

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 145/MP/2013**

**Coram:**

**Shri V.S. Verma, Member**

**Shri M. Deena Dayalan, Member**

**Date of Hearing: 1.10.2013**

**Date of Order : 3.02.2014**

**In the matter of**

Petition for adjudication of disputes arising out Power Purchase Agreement (Supplementary) dated 18.12.2012 entered into between the Petitioner and the Respondent.

**And**

**in the matter of**

DNH Power Distribution Company Ltd.  
Opposite Secretariat,  
Silvassa-396 230

**Petitioner**

**Vs**

NTPC – SAIL Power Company Ltd.  
NBCC Tower, 4th Floor,  
15, Bhikaji Cama Place,  
New Delhi-110 066

**Respondent**

**Parties Present:**

Shri Anand K. Ganesan, Advocate, DNHPDCL  
Shri C. Basu, NSPCL  
Shri S.D Jha, NSPCL

**ORDER**

The petitioner, a distribution licensee in the Union Territory of Dadara and Nagar Haveli and a successor of the Electricity Department of Dadra and Nagar Haveli Administration which earlier used to undertake distribution of electricity, seeks



adjudication of the dispute arising out of the claim of capacity charge by the respondent for the electricity contracted for purchase from the latter's power plant at Bhilai. The petitioner has sought the following specific reliefs, namely –

*“(a) Pass an ex-parte ad-interim order of stay of further billing and recovery of capacity charges by the Respondent from the Petitioner under the Agreement dated 18.12.2012 on account of the inability of the Petitioner to draw electricity for non-availability of medium term open access for 25 MW power.*

*(a) Confirm the interim order in terms of prayer (a) above after notice to the Respondent.*

*(b) Pass such other further order (s) as Hon'ble Commission may deem just in the facts of the present case.”*

2. The respondent, a generating company owned and controlled by the Central Government, has established a captive power plant with a total capacity of 500 MW at Bhilai in the State of Chhattisgarh. After meeting its captive requirement of 280 MW, the respondent sold the balance available capacity through long-term Power Purchase Agreements. Electricity Department, Dadra and Nagar Haveli entered into the Power Purchase Agreement dated 26.10.2007(PPA) with the respondent for purchase of 100 MW power, the capacity allocated to it and has been availing supply through long-term access.

3. The petitioner has submitted that the respondent offered to sell additional capacity of up to 65.5 MW on medium-term basis out of the capacity retained for captive consumption, which offer was accepted by Electricity Department, Dadra and Nagar Haveli. Accordingly, the parties entered into a Supplementary Agreements

dated 10.10.2012 and 18.12.2012. Under the Supplementary Agreement dated 10.10.2012, Dadra and Nagar Haveli was allocated additional 40.5 MW , whereas the Supplementary Agreement dated 18.12.2012 provides for allocation of additional 65.5 MW power for the period 1.4.2013 to 31.3.2014 and 64 MW power from 1.4.2014 to 31.5.2014.

4. Pursuant to the allocation of additional capacity, the petitioner was to obtain medium-term open access for transfer of power. The petitioner has stated that approval for medium-term open access for 40.5 MW was already accorded by Power Grid Corporation of India Ltd prior to signing of the Supplementary Agreement dated 18.12.2012. Therefore, Dadra and Nagar Haveli Administration applied for grant of medium-term open access for another 25 MW to enable the petitioner to draw the entire additional allocation of 65.5 MW power. The petitioner has submitted that medium-term open access for 25 MW was not granted for reason of non-availability of the transmission lines and constraints on the transmission system in the region. Consequently, the petitioner could not avail supply of power against 25 MW capacity.

5. The petitioner has submitted that despite the fact that power has not been drawn for reasons beyond the control of the petitioner, the respondent has been raising bills for capacity charges for the entire allocated capacity of 165.5 MW, including 25 MW for which medium-term open access has been declined. The petitioner has urged that the reasons for not availing supply of electricity are outside its control and cannot in any manner be attributed to any act of commission or omission on its part. It has been stated that non-availability of medium-term open access for 25 MW power amounts to *force majeure* condition and is covered under

Section 56 of the Contract Act which deals with the consequences of impossibility of performance of the contract. The petitioner has urged that in terms of Section 56 of the Contract Act, the contract becomes void the moment performance of the contract becomes impossible. In the circumstances of the present case, the petitioner has further argued, the moment Power Grid Corporation of India/Western Region Load Despatch Centre rejected its application for the medium-term open access for reason of transmission constraints, the Supplementary Agreement became void and the parties ought to have been placed in the same position as though the said agreement was not subsisting.

6. We have heard learned counsel for the petitioner and the representative of the respondent.

7. Learned counsel for the petitioner has stated that the petitioner vide its letter dated 9.5.2013 informed the respondent that in absence of medium-term open access for 25 MW, the capacity charges should be claimed only for 140.5 MW power and therefore, the petitioner approached the respondent to refund the surplus amount paid under protest. Learned counsel has stated that the respondent was further intimated that since the petitioner was not able to get the approval for wheeling of 25 MW power which was not scheduled, the petitioner was not liable to pay capacity charges for 25 MW power. Learned counsel has submitted that in response, the respondent in its letter dated 24.5.2013 clarified that capacity charges were payable by the beneficiaries based on the total capacity allocated from the generating station and not on the energy scheduled by the beneficiaries.



8. The representative of the respondent has submitted that the respondent neither received any communication from the petitioner regarding denial of medium-term open access nor did it receive any notice for termination of the Supplementary Agreement dated 18.12.2012. He has submitted that the petitioner could have utilized 25 MW power under short-term open access. It has been pointed out by the representative of the respondent that the petitioner has been over-drawing beyond its long-term allocation of 100 MW since October 2009. In response to the Commission`s query regarding scheduling of 25 MW power, the representative of the respondent has submitted that generation is getting adversely affected as it is not getting adequate schedule form the petitioner. He has further submitted that since the PPA is still in force, respondent is not able to supply 25 MW power to any other utility.

9. After the hearing the respondent filed its reply under affidavit dated 14.10.2013 in terms of the liberty granted at the hearing. The reply affidavit is in accord with the oral submissions made by the representative of the respondent at the hearing. The respondent in its reply affidavit has stated that in terms of the PPA and the Supplementary Agreement, it was the responsibility of the petitioner to arrange for the open access for transfer of power. The respondent has urged that under clause 2.1.8 of the PPA, delivery of power at the bus bar of the generating station is deemed to be supply of the allocated capacity to the petitioner irrespective of the availability of the transmission system and the electricity generated and delivered at the bus bar becomes the property of the petitioner who had specifically

agreed to pay the capacity charges for the capacity declared available as if it were the supply of the contracted power. Accordingly, according to the respondent, the petitioner is liable to pay charges for the capacity declared. The respondent has denied existence of any *force majeure* condition at the bus bar which is the point of supply/delivery of electricity. The respondent has alleged that the petitioner did not inform the respondent of non-availability of medium-term open access when supply was to commence but scheduled to draw the energy to the extent of 40.5 MW only. It has been pointed out that the petitioner informed the respondent of non-availability of open access only after the bill for the month of April 2013 was raised. The respondent has submitted that the petitioner did not make any effort to obtain supply through the short-term open access after the medium-term open access was denied.

10. The details of scheduled generation, actual generation at the generating station and drawal schedule of the petitioner, as filed by the respondent are below:

**(In MUs)**

| Month      | Total Declared Capacity | Total Gross Generation | Total Actual Generation | Declared Capacity <i>qua</i> Petitioner | Petitioner's Drawl Schedule |
|------------|-------------------------|------------------------|-------------------------|---|-----------------------------|
| April 2013 | 195.976                 | 208.956                | 190.478                 | 44.446                                  | 40.696                      |
| May 2013   | 320.335                 | 316.466                | 288.725                 | 92.279                                  | 81.604                      |
| June 2013  | 336.317                 | 319.700                | 292.062                 | 99.714                                  | 80.389                      |
| July 2013  | 349.680                 | 355.196                | 325.740                 | 103.952                                 | 93.159                      |
| Aug 2013   | 225.632                 | 221.478                | 201.446                 | 88.140                                  | 78.824                      |
| Sep 2013   | 339.840                 | 328.944                | 300.616                 | 100.733                                 | 86.274                      |

11. The respondent has relied upon the judgment of Delhi High Court dated 9.4.2009 in CS (OS) 579A/2002 (Jyoti Ltd Vs EIH Ltd).

12. We have given our serious consideration to the rival contentions.

13. The question that has been raised is regarding the obligation of the petitioner to pay the capacity charges for additional 25 MW capacity contracted under the Supplementary Agreement dated 18.12.2012. The respondent is a generating company owned or controlled by the Central Government. Therefore, by virtue of clause (a) of sub-section (1) of Section 79 of the Electricity Act, regulation of tariff of the respondent is within the jurisdiction of the Commission. The tariff is governed by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (the tariff regulations), terms and conditions specified by the Commission under Section 61 of the Electricity Act. The liability of a beneficiary to pay capacity charge for a thermal station is specified under (1) of Regulation 21 of the tariff regulations, according to which, the total capacity charge payable for a generating station is to be shared by its beneficiaries as per their respective percentage share / allocation in the capacity of the generating station. Clause (1) of Regulation 21 does not admit of any exception. In view of this provision, the petitioner is liable to pay the capacity charge for its entire capacity allocated to it from the generating station set up by the respondent.

14. In terms of clause 2.1.8 of the PPA, *“availability of power from the generating station at its 400 KV bus-bar shall be deemed to be the supply of allocated capacity to Bulk Power Beneficiaries **irrespective of availability of transmission system.**”* Busbar has been defined as *“400 KV Bus-bars of the station to which the outgoing feeders are connected.”* Clause 2.3 of the PPA declares that *“Bulk Power Beneficiary(ies) shall draw their share of power from 400 KV bus-bars of Bhilai Project. For accounting purpose, the power will be deemed to have been delivered at*



400 KV busbar.” Therefore, under the PPA, the power gets supplied to the extent of the capacity made available at the outgoing feeders. In other words, as agreed to by the parties, drawal of power by the petitioner is not a condition precedent for supply of power. The supply is delinked from the availability of the transmission system and therefore, non-availability of the transmission system does not affect the sale of the allocated capacity to the petitioner. The position becomes further clear from reading of the Supplementary Agreements dated 10.10.2012 and 18.12.2012. The Supplementary Agreement dated 10.10.2012 provided that the temporary allocation of power was “**subject to** obtaining Medium Term Open Access from the concerned agency by UT Dadra & Nagar Haveli.” However, under the Supplementary Agreement dated 18.12.2012 the position has changed and now it is provided that “UT Dadra & Nagar Haveli will obtain Medium Term Open Access from the concerned agency” for drawal of the additional capacity. The supply is no longer ‘subject to’ obtaining medium-term open access by the petitioner or availability of the transmission system. Accordingly, it is held that sale of power gets completed at the outgoing feeders of the bus bar and the petitioner acquires title to the power at that point of time. The petitioner is liable to pay the capacity charges for the capacity allocated/contracted and made available by the respondent.

15. The respondent has submitted that it used to declare the available capacity after taking into account the allocation made to the petitioner. The respondent has furnished the month-wise details of declared capacity and the capacity scheduled by the petitioner. It is a undisputed fact that the petitioner did not avail of the entire capacity declared to be made available by the respondent for reason of unavailability



of the transmission system for evacuation of power. Accordingly, the capacity declared by the respondent is deemed to have been made available at the bus bar of the generating station for the purpose of clause (1) of Regulation 21 of the tariff regulations and clause 2.1.8 of the PPA.

16. The above conclusion draws support from the provisions of the Sale of Goods Act, 1930. 'Electricity' is 'goods' within the meaning of the Sale of Goods Act, 1930 [***Commissioner of Sales Tax, Madhya Pradesh Vs Madhya Pradesh State Electricity Board (1969 1 SCC 200)***]. Section 19 (1) of the Sale of Goods Act, 1930 clearly provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 33 of the Sale of Goods Act legislates that delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf. Therefore, the intention of the parties as regards the time of transfer or delivery of power is to be gathered from the terms of the PPA. As concluded above, in terms of the PPA, the supply of power to the petitioner gets completed when it is made available by the respondent at the outgoing feeders. Accordingly, with the declaration of availability at the bus bar, power is delivered to the petitioner and the title passes on to it. Thereafter it becomes the responsibility of the petitioner to draw power for further use.

17. The petitioner has submitted that it was unable to draw 25 MW power because of unavailability of the medium-term open access. According to the

petitioner, unavailability of medium-term open access is a condition of *force majeure* which has frustrated the contract and discharged it from fulfilling its obligation for drawl of power in terms of clause 8 of the PPA and Section 56 of the Contract Act. The petitioner has contended that it stands relieved of its obligation to pay the capacity charge for 25 MW capacity contracted under the Supplementary Agreement dated 18.12.2012 and consequently it has no liability to pay the capacity charges. Thus, the petitioner has invoked the *force majeure* clause under the PPA and sought to argue that because of refusal of the concerned agency to grant medium-term open access, the agreement was frustrated and became void in view of Section 56 of the Contract Act. Clause 8 of the PPA specifies the *force majeure* as under:

***“8.0 FORCE MAJEURE***

*The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, force of nature, accident, act of God and any other reason beyond the control of concerned party. But any party claiming the benefit of this clause shall reasonably satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to this effect. Generation/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”*

18. It is seen that non-availability of the transmission system for evacuation of power was not within the contemplation of *force majeure* event when the parties signed the PPA as the supply was not dependent on the availability of the transmission system but was deemed to have been completed at the bus bar of the generating station irrespective of the availability of the transmission system, as already held. Any constraints faced after completion of transaction of supply to the petitioner does not affect the petitioner’s liability to pay the charges by invoking the

*force majeure* clause. Therefore, the petitioner is not entitled to invoke the *force majeure* clause under the PPA.

19. There is another reason for which the petitioner cannot draw benefit of the *force majeure* clause. Under this clause, the party claiming the benefit of the clause is mandated to give written notice within a reasonable time to the other party to this effect. There is nothing in the pleading of the petitioner that it gave such notice. The respondent has specifically pleaded that no such notice was given

20. The petitioner could not avail the power from the generating station for 25 MW on account of non-availability of MTOA. In that case, the petitioner should have surrendered 25 MW capacity of power and sought revision of the PPA. There is nothing in record that the petitioner made efforts to extricate itself from the situation and made itself liable for payment of capacity charges.

21. For the foregoing reasons, there is no merit in the present petition. The respondent becomes entitled to claim the capacity charge for the capacity declared and made available at the bus bar. The petition is accordingly dismissed. There shall be no order as to costs.

Sd/-

**(M. Deena Dayalan)**  
Member

sd/-

**(V.S.Verma)**  
Member

