

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 62/MP/2013

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member**

Date of Order: 15th of September, 2017

In the matter of

Petition under Section 79 (1) (f) of the Electricity Act, 2003 for adjudication of the disputes between the petitioner and the Respondent No. 1.

And

In the matter of

Kanti Bijlee Utpadan Nigam Ltd.
NTPC BHawan, Core 7, Scope Complex
7, Institutional Area, Lodhi Road,
New Delhi-110003

Petitioner

Vs

1. Bihar State Power Holding Company Ltd.
(Formerly known as Bihar State Electricity Board)
Vidyut Bhawan, Bailey Road,
Patna 800021

2. State Load Despatch Centre
Bihar State Power Holding Company Ltd.
Vidyut Bhawan, Bailey Road,
Patna 800021

Respondents

Parties Present:

Shri M. G. Ramachandran, Advocate, KBUNL
Shri Avinash Menon, Advocate, KBUNL
Shri M. K. Sinha, KBUNL
Shri S. K. Mandal, NTPC
Shri R. P. Bhatt, Sr. Advocate, BSPHCL
Shri Mohit Kr. Shah, Advocate, BSPHCL

ORDER

The petitioner, Kanti Bijlee Utpadan Nigam Limited which owns the Muzaffarpur Thermal Power Station (2 x 110 MW) (the generating station) has filed the present petition with the following prayers:

- “(a) Admit the petition under section 79 (1) (f) of the Electricity Act, 2003
- (b) Adjudicate upon the disputes and differences that have arisen between the Petitioner and Respondent No. 1;
- (c) Direct Respondent No. 1 to make the payments of the bills of the Petitioner for the period from 12.12.2010 to 09.03.2011, for the period from 20.03.2010 to 30.03.2011 and for the period from 04.11.2011 to 29.03.2012 along with applicable surcharge.
- (d) Pass an interim order directing Respondent no. 1 to release the amounts due to the Petitioner; and
- (e) Direct SLDC, Patna (Respondent No. 2) for implementation of ABT in respect of MTPS.
- (f) Pass any such further order (s) as deemed fit and proper in the circumstances of the case;”

2. The Petitioner is a Joint Venture Company of NTPC Ltd. and erstwhile Bihar State Electricity Board (BSEB) with 65% equity contribution by NTPC Ltd. and 35% equity contribution by the erstwhile BSEB. Consequent to the reorganization of BSEB in November 2012, Bihar State Power Holding Company Limited (BSPHCL), Respondent No.1 herein became the successor company to BSEB for its JV. Prior to the reorganization in Nov'2012 all the functions e.g. Generation, Transmission, Distribution, Load Despatch etc. was under the control of erstwhile BSEB.

3. The generating station was commissioned by BSEB in the year 1985-86. The generating station was shut down in the year 2003 on account of low performance and high cost of generation. The generating station was vested in the Petitioner on 08.09.2006 pursuant to Bihar Electricity Reform (Transfer of Muzaffarpur Thermal Power Station) Scheme, 2006 notified by the State Government under Section 131 of the Electricity Act, 2003 (the Act). The Petitioner was thereby entrusted with the responsibility to refurbish, renovate, modernise, operate and maintain the generating station.

4. Respondent No. 1 is the sole beneficiary of the generating station. A Power Purchase Agreement dated 22.08.2006 (PPA) was signed between NTPC Ltd., on behalf of the Joint Venture Company which was to be established, and BSEB. The PPA *inter alia* made the following specific provisions to ensure timely payment of the amounts becoming due for supply of power and the consequences of delay in making payment:

“2.2.3 Notwithstanding the obligation of BSEB to pay all the dues as per this Agreement, in the event of default in opening of LC of adequate amount in favour of JVC or payment of bills beyond a period of Sixty (60) days from the presentation of bills, JVC shall be entitled to regulate power supply to BSEB...”

5. The petitioner has submitted that to meet the immediate need of power in the State of Bihar, Unit 2 of the generating station was synchronized in July' 2007 after partial R&M and coal firing was carried out on 29.1.2008. The Petitioner had filed a tariff petition being No. 65/2007 for approval of tariff for the generating station for the period 8.9.2006 to 31.3.2009. It was submitted by the petitioner that pending stabilization of the

Unit, power could not be scheduled on firm basis. The Commission therefore by order dated 11.09.2007 had directed that supply of power from the generating station would be treated as infirm power and charged at UI rates as applicable from time to time and would be in conformity with clause 7.1.6 of the PPA, when schedule is assumed to be zero. It was further directed that the revenue earned from the sale of infirm power in excess of fuel cost would be adjusted against the capital cost as per regulation 19 of 2004 Regulations. The clause 7.1.3 to clause 7.1.5 of the PPA pertaining to Provisional tariff was kept in abeyance by the Commission.

6. The Petitioner has stated that as per the directions of the Commission, it billed Respondent no. 1 for the power supplied at UI rates from 29.01.2008 onwards. Respondent no.1 made payment of the bills till September'2008. However, Respondent no.1 stopped making payment of energy bill w.e.f October'2008 stating that UI rates, which were about Rs.6.5/ kwh, were very high. Therefore, at a meeting held on 17.12.2008, it was agreed between the parties that the provisional tariff to be charged by the Petitioner for sale of power would be at the rate of Rs.3.65/kwh (Rs.0.80/kwh towards capacity charge and Rs.2.85/kwh towards energy charge) to cover operating expenses of the generating station. The relevant extracts from the minutes of the meeting are placed below:

“After deliberations, a rate of Rs.3.65 per unit was worked out to meet the operating expenses of the station. Chairman, BSEB agreed to make payment of the outstanding bills of October and November'08 also corresponding to this rate and assured for regular payment in future at this rate to ensure continuous operation of the unit. It was also agreed that after COD also, payment at this rate will be released which shall be subject to adjustment based on tariff decided by CERC.”

7. It has been stated by the petitioner that Unit 2 of the generating station was declared under commercial operation on 15.10.2010 after emergent and selective refurbishment. The Petitioner filed a fresh petition (Petition no. 271/2010) for approval of tariff for the period 15.10.2010 to 31.3.2014 in respect of Unit 2 for sale of power to Respondent No. 1. The provisional tariff was approved by the Commission vide order dated 23.2.2012.

8. The Petitioner has claimed that since it is governed by the provisions of IEGC 2010, after commencement of commercial operation it regularly gave Declared Capacity (DC) to SLDC, Patna (Respondent no.2) which is responsible for optimum scheduling and despatch of electricity within the state. However, the petitioner has alleged that Respondent no.2 did not provide Scheduled Generation (SG) against DC of the Petitioner and also indicated that in the absence of regular schedule from Respondent no.2, the Petitioner was generating on the basis of DC. The Petitioner has submitted that by not providing the SG, Respondent no.1 accepted scheduling of generation whatever was made available against the DC declared by the Petitioner.

9. The Petitioner has stated that after commencement of commercial generation from Unit 2 and till issuance of provisional tariff by the Commission vide the order dated 23.02.2012, it continued to bill Respondent no.1 at mutually agreed rate of Rs.3.65/kwh on weekly basis considering the Commission order dated 11.09.2007 in petition no. 65/2007 and as agreed with Respondent no.1 in the meeting on 17.12.2008. However, Respondent No.1 did not make timely payments even though it had categorically agreed for the same in the 17.12.2008 meeting. It was paying amounts of Rs.1.5 crore to Rs.2.5 crore against the weekly bills ranging from Rs.4 crore to Rs.5 crore. This

shortfall had led to accumulation of outstanding dues to the tune of Rs.48.05 crore as on 6.12.2010. As a result there was no fund to arrange fuel by the Petitioner and Unit 2 could not be operated during the period beyond 12.12.2010 till 09.03.2011.

10. The Petitioner has stated that in view of the mounting dues and to reduce the capacity charge liability of Respondent no.1, matter regarding sale of power to other willing purchasers outside the State of Bihar was taken up in the KBUNL Board meeting on 19.1.2011. However, it was opposed by the Respondent no.1-BSEB representatives on the Board. The Petitioner further requested Respondent no.1 to give consent for sale of power to other willing purchasers outside the State of Bihar vide letter dated 4.2.2011, which was again denied by Respondent no.1 vide its letter dated 10.2.2011.

11. Against the outstanding of around Rs.50 crore, partial payment of Rs.15.72 crore was received by the Petitioner by March'2011. With this limited fund, unit could be further operated only for around 10 days i.e. 09.03.2011 to 20.03.2011 as the major amount was utilised for disbursement of salary etc. On account of default of Respondent no.1, unit was again shut down from 20.03.2011 to 30.03.2011.

12. From April' 2011 onward, the Unit was operated on a regular basis. The Petitioner thereafter vide letter dated 14.06.2011 requested Respondent no.1 to increase the tariff from Rs.3.65/kwh to cover the increase in fuel expenses as the fuel prices had increased compared to the time when above tariff was agreed and the capacity charge in the above tariff included only the operating expenses. However, Respondent no.1 did not agree to increase the tariff. The Petitioner vide letter dated 10.9.2011 again requested Respondent no.1 to enhance the tariff of Rs.3.65/kwh as the

increase in fuel cost had exhausted the entire working capital. In view of the mounting of cumulative cash-loss to the tune of Rs.61.32 Crore till Oct'2011 due to difference in cost of generation and the tariff (Rs.3.65/kwh) being paid by Respondent no.1, the Petitioner had informed that it had no option but to further stop generation w.e.f 3.11.2011.

12. Meanwhile, Respondent No.1 vide the letter dated 8.2.2012 requested Petitioner to plan Unit-2 shutdown for comprehensive R&M works simultaneously with its BTPS (Barauni) unit by BHEL. Further vide letter dated 7.3.2012 Respondent no.1 informed the Petitioner regarding shutdown of its BTPS (Barauni) Unit w.e.f 15.3.2012 for R&M.

13. After approval of provisional tariff by the Commission by order dated 23.2.2012, the Petitioner had raised bills on 1.3.2012 and 21.5.2012 for about Rs.88.37 crore on Respondent no.1 for the differential amount for the energy supplied and earlier claimed at Rs.3.65/kwh along with applicable interest. The claim by the Petitioner included capacity charge for the periods of shutdown viz. 12.12.2010 to 9.3.2011, 20.3.2011 to 30.3.2011 and 3.11.2011 to 29.3.2012. By letter dated 15.5.2012, Respondent no.1 admitted only an amount of Rs.18.64 Crore and after discussions agreed to pay further amount of Rs.6.61 Crore vide letter dated 11.06.2012. Thus the Petitioner was paid a total amount of Rs.25.24 Crore. The Petitioner thereafter discussed the matter at various levels, but without any fruitful results as Respondent no.1 considered zero availability during the periods of shutdown.

14. The Petitioner has claimed that it is entitled to capacity charge for the periods 12.12.2010 to 9.3.2011, 20.03.2011 to 30.03.2011 and 03.11.2011 to 29.03.2012 in terms of the PPA corresponding to its availability for these periods since Unit-2 could

not be operated on these occasions for the reasons entirely attributable to Respondent no.1. The Petitioner has filed the detailed computation of capacity charge for the above mentioned shutdown periods as per the direction of Commission as under:

S. No.	Period	Amount billed (Rs.)
1	12.12.2010 – 9.3.2011	22,37,17,305/-
2	20.3.2011 – 30.3.2011	2,79,64,663/-
3	3.11.2011 – 29.2.2012	26,55,62,167/-
4	1.3.2012 – 29.3.2012	6,48,22,767/-
	TOTAL	58,20,66,902/-

15. The petitioner has also sought a direction for Respondent no.2 for implementation of ABT for the generating station.

16. Respondent No.1 in its reply dated 7.8.2013 has disputed its liability to pay the outstanding amount of Rs.62.13 crore claimed by the Petitioner. Respondent no.1 has stated that in addition to Rs.25.24 crore paid earlier, it has paid a sum of Rs.59.02 crore on 28.5.2013, total payment made being Rs.84.26 crore, without prejudice to its claim as also pending adjudication of the dispute.

17. Respondent no.1 has also stated that during December 2008, the Petitioner had insisted for payment of charges of infirm power @Rs.3.65/kwh which was agreed to by the erstwhile BSEB at the insistence of KBUNL. Respondent No.1 has alleged that Petitioner was unable to provide a firm schedule of availability of power resulting in the Respondent no.2 being unable to provide Schedule Generation (SG). Respondent no.1 has further alleged that it was Petitioner who has engaged in Grid indiscipline and IEGC violation by way of generating energy without getting the SG fixed. Respondent no.1 has stated that outstanding dues as on 3.11.2011 was “meagre” when the Petitioner

herein shut down the Unit no.2 creating a hoax that it has suffered a huge amount of cash loss. On one hand the Petitioner was not pursuing the tariff petition filed before the Commission after the COD on 15.10.2010. On the other hand, it was deviating from undertaking given in 17.12.2008 meeting for acceptance of tariff of Rs.3.65/kwh (even after COD), till the tariff is decided by the Commission. Under the guise of suffering cash losses and non-availability of coal, the Petitioner had shut down the Unit w.e.f 3.11.2011. It has also stated that NTPC having majority stake should have helped the Petitioner in the cash-loss situation. Respondent no.1 has averred that it was seriously prejudiced on account of shutdown of Unit 2 as it was not only deprived of the power at the time of huge scarcity but also suffered financially as it had to procure power from other costlier sources to meet the demand of customers. Respondent no.1 has alleged that Unit 2 was shut down because it was not able to generate consistently and non-payment was only a ploy. Respondent no.1 has argued that PPA does not authorize the Petitioner to claim capacity charge when generation is unilaterally stopped by Petitioner. Accordingly, Respondent no.1 has denied its liability to pay capacity charge for the periods of shutdown. Respondent no.1 has stated that the Petitioner in its letter dated 29.3.2012 informed Respondent no.2 that DC of the generating station was revised to 0 MW with immediate effect since Unit 2 was being taken under extensive R&M.

17. Respondent no.1 has averred that it has calculated month-wise capacity charge payable to the Petitioner for the period 15.10.2010 to March'2012 in accordance with the formula given under Regulation 21 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 by taking Plant Availability Factor achieved during the month (PAFM) equal to Actual Generation instead of DC since it

was drawing 100% of the power generated by the generating station. In accordance with the calculations made by Respondent no.1 , capacity charge for the relevant period total upto Rs.44.09 crore (Annexure R4 to the reply). No capacity charge is payable as per the Respondent no.1 for the months of January 2011, February 2011, December 2011, January 2012, February 2012 and March 2012. There was no generation during the following periods:

- a. 13.12.2010 to 6.3.2011
- b. 21.3.2011 to 27.3.2011
- c. 16.5.2011 to 5.6.2011
- d. 27.6.2011 to 30.6.2011
- e. 26.9.2011 to 2.10.2011
- f. 4.11.2011 to 31.3.2012

18. As regards Petitioner prayer to implementation of ABT, Respondent no.1 has stated that it has no objection to the proposal, except that UI charges would not be applicable for the power generated by the Petitioner and purchased by Respondent no.1 since the generating station is jointly owned by NTPC Limited and Respondent no.1 and has only one beneficiary.

19. Respondent no.1 has submitted that the basic issue arising in the present case is whether the stoppage of generation by the Petitioner was on account of non-payment of its dues or for any other reason. According to Respondent no.1 this requires recording of evidence which does not fall within the scope of the Electricity Act. According to the Respondent no.1 the issue is to be referred for Arbitration to the Arbitrator in terms of clause 12.2.2 of PPA. In other words, Respondent no.1 has raised the question of

jurisdiction of the Commission to adjudicate the dispute in terms of clause (f) of Sub-section (1) of Section 79 of the Electricity Act, 2003.

Analysis and Decision

20. We heard learned counsel for the petitioner and learned senior counsel for the Respondent No.1 and perused documents on the record.

21. We first dispose the preliminary objection of Respondent no.1 as to jurisdiction. There is no dispute that NTPC Ltd., a Central Government company is the major equity holder in the company with 65% equity share. By virtue of this fact, the Petitioner as a generating company is controlled by the Central Government. Accordingly, the PPA contains the following provision for determination of tariff:

“7. TARIFF

7.1 Tariff determination

The tariff terms & conditions for the power to be supplied by JVC from the Station shall be determined by CERC from time to time as per applicable law.
.....”

22. The power of determination of tariff by the Central Commission can be traced to clause (a) of sub-section (1) of Section 79 of the Electricity Act, according to which regulation of tariff of the Petitioner is within the jurisdiction of the Central Commission. The dispute involved in the Petition relates to recovery of tariff fixed by this Commission under the Electricity Act. Therefore, adjudication of the dispute is within the jurisdiction of the Commission under clause (f) of sub-section (1) of Section 79. Merely because adjudication of the dispute involves taking of evidence on the issue as to whether the shutdown was on account of non-payment of dues by Respondent no.1 or for any other

reason, does not affect exercise of jurisdiction by the Commission. Therefore, the objection of Respondent no.1 as to jurisdiction has no merit.

23. Clause 12.1.1 of the PPA provides that all differences and disputes between the parties arising out of or in connection with the PPA shall be mutually discussed and resolved amicably. At the hearing on 08.08.2013, the Commission directed the parties to make efforts to amicably resolve the dispute regarding payment of capacity charge. During the course of hearing on 24.09.2013, it was informed that in accordance with the Commission's direction a meeting between senior level officials at the level of the Director (Commercial) of the Petitioner and CMD of Respondent no.1 was convened on 05.09.2013 to resolve the dispute. However, even after giving sufficient time (more than six months), no amicable solution could be reached. At the hearing on 24.04.2014, learned counsel for the Petitioner requested for listing of the Petition on merits. Accordingly, the petition has been heard on merits.

24. Apart from seeking direction for payment of outstanding amount in respect of the energy bills raised for the period from 15.10.2010 (COD of Unit 2) to 29.3.2012, the Petitioner has sought a direction that the generating station be subjected to ABT. Respondent no.1 in its reply has stated that it has no objection to the grant of Petitioner's prayer provided that it should not be liable to pay Unscheduled Interchange (UI) charges for the power drawn from generating Station. The ground for seeking exemption from UI is that the State Government as well as Respondent no.1 have contributed towards the equity contribution of the Petitioner and State of Bihar is the sole beneficiary.

25. The matter regarding implementation of ABT for generating stations owned or controlled by Govt. of India having single/ sole beneficiary has already been decided by Commission in the Petition No.67/2003 (Suo-motu) vide order dated 4.7.2005 related to erstwhile Andhra Pradesh (sole beneficiary) and NTPC-Simhadri generating station. The decision of Commission has also been upheld by Hon'ble Supreme Court in the judgment dated 17.8.2007 in Civil Appeal no.2104 of 2006 which states that the State Grid cannot be isolated and be seen as independent from the region. Relevant portion of the said judgment is extracted as under:

“(21) For the reasons aforesaid, we answer all the questions raised in this appeal in the negative as hereunder:-

Question (A)

(22) The application of Availability Based Tariff and imposition of Unscheduled Interchange (UI) charges are essential part of the Functions of the Central Commission under Section 79(1)(h) of the Electricity Act, 2003 which reads to specify Grid Code having regard to the Grid Standards, and Sub-section (2) of Section 28 read with Section 178(2)(g) dealing with the Central Commission's powers to frame Grid Code. The maintenance of Grid discipline envisaged under the Grid Code is regulated by the mechanism of ABT and UI charges. There is no basis for the appellant to contend that unless something is a part of Tariff the Central Commission cannot exercise powers and functions. The ABT and UI charges are commercial mechanism to control the utilities in scheduling, dispatch and drawl and the UI charges are tariff or charges payable for deviations. In the facts and circumstances mentioned above the legal position is clear and there is no ambiguity in respect of the jurisdiction of the Central Commission.

Question (B)

(23) The circumstances under which the order of the Central Commission was made, the previous orders passed by the Central Commission and the fact that the order challenged by the Appellant was only an order fixing a prospective date for implementation of ABT in the case of generating station supplying to single state and not an order deciding the right or obligations. It is therefore not correct for the appellants to say that the Order was passed ex-parte or suo moto in violation of any principles

of natural justice or otherwise the order is bad or non est. As mentioned above after the order of the Central Commission was passed, the second respondent and the State Load Dispatch Centre (SLDC) in the State of Andhra Pradesh had deliberated on the steps to be taken for implementation. The SLDC was acting on behalf of the appellants. The appellants and SLDC did not raise any objection or otherwise plead any difficulty in the implementation of the ABT and UI mechanism at the relevant time. Even now, except for pleading hyper-technicalities, the appellants have not shown any legal prejudice they suffer on account of the implementation of ABT for the Simhadri generating station of NTPC. The question of law has been raised mechanically without any factual bearing or implication.

Question (C)

(24) As already noticed, the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce. See Indu Bhusan vs. Rama Sunderi, AIR 1970 SC 228, K. Ramanathan vs. State of Tamil Nadu (1985) 2 SCC 116, V.S. Rice and Oil Mills vs. State of Andhra Pradesh, AIR 1964 SC 1781, Deepak Theatre, Dhuri vs. State of Punjab, 1992 Supp.(1) SCC 684.

Question (G)

(25) In the facts and circumstances as alluded, and as per the Scheme of the Electricity Act, 2003 mentioned above, the Central Commission has the plenary power to regulate the Grid, particularly in the context of the Grid being integrated and connected across the region comprising of more than one State. The State Grid cannot be isolated and can be seen as independent from the region.”

26. Non-implementation of ABT by Respondent no.2 is not in accordance to above mentioned judgment of Hon'ble Supreme Court. ABT for the generating station is therefore applicable with all its consequences, without any limitation and exception. Accordingly, Respondent no.2 is directed to ensure availability declaration, scheduling, despatch and Deviation Settlement implementation and issuance of necessary monthly/

weekly Energy Accounts/ Deviation Settlement Accounts etc. as per IEGC and other applicable regulations in respect of the instant station.

27. Now we come to the dispute relating to the petitioner's claim for capacity charge for the periods the generating station remained under shutdown i.e. (i) 12.12.2010 to 9.3.2011, (ii) 20.03.2011 to 30.3.2011 and (iii) 3.11.2011 to 29.3.2012.

28. After COD on 15.10.2010, Unit-2 achieved stabilized operation and generated power on firm basis with a PAFM of 56.9% & 65% in the month of Oct'2010 & Nov'2010 respectively. This PAFM has also been admitted in the invoices by Respondent no.1 (Annexure R-4 in the reply dated 07.08.2013). The partial payment of the weekly energy bills by Respondent no.1, which was being raised at a fixed rate of Rs.3.65/ kwh, had led to increase in outstanding amount to Rs.50 crore in November 2010 resulting in lack of funds for buying fuel and consequent shutdown of Unit-2. Prior to unit stoppage on 12.12.2010, Petitioner had written several letters to Respondent no.1 for payment against the outstanding amount to keep the unit operational. The Petitioner had also proposed the option of selling power to other willing buyers before the Board of KBUNL which was not agreed upon by BSEB (Respondent no.1) representatives on the Board. Therefore Respondent no.1 contention that Petitioner had stopped unit due to problems in power generation on firm basis and non-payment & inability to buy fuel was only a ploy, creating a hoax that it has suffered a huge amount of cash loss is not established. The Unit shut down for the period 12.12.2010 to 9.3.2011 and 20.3.2011 to 30.03.2011 is attributable to payment default by the Respondent no.1.

29. Now we examine the provisions available for default in payment in the PPA and the G.O.B Transfer Notification dated 08.09.2006.

30. Clause 2.2.3 and Clause 10.1 of the PPA provides that for any reduction in generation at the Station on account of non-availability of appropriate Letters of Credit/ non- payment of dues, the station shall be treated as available. Full charges towards the power allocated to BSEB will be payable even if power is not drawn by BSEB for any reason other than those attributable to JVC. Clause 6(b) of the Govt. of Bihar transfer notification dated 08.09.2006 provides that the Board shall open and maintain irrevocable revolving letter of credit equivalent to 105% of the average monthly billing for the power supplied from Generating Station. In case requisite Letter of credit is not opened or the payments are not made, the supply of electricity shall be regulated/ relocated to other States. Any reduction in generation on account of non-availability of appropriate letters of credit shall be treated as deemed generation.

31. Under the above mentioned circumstances, the PAFM claimed by Petitioner for the shutdown period of (i) 12.12.2010 to 9.3.2011 and (ii) 20.3.2011 to 30.3.2011 clearly qualifies for the Deemed Generation as per the provisions of PPA and the Transfer Notification issued by Govt. of Bihar. Therefore, the charges claimed by the Petitioner for the above period is valid and is payable by Respondent no.1.

32. On the 3rd occasion i.e. during the period 3.11.2011 to 29.3.2012, Petitioner has submitted that generating station was stopped because of rising revenue loss/ deficit

due to fuel cost under-recovery in view of increase in fuel cost vis-a-vis payment continuing at the rate Rs.3.65/kwh.

33. The Petitioner vide its letters dated 14.6.2011 and 10.9.2011 requested Respondent no.1 to revise the mutually agreed provisional tariff from Rs.3.65/kwh to Rs.5.16/kwh to meet the enhanced fuel expenses on account of increase in coal cost. There is no issue raised by Petitioner in respect of payment default against the mutually agreed provisional tariff of Rs.3.65/kwh for this period. Respondent no.1 had in-turn replied the Petitioner to expedite issuance of tariff order from CERC and had further stated that it was the responsibility of NTPC (Majority Stake-Holder) to bail out the Petitioner from such financial problems. As per the submissions of Petitioner and Respondent no.1, the provisional tariff of Rs.3.65/kwh was mutually agreed between them in lieu of the UI rate based payment as per the order dated 11.9.2007 in Petition No.65/2007 for the generating station. Respondent no.1 had in the beginning expressed its difficulty in paying at the UI rate as it was coming to be higher (more than Rs.6.5/kwh).

34. As mentioned in the copy of invoices submitted in the Petition, the coal cost (LPPF) during the months October 2010, November 2010, December 2010 & March 2011 was in the range of Rs.2100 per MT to Rs.2450 per MT. Against the same the coal cost for the months beyond April 2011 is found to be in the range of Rs.3000 ~ Rs.3500 per MT. Thus there is an increase in coal cost by around 20% - 40%. The impact of such increase in fuel cost is recoverable as per energy charges formula in the tariff. In this case *ad hoc* payment was being made at a single fixed rate; it was therefore incumbent upon the Respondent No.1 to discuss the issue for a reasonable tariff for

viable/ sustainable operation when the matter of increasing revenue loss due to increased fuel cost was raised by Petitioner. Although the matter of expediting tariff order was raised by Respondent no.1 as remedy, it was open to follow the tariff as per the 11.9.2007 order in Petition No. 65/2007. In view of the above, shut-down of the unit for the period beyond 3.11.2011 is also owing to partial payment/ inadequate payment in respect of the extant the Commission order applicable for the generating Station. Responsibility for meeting revenue/ working capital shortfalls for such evident reasons cannot be assigned to stakeholders.

35. Further, Unit was under shut-down since 3.11.2011. Respondent no.1 had subsequently in February 2012 written to the Petitioner for planning R&M of Unit-2 w.e.f 15.3.2012 (letters dated 8.2.2012 and 7.3.2012). Based on the consent/ clearance given by Respondent No.1 (sole beneficiary) for R&M w.e.f 15.3.2012, Unit 2 shutdown from 3.11.2011 to 14.3.2012 is attributable to Respondent No.1.

36. Under the circumstances mentioned above and as per the terms of PPA and Transfer Notification issued by Govt. of Bihar, we are of the view that capacity charges claimed for the shutdown period beyond 3.11.2011 up to 14.3.2012 (i.e. till Unit-2 R&M shutdown was cleared by Respondent no.1) is also payable by Respondent no.1. However, the capacity charge billed by Petitioner for the shutdown period i.e. from 15.3.2012 to 29.3.2012 is not valid and hence not payable as the Petitioner was informed well in advance about the R&M plan w.e.f 15.3.2012.

37. Further, admissibility of bills for the remaining period i.e. 15.10.2010 to 12.12.2010, 10.3.2011 to 20.3.2011 and 31.3.2011 to 3.11.2011, by Respondent No.1 considering DC equal to actual generation is wrong. It has been clarified above that Generating Stations owned or controlled by central government, irrespective of the number of beneficiary(ies), are in the ambit of ABT. Accordingly, the availability (PAFM) claimed by Petitioner in the invoices is admissible for billing. Since it was SG which was not requisitioned by Respondent no.1 as required under regulations, same has been rightly considered equal to actual generation for the purpose of billing under the present circumstances.

38. Respondent No.1 has paid Rs.84,26,35,715/- i.e. 95% of the amount claimed by the Petitioner which is Rs. 88,36,97,543/-. Therefore amount of Rs.4,10,61,828/- is the outstanding amount against the invoiced amount.

39. The Petitioner vide affidavit dated 27.6.2014, has submitted that the amount claimed for the period 1.3.2012 to 29.3.2012 is Rs.6.48 crore. Since the claim of capacity charges by the Petitioner for the period from 15.3.2012 to 29.3.2012 has not been allowed, the invoice amount gets reduced by corresponding amount i.e. Rs.3.35 crore.

40. In view of Unit-2 commercial operation being undertaken under special circumstances before R&M after only emergent and selective refurbishment for meeting state power requirement and the minor difference in the amount payable and paid, no further amount is required to be paid/ claimed by the Respondent No.1/ Petitioner in

respect of Unit 2 commercial operation w.e.f 15.10.2010 till its shutdown for R&M in March, 2012.

41. Petition No. 62/2013 is accordingly disposed of.

Sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson