

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 145/MP/2013

Subject : Petition for adjudication of disputes arising out of Power Purchase Agreement (Supplemental) dated 18.12.2012 entered into between the petitioner and respondent.

Date of hearing : 14.3.2018

Coram : Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Petitioner : DNH Power Distribution Company Limited

Respondent : NTPC- SAIL Power Company Limited

Parties present : Shri Anand K. Ganesan, Advocate, DNH Power
Ms. Swapna Seshadri, Advocate, DNH Power
Ms. Rhea Luthra, Advocate, DNH Power
Shri M.G. Ramachandran, Advocate, NTPC-SAIL
Ms. Anushree Bardhan, Advocate, NTPC-SAIL
Ms. Poorva Saigal, Advocate, NTPC-SAIL
Shri Dilip Kumar Tiwari, NTPC- SAIL
Shri A.K. Bishoi, NTPC-SAIL

Record of Proceedings

Learned counsel for the Petitioner argued at length and submitted that the Hon'ble Appellate Tribunal for Electricity vide its Judgment dated 4.1.2018 in Appeal No. 92 of 2014 remanded the matter to the Commission with a direction to reconsider the matter afresh and pass appropriate order in accordance with law after giving reasonable opportunity of hearing to the parties. Learned counsel for the Petitioner further submitted as under:

(a) On 26.10.2007, a Power Purchase Agreement (PPA) was executed between the Petitioner and the respondent which was amended by the 10th Supplementary Agreement dated 18.12.2012.

(b) Out of total contracted capacity from the generating station, capacity of 100 MW was allocated to the Petitioner on long-term basis. Since, there was surplus power which was not being used for the captive purpose, the respondent proposed to increase the allocation and offered to sell additional capacity up to 65.5 MW on medium term basis to the Petitioner which was accepted by the Petitioner. On 18.12.2012, the Petitioner and the respondent entered into a Supplementary Agreement for an additional capacity of 25 MW. As per Note 1 to Clause 2.1 of the Supplementary Agreement, the Petitioner was required to obtain Medium Term Open Access (MTOA) from the concerned agency for drawal of the capacity from the generating station.

(c) Subsequently, on 17.12.2013, the Petitioner made an application to PGCIL for grant of MTOA of 25 MW to draw electricity from the generating station of the respondent which was denied by PGCIL on account of constraint in the transmission system in the region and non-availability of the transmission lines.

(d) Learned counsel referred to Clause 8.0 of the PPA and submitted that the non-availability of MTOA for 25 MW power amounts to force majeure condition and has frustrated the performance of contract by the parties under Section 56 of the Indian Contract Act, 1872 which provides for the consequences of impossibility of performance of the contract. The contract becomes void the moment the performance of the contract becomes impossible. However, the respondent did not accept the force majeure condition and raised the bills for payment of fixed charges including 25 MW on the Petitioner, despite the fact that the inability to procure electricity by the Petitioner under the agreement dated 18.12.2012 is not for any act of commission or omission on the part of the Petitioner but on account of reasons beyond the control of the Petitioner.

(e) The respondent contented that the Petitioner did not inform the respondent about the non-availability of the open access and not specifically provided one month notice in terms of Note 2 to Clause 2.1 of the Supplementary Agreement. However, the Petitioner vide its letter dated 11.10.2013 informed the respondent for withdrawal of allocation in terms of Note 2 to Clause 2.1 of the Supplementary Agreement and gave notice of force majeure for not being in a position to perform its obligation under the Supplementary Agreement dated 18.12.2012. Further, non-grant of open access was within the knowledge of the respondent since the beginning, as the scheduling of power was not done by WRLDC. In fact, the respondent vide its letter dated 20.5.2013 had raised this issue in the 64th Commercial Committee Meeting of the WRPC. Therefore, the Petitioner is not liable to pay the fixed charges without there being a single unit of electricity declared available and scheduled.

2. Learned counsel for NTPC-SAIL submitted that the respondent neither received any communication from the Petitioner regarding denial of MTOA nor did it receive any notice for termination of the Supplementary Agreement dated 18.12.2012. Learned counsel for NTPC-SAIL further submitted as under:

(a) Note 1 to Clause 2.1 of the 10th Supplementary Agreement dated 18.12.2012 provides that it is the responsibility of the Petitioner to obtain the MTOA from the concerned agency for drawal from the generating station. With regard to temporary allocation, the parties had voluntarily agreed to and entered into the 10th Supplementary Agreement with the specific stipulation that Petitioner would obtain MTOA which was in deviation from the earlier clause of 9th Supplementary Agreement wherein it was stated that the power allocation shall be subject to obtaining MTOA.

(b) Clause 2.1.8 of the PPA provides that the availability of power from the generating station shall be deemed to be the supply of the allocated capacity to the Petitioner irrespective of the availability of the transmission system. Therefore, the parties have consciously agreed that in the contingency of the non-availability of

the transmission system, there will be a deemed supply for which fixed charges are to be paid.

(c) 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 Regulation 21(1) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 and clause 2.1.8 of the PPA and accordingly, the Petitioner is liable to pay the capacity charges.

(d) As per Clause 8.0 of the PPA, it is an obligation on the party claiming the benefit of force majeure to reasonably satisfy the other party of the existence of such event and give written notice within a reasonable time to this effect. However, the Petitioner is raising the issue of force majeure for the first time before the Commission which is in violation of the agreed terms and conditions of PPA and accordingly, the claim of the Petitioner for occurrence of force majeure event due to non-availability of MTOA is liable to be rejected.

(e) The parties had duly entered into a contract whereby the Petitioner had unconditionally agreed to pay the capacity charges taking the burden of not only applying for and obtaining the open access but also the consequences of non-availability of open access. Therefore, the Petitioner cannot be allowed to plead any force majeure or impossibility of performance or claim undue burden on the consumers. Therefore, the Petitioner has the absolute liability to pay fixed charges as per Clause 2.1.8 of the PPA. In support of his arguments, learned counsel relied upon the Hon'ble Supreme Court judgement in *Satyabrata Ghosh V. Mugneeram Bangur [AIR 1954 SC44]* and *Energy Watchdog V. CERC and Ors. [2017 SCC Online SC 378]*.

3. After hearing learned counsels for both the parties, the Commission directed the Petitioner to file its written submission, by 23.3.2018 with an advance copy to the respondent, who may file its response, within 3 days thereafter.

4. The Commission directed that due date of filing the written submissions should be strictly complied with failing which the order shall be passed on the basis of the documents available on record.

5. Subject to the above, the Commission reserved the order in the Petition.

By order of the Commission

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