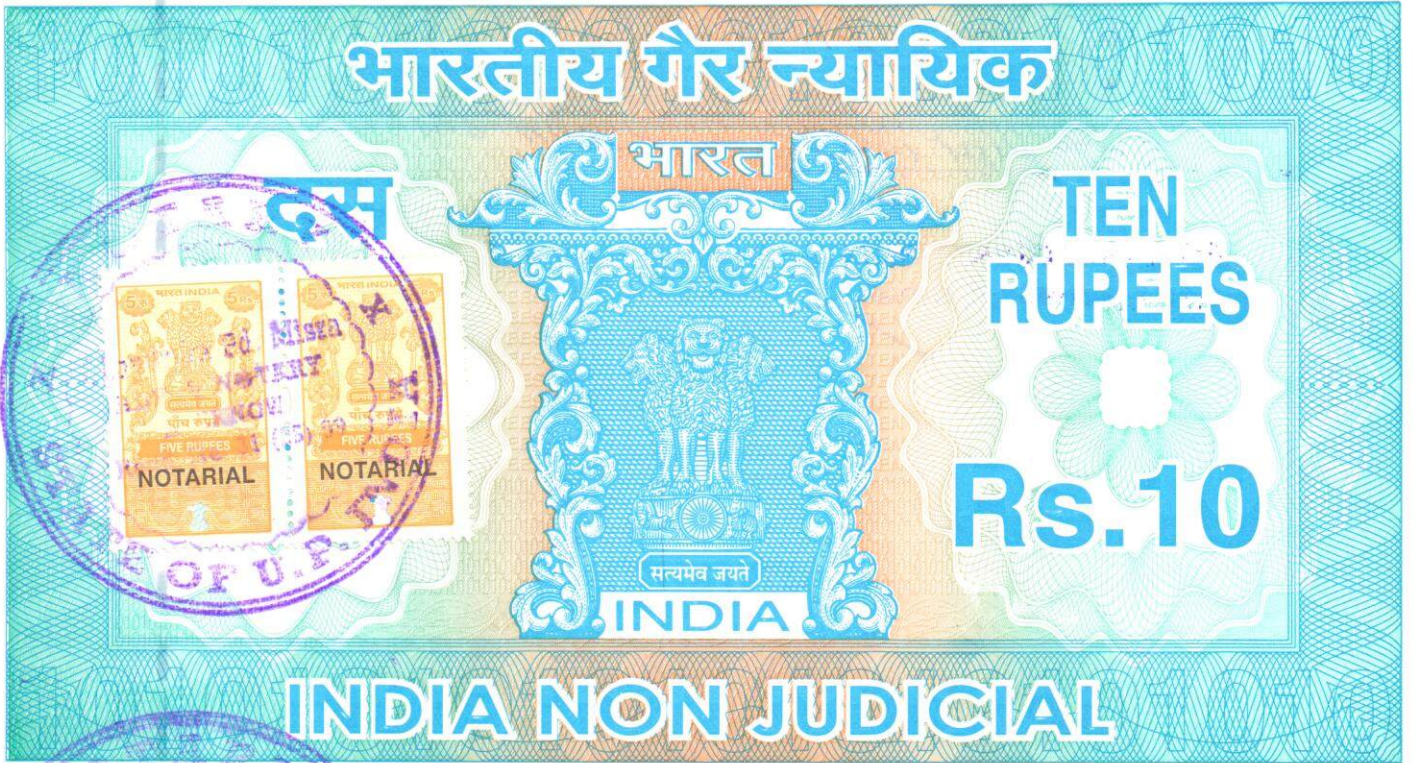
INDEX

SL. No.	DESCRIPTION	PAGE No.
1.	REJOINDER AFFIDAVIT IN RESPONSE TO THE COUNTER FILED BY THE U.P. POWER CORPORATION LIMITED	

Dated: January, 2018
Lucknow

PETITIONER

श्याम नारायण
अभियन्ता (वाणिज्य)
उ०नि०लि०
त भवन-लखनऊ



उत्तर प्रदेश UTTAR PRADESH

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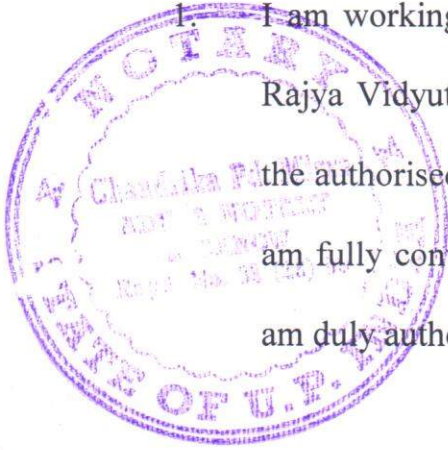
.....RESPONDENTS


Chandrika Pd. Misra
Adv & Notary
HQ Collectorate
Lucknow U.P. INDIA
Regd. No. 31 (25) 99


ई० श्याम नारायण
मुख्य अभियन्ता (वाणिज्य)
उ०नि०लि०
शक्ति भवन-लखनऊ

**REJOINDER AFFIDAVIT IN RESPONSE TO THE REPLY FILED
BY THE U.P. POWER CORPORATION LIMITED (R-1)**

I, **Shyam Narain, S/o Late Devraj**, aged about **59** years, working as **Chief Engineer (Commerical), 7th Floor Shakti Bhawan Extn., Ashok Marg Lucknow – 226001** do hereby solemnly affirm and declare as under:



1. I am working as **Chief Engineer (Commerical)** with Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited, the Petitioner herein, and am the authorised representative of the Petitioner in the present petition. I am fully conversant with the facts and circumstances of the case and am duly authorized and competent to affirm this affidavit.

2. I have perused the reply filed on behalf of U.P. Power Corporation Limited (UPPCL) vide their affidavit of dt 16.12.2017 & letter no. 1191/CE/PPA/UNL, dt 16.12.2017 and have understood the contents thereof. I say that all the averments in UPPCL's Reply, save insofar as are expressly admitted herein, are denied. The present rejoinder affidavit may kindly be read along with the averments in the petition.

The Petitioner's responses to UPPCL's reply on specific contentious

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Shyam Narain

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issues that are the subject matter of the present petition have been elaborated in the succeeding paragraphs.

3. The Petitioner in its previous submission has already submitted that the revised Project Cost works out to be Rs. 7,795.11 crore considering the IDC of Rs. 2349.48 crore. Further, since Hon'ble UPERC in its Order dated 20.12.2017 has issued the directions for appointing a committee to undertake the prudence check for approval of the capital cost and determination of final tariff for Anpara D project, the Petitioner would submit the revised Tariff formats based on the directions and any other observations (if any) of the Committee so formed by the Hon'ble Commission.

4. In regard to the liquidated damages of Rs.152 crores imposed on M/s BHEL, the Petitioner hereby submits that the same has already been accounted in the financial statement for FY 2016-17. However, since the matter is under dispute with M/s BHEL, the Petitioner requests the Hon'ble Commission to kindly consider the adjustment on this account in the Capital Cost, based on the final outcome of the dispute.

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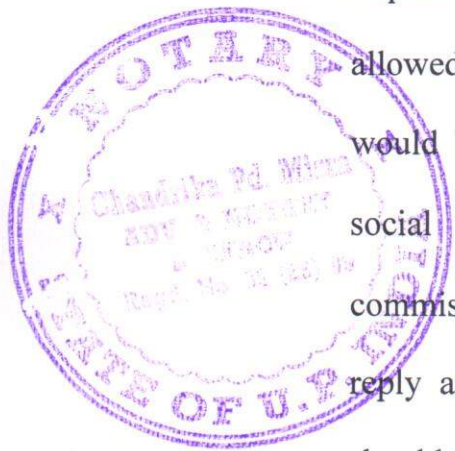
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5. The copy of the Legal opinion received in respect to Foreign Exchange Rate Variation of Rs. 31.50 crore raised by M/s BHEL, is attached herewith the reply for kind reference of the Hon'ble Commission marked as Annexure-A. As per the legal opinion the Foreign Exchange Rate Variation of Rs. 31.50 crore is in line with the contract executed between the petitioner and M/s BHEL and therefore the same has to be paid as per terms of the Contract.

6. In respect to expenditure on CSR (Corporate social Responsibility) of Rs. 21 crores, the Petitioner hereby submits that it was a mandatory requirement as per the MoEF Notification and the same should be allowed to the Petitioner as a part of Capital Cost, being the same would be expended by the Petitioner under the head of Corporate social Responsibility. Secondly all the reasons for delay in commissioning of the Anpara D units, quoted by the Petitioner in its reply are uncontrollable and it is hereby requested that the delay should be allowed to the Petitioner considering the various grounds submitted.

7. In respect to the drawl of Loan upto the date of COD, the petitioner hereby submits that a total loan of approx Rs. 4765 crore has been



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M. S. Singh

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drawn upto the date of COD which is well within the Debt: Equity norms specified by the Hon'ble Commission in its Generation Regulations.

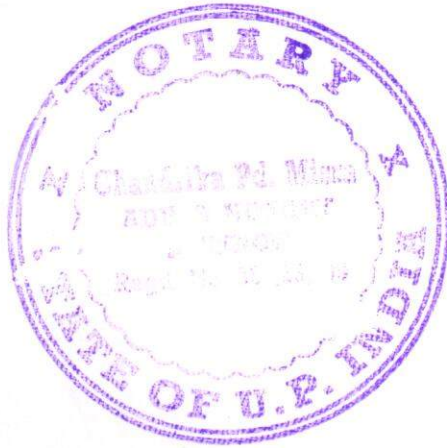
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VERIFICATION

I, the above named deponent, do hereby verify that the contents of this affidavit are true and correct to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified by me on this 08th January, 2018, at Lucknow.



Sworn and Verified
Before Me

Chandrika P. Mishra
Adv & Notary
HQ Collectorate
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इ० श्याम नारायण
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Date : 23 July, 2017

To,
The Company Secretary,
Uttar Pradesh Rajya Vidut Utpadan Nigam Limited,
Shakti Bhawan, Lucknow.

Subject: Legal Opinion.

Dear Sir,

In the present matter you seek legal opinion on the following points. On the basis of the photo copy of the documents which are provided by I am giving my opinion:-

M/s BHEL was awarded the work of execution of 2x500 MW Anpara 'D' TPP for which the following LoA were issued :

1. Letter of Award for **Supply** issued vide **LoA No. 2127/SE/PPMM/ANP 'D'** dated **15.04.2008**
2. Letter of Award for **Erection, Testing & Commissioning** vide **LoA 2128/SE/PPMM/ANP 'D'** dated **15.04.2008**
3. Letter of Award for **Civil works** vide **LoA 2129/SE/PPMM/ANP 'D'** dated **15.04.2008**

M/s BHEL had vide letter no. MS-1-07-0029 dated 3rd February 2015 raised its claims for payment against ERV and corresponding custom duty variation calculation for Anpara 'D' TPP against which it has claimed a sum of Rs. 36,29,79,328/-, Calculation details for the same are as follows :

a) Variation in CIF on account of Exchange Rate Variation in India Rupees	1,29,95,86,566
b) Additional Custom Duty on account of variation in ERV (5% of 'a' above in Indian Rupees)	6,29,79,328
Total	<u>1,32,25,65,894</u>

BHEL has given the ERV and corresponding custom duty variation detailed above of which it has claimed the following sums from UPRVUNL :

a) Variation in CIF on account of Exchange Rate Variation in Indian Rupees (Subject to a ceiling of 5% on variation in CIF component)	30,00,00,000
b) Additional Custom Duty on account of variation in ERV	6,29,79,328
Total	<u>36,29,79,328</u>

BHEL has given a detailed calculation memo placed at Annexure 1 to its above referred letter which are enclosed herewith.

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S. Sanyal

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In the calculation memo placed in Annexure 1, the ERV variation has been calculated for the period Zero Date starting on 13.01.2008 and ending on 13.07.2009 being 18 months from the Zero Date. BHEL in its letter referred above has nowhere mentioned the respective clauses of the Contract but it is deemed that the said claim has been raised under the provisions of the contract entered between UPRVUNL and BHEL.

My opinion has been sought on the maintainability of the said claim as referred to above.

In this regard the detailed discussions were held with the concerned senior officers of UPRVUNL who have been dealing with the contract alongwith the Company Secretaries of UPRVUNL. During the discussion, it was agreed that the claims filed by BHEL are within the provisions of the concerned clauses as are available and are incorporated in the contract documents. The various clauses which relate to the above claims are detailed below :

Clause 2.2 of the LoA for supply

Breakup of Price

(Rs. In Crores)

a)	Supply of Main Equipment & Mandatory Spares (Ex-BHEL Works/BHEL Sub Contractors works/Port of entry in India basis). (Including Custom Duty but excluding other taxes and duties)	2205.00
b)	Local freight for Main equipment and Mandatory spares. (Excluding taxes and duties).	55.00
c)	Taxes & Duties Main Equipment and Mandatory Spares. <ul style="list-style-type: none"> • Excise Duty @16% • Education Cess@3% • Central Sales Tax@ 3% (for despatches from outside the state of Uttar Pradesh) • Local Sales Tax/Trade Tax@ 4% (as applicable on the despatches from within the state of Uttar Pradesh) • Taxes and Duties on freight (Service tax @12% and Education Cess @3% on 25% of the freight value.) <p>Any other Taxes and Duties applicable on the date of Lol i.e. 24.10.2007 is also included above.</p>	310.76
	Grand Total (Supply + Taxes & Duties)	2570.76

(Rupees two thousand five hundred seventy crores and seventy six lacs only)

Clause 2.4 of the LoA for supply

The above price mentioned at 2.2 (a) above include a CIF component of Rs. 600 Crores (Rupees six hundred crores) for which the exchange rate of US \$ and Euro € shall be the BC selling rate of SBI as applicable on the Zero date. In case of any variation in the CIF Component on account of exchange rate variation UPRVUNL will be liable for upward variation subject to a ceiling

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limit of maximum 5% (Five percent) and for downward variation the ceiling limit shall be 10% (Ten percent). The variation in foreign exchange and corresponding custom duty variation will be computed as per formula enclosed at Annexure-3. Billing of variation in exchange rate and custom Duties of imported component will be done 18 (eighteen) months after the zero date in one lot.

Clause 2.5 of the LoA for supply

Custom duty @ 5% shall be applicable on import of raw materials and components required for further manufacture at your works and is included in prices at 2.2 (a) above.

Clause 2.6 of the LoA for supply

The above price in para 2.2 is inclusive of following Taxes and Duties:

S.no.	Item	Rate
a)	Custom Duty	5%
b)	Excise Duty	16%
c)	Educational Cess	3%
d)	Central Sales Tax	3% or as applicable for despatches from the outside the state of Uttar Pradesh.
e)	Local Sales/Trade Tax	4% or as applicable on the despatches within the state of Uttar Pradesh on the supply portion.
f)	Taxes and Duties on freight	(Service tax@ 12% and Educational Cess@3% on 25% of the freight value)
g)	Any other Taxes and Duties applicable on the date of LOI i.e. 24.10.2007 is also included in para 2.2 c) above.	

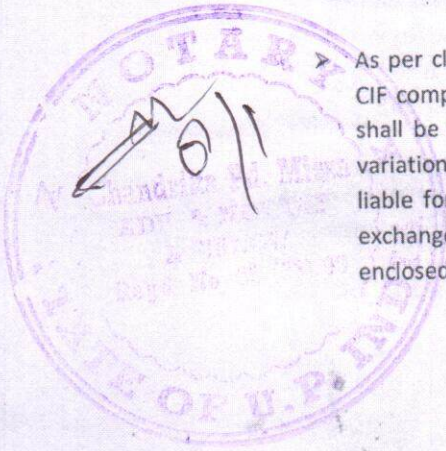
Clause 2.7 of the LoA for supply

Necessary Forms for claiming concessional tax viz. Form C, Form D and Form 31 shall be provided by UPRVUNL to BHEL only. Any other Taxes and Duties applicable after the date of LOI i.e. 24.10.2007 or statutory variation in rates of Taxes/Duties shall be payable extra by UPRVUNL if it exceeds the ceiling limit of Rs 310.76 Crores, However, if the total tax liability of BHEL is less than that indicated in Para 2.2 (c) above, UPRVUNL will pay such reduced amount only.

The above clauses referred to were discussed in detail and the applicability of said clauses on the claims raised by M/s BHEL were also discussed.

1. In regard to the maintainability of claim of Rs. 30 Crores towards Exchange Rate Variation raised by M/s BHEL is discussed as below :

As per clause 2.4 narrated above the prices mentioned in clause 2.2 above included CIF components of Rs. 600 Crores for which the exchange rate of USD \$ and Euro € shall be the BC selling rate of SBI as applicable on the Zero Date. In case of any variation in CIF components on account of Exchange Rate Variation, UPRVUNL was liable for upward revision subject to a ceiling limit of 5%, The variation in foreign exchange and corresponding custom duty variation will be computed as per formulae enclosed at Annexure 3, which is detailed below :



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$$P_1 = P_0 \left[\left\{ \frac{100 + CD1}{100} \right\} \left\{ 0.70 \times \frac{EU1}{EU0} + 0.30 \times \frac{US\$1}{US\$0} \right\} - \left\{ \frac{100 + CD0}{100} \right\} \right]$$

Where

- P_1 = Variation in price on account of variation in foreign exchange rates and custom duty rate at eighteen month of Zero date i.e. 13.01.2008
- P_0 = Base price of imported raw material/component (CIF content) on Zero date i.e. 13.01.2008.
- EU = Equivalent Rs. For one EURO.
- US\$ = Equivalent Rs. For one US Dollar.
- CD1. = Custom Duty rate expressed in percentage.
- CD0 = Custom Duty considered 5% (five percent).
- Subscript '0' = Refers to the base exchange rate and base custom duty as on Zero Date i.e. 13.01.2008.
- Subscript '1' = Corresponds to the period of eighteenth month from Zero date.

Note : All Exchange rate shall be the BC selling rate of SBI applicable on Zero Date and said eighteenth month of billing date.

- Clause 2.4 further provides that for billing of variation in exchange rate and custom duties of imported components will be done 18 months after the Zero Date in one lot.
- The officers of the UPRVUNL have a consensus that the claim has been calculated in line with the formulae as given in the contract at Annexure 3, which is detailed above. Thus there is no dispute in said matter. It was further informed by the officers of UPRVUNL that nowhere in the contract there is a provisions that BHEL has to give any documentary proof regarding import / payment of the same and accordingly BHEL has in its letter referred to above clearly stated that since the foreign exchange variation is based on CIF value and exchange rate specified in the contract, accordingly copy of dispatch documents including Bill of Lading is not required to be submitted. However in my opinion, BHEL should be directed to submit the BC selling rate of SBI on the Dollar and Euro on the amounts that he has charged in his claim. In case as per the certificate issued by any branch of SBI the rates are same as has been charged by BHEL, the calculations seems to be alright and there will be no disputes on the same.

Accordingly in my view, Rs. 30 Crores that BHEL has charged towards Exchange Rate Variations on the CIF value with a ceiling of 5% of Rs 600 crore as provided in clause 2.4 is inline with the contractual obligations and UPRVUNL is liable to pay the same.

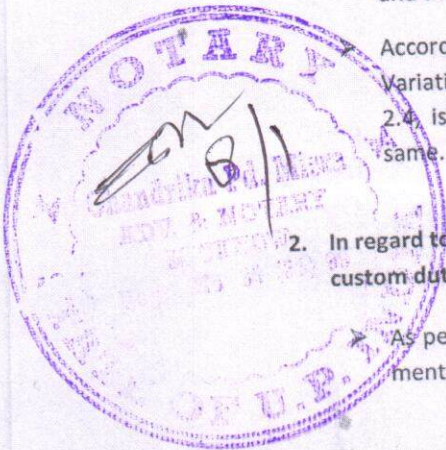
2. In regard to the maintainability of claim of Rs. 6,29,79,328/- on account of additional custom duty raised by M/s BHEL is discussed as below :

- As per clause 2.6 , the custom duty as prevailing on day of the Contract has been mentioned as 5%. M/s BHEL in his detailed claim calculation at Annexure 1 has

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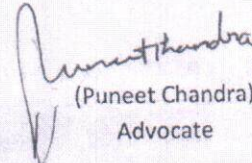
shown the custom duty as on Zero Date as 5% and the custom duty after 18 months from the Zero Date also as 5%. In view of the same the provisions of the clause 2.7 as narrated above don't come in to force in the present matter under consideration.

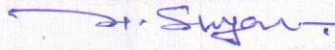
- The contention of BHEL in the said matter is that, it has paid additional custom duty to the tune of Rs 6,29,79,328 due to Exchange Rate Variation and is claiming the total amount. The question under consideration is that since there was a cap of 5% upward ceiling on CIF value of Rs 600 crore, so whether UPRVUNL is liable to pay the total additional Custom Duty paid by BHEL or whether the liability of UPRVUNL is restricted to the duty payable under the 5% ceiling liability of Rs 30 crore increased due to Exchange Rate Variation.

In view of the narration given above, I am of the opinion that since the liability of UPRVUNL for payment to BHEL against Exchange Rate Variation is restricted to Rs 30 crore, therefore the liability of UPRVUNL for payment towards additional custom duty due to Exchange Rate Variation is limited to 5% of the UPRVUNL portion of Rs 30 crore only.


My opinion is accordingly.

Yours sincerely,


(Puneet Chandra)
Advocate
23/7/2017






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