

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 145/MP/2013

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

Date of Order: 17th of September, 2018

In the matter of:

Petition for adjudication of disputes arising out of 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, DNH Power
Ms. Swapna Seshadri, Advocate, DNH Power
Ms. Rhea Luthra, Advocate, DNH Power
Shri M.G. Ramachandran, Advocate, NTPC-SAIL
Ms. Poorva Saigal, Advocate, NTPC-SAIL
Shri Dilip Kumar Tiwari, NTPC-SAIL
Shri A.K.Bishoi, NTPC-SAIL

ORDER

Brief Facts of the Case:

The Petitioner, DNH Power Distribution Company Ltd., is an unbundled entity vested with the function of distribution of electricity in the Union Territory of Dadra and Nagar Haveli. The Respondent, NTPC-SAIL Power Company Limited is a



generating company which has established a 500 MW (2x250 MW) generating station at Bhilai in the State of Chhattisgarh. Out of 500 MW, 280 MW were earmarked for captive use, 70 MW was allocated to Union Territory of Daman and Diu, 100 MW was allocated to the Union Territory of Dadra and Nagar Haveli, and 50 MW was allocated to Chhattisgarh State Electricity Board. Pursuant to the allocation of 100 MW power from the generating station, the Petitioner entered into a Power Purchase Agreement with the Respondent on 26.10.2007. Both the Petitioner and Respondents also signed the Supplementary Agreements on 6.1.2009, 29.12.2009, 13.5.2010, 25.8.2010, 2.11.2010, 31.12.2010, 24.3.2011, 30.5.2011, 10.10.2012 and 18.12.2012 amending the terms and conditions of the PPA. For evacuation of its share of power from the generating station, the Petitioner obtained long term access from the Central Transmission Utility in terms of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term access and Medium Term Open Access and related matters) Regulations, 2009 (Connectivity Regulations) for 100 MW of power.

2. On account of availability of surplus power with the Respondent on account of non-utilization of entire power meant for captive consumption, the Respondent offered to sell 65.5 MW to the Petitioner on medium term basis which was acceptable to the Petitioner. Both Petitioner and Respondent entered into 9th Supplementary Agreement dated 10.10.2012 and 10th Supplementary Agreement dated 18.12.2012 for supply of 40.5 MW and 25 MW respectively providing for the terms and conditions for procurement of electricity on medium term basis from 1.4.2013 to 31.5.2014.

3. Pursuant to the Supplementary Agreement dated 10.10.2012, the Petitioner made an application to CTU for grant of medium term open access for 40.5 MW which was granted by PGCIL. Pursuant to the Supplementary Agreement dated 18.12.2012, the Petitioner made an application dated 17.12.2013 to CTU for grant of medium term open access for 25 MW. However, CTU did not grant medium term open access on account of constraints in the transmission system in the region and non-availability of transmission lines. Considering that the non-grant of medium term open access for 25 MW by CTU amounted to force majeure and had frustrated its contractual performance under the PPA to the extent of 25 MW, the Petitioner approached this Commission by way of the present petition with the following prayers:

“28. In the facts and circumstances mentioned above, it is respectfully prayed that the Commission may be pleased to:

- (a) Hold and declare that the non-availability of medium-term open access is a force majeure condition and discharges the performance of the obligation on the part of the Petitioner to procure electricity on medium-term basis from the generating station of the Respondent.
- (b) Hold and declare that the Agreement dated 18.12.2012 for purchase of electricity by the Petitioner from the Respondent to the extent of 25 MW on medium term basis is void on account of impossibility of performance.
- (c) Hold and declare that the Petitioner is not liable to pay capacity charges or other charges to the Respondent for non-drawl of electricity to the due to non-availability of medium term open access for 25 MW power.
- (d) Hold and declare the Respondent is liable to refund the capacity charges collected from the Petitioner for the Petitioner not being in a position to draw electricity due to non-availability of medium-term open access, together with interest as determined by the Commission.
- (e) Pass such other further orders as the Commission may deem just in the facts of the present case.”

4. The Commission after hearing the Petitioner and the Respondent disposed of the petition vide order dated 3.2.2014 as under:

“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."

5. The Petitioner challenged the above order of the Commission in Appeal No. 41 of 2014 before the Appellate Tribunal for Electricity (Appellate Tribunal). The main plank of the argument of the Petitioner in the appeal was that it was not granted opportunity to file rejoinder to the reply of the Respondent in the main petition and therefore, the order dated 3.2.2014 was issued in violation of natural justice. The Appellate Tribunal in its judgement dated 4.1.2018 set aside the order of the Commission and remanded the matter for fresh consideration. The observations and directions of the Appellate Tribunal in its judgement dated 4.1.2018 are extracted as under:

"15. What has emerged from the available record before us is whether the impugned order passed by the Central Electricity Regulatory Commission, New Delhi is sustainable in law on account of not offering reasonable opportunity for filing rejoinder to the reply filed by the first Respondent to the main petition. The specific ground has been pleaded by the Appellant in the Memo of Appeal that the Central Commission has failed to appreciate that the reply was never served by the first Respondent personally or through their counsel to the Appellant. It was, in these circumstances that the Appellant has been constrained to file its affidavit dated 27.01.2014 before the Central Commission but, unfortunately, the same has not



been taken on record and the Central Commission has erroneously come to the conclusion on factual and legal aspect of the matter. Further, the bone contention of the learned counsel for the Appellant, as stated in three pleadings supported by the affidavit (i) Affidavit filed before the Central Commission on 27.01.2014, (ii) Appeal filed before this Tribunal on 28.03.2014 and, (iii) Rejoinder filed to the reply of Respondent No.1, is that, the reply filed by the Respondent No.1 was not served to the Appellant. The Appellant, being a public utility and responsible distribution company, has made three statements on sworn affidavit that no sincere efforts, as such, has been made by the Respondent No.1, even before the Appellate proceedings, to show that the reply was duly served on the Appellant or the learned counsel appearing for the Appellant nor produced any authenticated acknowledgement till as on date.

16.Taking into consideration the legal and factual aspects in the instant case, we are of the considered view that the impugned order cannot be sustained and liable to be set-aside and the matter requires reconsideration in accordance with law.

17. We are of the considered view that the matter requires reconsideration by the Central Commission afresh as stated in the above paragraphs. Therefore, we do not want to express any opinion on merits and demerits of the case on the stand taken by the respective counsel on the other grounds urged in the instant Appeal at this stage.

18. For the above foregoing reasons, at supra, the instant Appeal, being Appeal No. 92 of 2014 filed by the Appellant is allowed. The impugned Order dated 03.02.2014 passed in Petition No. 145/MP/2013 by the Central Electricity Regulatory Commission, New Delhi is hereby set-aside. The matter stands remanded back to the Central Electricity Regulatory Commission, New Delhi to reconsider the matter afresh and pass appropriate order in accordance with law after offering reasonable opportunity of hearing to the Appellant and the Respondent No.1 and dispose of the matter as expeditiously as possible at any rate within a period of six months from the date of the appearance of the parties before the Central Electricity Regulatory Commission, New Delhi.”

6. Pursuant to the remand, the matter was listed for hearing and the counsels for both the Petitioner and Respondents argued the matters on merit at length. We are now proceeding to deal with the rival submissions of the Petitioner and Respondent.

Submissions of the Petitioner and Respondent

7. The broad contentions of the Petitioner in the petition are as under:

(a) The medium term open access to be obtained for 25 MW was for a specific condition in the Agreement dated 18.12.2012 and the Petitioner was required to obtain the same. When the said condition cannot be fulfilled

for reasons beyond the control of the Petitioner, the performance of the Agreement dated 18.12.2012 needs to be discharged.

(b) The non-availability of medium term open access for 25 MW power amounts to a force majeure condition and is covered under Section 56 of the Indian Contract Act, 1872 which deals with the impossibility of performance of the contract. In terms of the said provision, the contract becomes void the moment its performance becomes impossible. In the present case when PGCIL/WRLDC rejected the application for medium term open access for the reasons of transmission constraints, the Agreement dated 18.12.2012 became void. Consequently, the Petitioner ought not to be put to loss or prejudice on account of its inability to perform its obligations under the PPA with the Respondent.

(c) The Petitioner represented to the Respondent vide its letter dated 9.5.2013 about the non-availability of the medium term open access for 25 MW power and the inability of the Petitioner to perform its obligations under the agreement dated 18.12.2012 for drawal of electricity through medium-term open access. The Respondent did not accept the representations and contentions of the Petitioner and proceeded to raise the bills of capacity charges on the Petitioner for payment of tariff.

(d) 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 which are not attributable to and beyond the control of the Petitioner, namely, the non-availability of medium-term open access due to transmission constraints. This is clearly a case of



force majeure and is covered under section 56 of the Indian Contract Act and the Petitioner is entitled to be discharged from its obligation to pay the capacity charges.

8. The Respondent in its reply dated 14.10.2013 submitted as under:

(a) In terms of the provisions of the PPA dated 26.10.2007, namely, 2.2.1 (allocation of capacity), 2.1.6 (diversion of share of bulk power beneficiaries in the event of their inability to utilize their full share), Para VII of Annexure I (deemed generation), clause 2.1.8 (Availability of power from the generating station to be considered as deemed supply of allocated capacity of bulk power beneficiaries irrespective of availability of transmission system), clause 2.3 (drawl of power), clause 5.1 (terms and conditions of supply of energy), clause 6.1(Billing), clause 8.0 (force majeure) read with the 10th Supplementary Agreement dated 18.12.2012, the parties have clearly agreed that whatever is made as availability by the Respondent for delivery at the generation bus bar shall be deemed to be supply of allocated capacity to the Petitioner, notwithstanding that the Petitioner was unable to draw power on account of non-availability of the transmission system. The contract between the Petitioner and the Respondent is for delivery of power at the bus bar and the title to the electricity becomes the property of the Petitioner at the bus bar of the generating station. Any difficulty in the transmission of such electricity from the bus bar to the destination of the Petitioner is a matter of post-delivery of the contracted power by the Respondent and the transmission constraints is entirely to the account of the Petitioner. The Petitioner having agreed to pay for the declared capacity available, the Petitioner is liable to pay the



deemed generation to the Respondent for the declared capacity in terms of Clause 2.1.6 read with para 8 of Annexure-I to the PPA.

(b) The provisions of force majeure contained in Clause 8 of the Power Purchase Agreement will have no application as there is no force majeure reason for delivery of power at the generation bus bar of the generating station beyond which it is the responsibility of the Petitioner to arrange for the transmission of power. Further the Respondent is not claiming any loss or damages arising out of non-performance of the obligations under the PPA but is merely claiming consideration of the capacity charges payment in the event of deemed generation or in the event of deemed supply of allocated capacity. In this connection, the Respondent has relied upon the judgment dated 9.4.2009 of the Hon'ble Delhi High Court in CS (OS) 597A/2002 (Jyoti Limited Vs. EIH Limited).

(c) The Petitioner did not inform the Respondent about the non-availability of MTOA at a time when the duration of supply of 65.5 MW was to commence and had only scheduled energy to the extent of 40.5 MW for which MTOA was available. The Petitioner raised the issue of capacity charges only when the bills were raised during the month of April 2013. If the Petitioner considered non-availability of MTOA was a force majeure event within the meaning of clause 8 of the PPA, it would have duly given a notice at the time when the MTOA was not granted to the Petitioner. The Petitioner is obliged to pay the capacity charges in respect of 25 MW of the contracted capacity for the period from 1.4.2013 to 31.3.2014 irrespective of the non-availability of MTOA.

(d) In compliance with the directions of the Commission, the Respondent has placed on record for the period 1.4.2013 to 30.9.2013 (i) the declared availability of the generating station; (ii) capacity declared available by the Respondent against the allocated capacity of the Petitioner; (iii) schedule given by all the beneficiaries; (iv) schedule given by the Petitioner; and (v) actual generation by the Respondent. The Respondent has submitted that as against the capacity declared available to the Petitioner, the scheduled energy is less. The difference is the capacity which the Respondent was in a position to generate (its machines were available for generation) but on account of the schedule being not available from the Petitioner, there was no actual generation. The capacity charges are payable for the above difference between the capacity declared available to the Petitioner and the capacity scheduled by the Petitioner in terms of clause 2.1.1 read with Annexure-I of Clause 8(viii) and clause 2.1.8 of the PPA. The quantum of power made available to the Petitioner was not sold to any other person.

9. The Petitioner in its affidavit dated 27.1.2014 has submitted that it had not received any reply from the Respondent to the Petition and therefore, it could not file any rejoinder. However, the Petitioner through the said affidavit sought to clarify certain issues raised during the hearing on 1.10.2013. The Petitioner has sought to clarify the following issues:

(a) As regards the notice which was required to be given in terms of Note 2 of clause 2.1, the Petitioner has submitted that its case was that the PPA was frustrated right from the beginning when the open access was denied to

the Petitioner and hence notice for review/withdrawal of temporary allocation was not required to be given under the frustrated PPA.

(b) The Petitioner had sent a letter dated 9.5.2013 and therefore, in terms of Note 2 Clause 2.1, the Respondent ought to have withdrawn the allocation at least one month from 9.5.2013. Pursuant to the hearing on 1.10.2013 wherein the Respondent submitted that one month's notice was not specifically given, the Petitioner sent a communication dated 11.10.2013 to the Respondent calling for withdrawal of the allocation in terms of Note 2 of Clause 2.1 of the Agreement dated 18.12.2012.

(c) As regards scheduling of power through short term open access, the Petitioner has submitted that the Petitioner on 21.10.2013 applied for short term open access from WRLDC for the capacity of 25 MW which was rejected by WRLDC on 23.10.2013.

10. The Petitioner filed Appeal No.92 of 2014 against the Commission's order dated 3.2.2014 in the present petition. In the appeal, it was argued that the reply dated 14.10.2013 by the Respondent was not served on the Petitioner (Appellant in the Appeal) and therefore, the Petitioner was not given opportunity to file the rejoinder. The other point of argument was that the affidavit dated 27.1.2014 was not taken on record and the Commission had erroneously come to the conclusion on the factual and legal aspect of the matter. The Appellate Tribunal after considering the submissions of the Petitioner and Respondent has remanded the matter to the Commission to reconsider the matter afresh and pass appropriate order in

accordance with law after offering reasonable opportunity of hearing to the Petitioner the Petition.

11. The matter was listed for hearing on 16.1.2018. The Commission issued notice to the parties to file their written submissions and posted the matter for hearing on 14.3.2018. The Respondent and the Petitioner filed their written submissions vide affidavit dated 22.2.2018 and 23.3.2018. The matter was extensively heard on 14.3.2018 and the arguments of the parties have been recorded in the Record of Proceedings of the said date. The parties were directed to file their written submissions of the arguments made. The Petitioner and Respondents have filed their written submissions on 23.3.2018 and 27.3.2018 respectively. The Petition was further heard on 7.8.2018 since one of the Members who heard the Petition demitted office before issue of order.

12. Briefly, the contentions of the Petitioner regarding non-entitlement of the Respondent to recover the capacity charges for 25 MW are as under:

(a) The responsibility for applying and obtaining the MTOA was that of the Petitioner. Since the MTOA being refused was a circumstance beyond the control of the Petitioner, its case is covered under force majeure clause under PPA which covers “any other reason beyond the control of the concerned party”. The concept of force majeure applies when there is a contractual obligation on a party which the party is unable to fulfill for reasons beyond its control.

(b) A force majeure event because of which the Petitioner is unable to draw electricity is covered under clause (viii)(b) of Annexure I to the PPA which provides as under:

“(viii) Deemed generation means for any period the quantum of energy which NSPCL was in a position to generate during such period, but could not generate, as a result of:

(b) any failure on the part of Bulk Power Beneficiaries to draw/purchase energy, except for the failure occasioned due to Force Majeure condition and/or”.

Therefore, the specific circumstances where the beneficiary is unable to draw or purchase electricity due to force majeure conditions disentitles the Respondent for claiming deemed generation and consequently capacity charges.

(c) The refusal of the MTOA is available on the website of WRLDC and the Respondent was aware of the same. The Petitioner had also informed the Respondent about the same vide its letter dated 9.5.2013. Further, in the Agenda item for WRPC meeting on 29.5.2013, it has been recorded that “NSPCL vide letter No. 01:CP&C:103 dtd 20.05.2013 (copy enclosed at Annex-SA-6.1) have requested that 25 MW capacity of NSPCL is remaining idle and not getting scheduled to DNH as a result of non-granting of MTOA of 25 MW capacity to UT DNH”. Therefore, Respondent cannot plead that it was not aware of the refusal to grant MTOA to the Petitioner and consequently the Petitioner not being in a position to off-take electricity.

13. The Respondent in its written submission has opposed the claims of the Petitioner on the following grounds:

(a) Clause 2.1.1 of the 10th Supplementary Amendment dated 18.12.2012 specifically provided that it shall be the responsibility of the Petitioner to obtain MTOA from the concerned agency for drawal of 25 MW. The responsibility of

making the arrangement for transmission electricity from the bus bar of the generating station to the destination at DNH is entirely that of the Petitioner.

(b) The capacity declared by the Respondent is deemed to have been made available at the bus bar of the generating station under clause 21(1) of 2009 Tariff Regulations and clause 2.1.8 of the PPA. Further, the Petitioner has specifically agreed in clause 2.1.8 of the PPA dated 26.10.2007 to pay for the capacity charge irrespective of the availability of the transmission system. The Respondent's obligations are fulfilled by offering the delivery of power at the bus bar and once the same is done, the Petitioner is liable to pay the capacity charges.

(c) The provisions of force majeure contained in clause 8 of the PPA will have no application to the liability to pay the capacity charges in view of the specific and express clauses in the PPA. There is a difference between the wordings of 9th and 10th Supplementary Agreements which establishes that the benefit of force majeure cannot be taken. Further, the Petitioner has never agitated the issue of non-availability of MTOA as a force majeure event under clause 8 of the PPA and in any event, the Petitioner has not given notice regarding force majeure in terms of the Clause 8 of the PPA which is a pre-condition for claiming relief under the said provision.

(d) The letter dated 11.10.2013 alleged to have been sent by the Petitioner was not received by the Respondent who has specifically denied the receipt of the said letter.

(e) The only exit route provided in the Supplementary PPA between the parties is in terms of Note 2 to the Amended clause 2.1.1 and the same was not adopted by the Petitioner till February 2014. When a specific notice was sent on 7.2.2014 in terms of Note 2, the allocation in terms of the 10th Supplementary PPA came to an end in March 2014 and there was no claim for capacity charges by the Respondent thereafter.

14. The Petitioner has refuted the objections of the Respondent as under:

(a) The PPA in question is for temporary allocation of power which happens from time to time. The PPA specifically provides that MTOA shall be obtained by the Petitioner. If the obligation is not fulfilled for reasons beyond the control of the Petitioner, that situation would be covered under force majeure. The interpretation of the Respondent regarding non-applicability of force majeure clause for non-availability of MTOA would render the force majeure clause redundant, otiose and inapplicable qua the Petitioner.

(b) Clause 2.1.8 of the PPA is applicable for firm allocation of power for which the Commission's regulations provide for long term access. Only with regard to such firm allocation, the non-availability of transmission system may result in deemed supply based on availability. However, the Supplementary PPAs including 10th Supplementary PPA are for temporary allocation of power available with the Respondent from time to time. Since the temporary allocation requires medium term or short term open access, PPA provides for the obligation to obtain open access on the Petitioner. If the obligations are not fulfilled for reasons beyond the control of the Petitioner, then the parties can take recourse to the force majeure clause in the PPA.

(c) As regards the difference in wordings between the 9th Supplementary Agreement (where allocation is made subject to obtaining MTOA) and 10th Supplementary Agreement (where it is the responsibility of the Petitioner to obtain the MTOA), the Petitioner has submitted that while in the first case, the PPA does not become valid and binding unless the MTOA is obtained, in the second case, it is the contractual obligation of the Petitioner to obtain MTOA and if the contractual obligation is not fulfilled by the Petitioner for reasons attributable to the Petitioner, then no relief is available to the Petitioner. However, if the contractual obligation is not fulfilled for reasons beyond the control of the Petitioner, then the Petitioner can claim benefit of force majeure under the PPA.

(d) As regards the contention of the Respondent that there was no written communication and notice of force majeure, the Petitioner has submitted that it is an undisputed fact that there was no open access available to the Petitioner for drawal of power. The purpose of the written notice is to enable the other party to become aware of the factual position and to verify the facts. The Respondent had knowledge of the denial of open access which the Respondent raised in the WRPC meeting. It is therefore hyper-technical to contend that even though there was knowledge, since written notice was not given which is procedural, the substantive relief cannot be granted. The Petitioner on 9.5.2013 gave a specific communication in writing about the non-availability of open access and therefore, at least from 9.5.2013, the contention of the Petitioner regarding notice does not survive. After getting the letter dated 9.5.2013, the Respondent could have levied the capacity charges

for one month from 9.5.2013 (even assuming that there was no force majeure condition).

Analysis and Decision

15. In the light of the submission of parties through written pleadings and oral submissions during hearing, the following issues arise for our consideration:

(a) **Issue No. 1:** Whether non-grant of MTOA to the Petitioner is a force majeure event in terms of the PPA?

(b) **Issue No. 2:** Whether the Petitioner is liable to pay the capacity charges for additional 25 MW contracted under the Supplementary Agreement dated 18.12.2012 and if so, for which period?

Issue No.1: Whether non-grant of MTOA to the Petitioner is force majeure event?

16. The Petitioner is a beneficiary of firm power of 100 MW from Unit 2 of the generation project of the Respondent for which the Petitioner has entered into a Power Purchase Agreement dated 26.10.2007. Firm power allocation of 100 MW is scheduled through long term access obtained by the Petitioner from CTU. On account of non-utilisation of its generation capacity meant for captive consumption, the Respondent offered to sell 65.5 MW power to the Petitioner on medium term which was accepted by the Petitioner. Two Supplementary Agreements, 9th Agreement dated 10.10.2012 and 10th Amendment dated 18.12.2012 were entered into between the Petitioner and Respondent for supply of 40.5 MW and 25 MW respectively for the period from 1.3.2013 to 31.5.2014. While the Petitioner was granted MTOA for 40.5 MW from CTU, its application dated 17.12.2012 for MTOA for 25 MW was rejected by CTU in December 2012 on account of constraints in

transmission system in the region and non-availability of the transmission lines. Scheduling of power started from April 2013 and the Petitioner could not schedule 25 MW power on account of non-availability of MTOA. The Respondent raised the invoice dated 9.5.2013 for the month of April 2013 which included the capacity charge for 25 MW. The Petitioner took up the matter with the Respondent vide its letter dated 9.5.2013 which is extracted as under:

“.....Based on the supplementary agreement signed by NSPCL and DNHPDCL as on 18.12.2012, DNHPDCL approached PGCIL for MTOA approval for wheeling of 25 MW as on 22.12.2012 vide letter No. 7-8 (21)/ELE/2002/Part-III/4207 to supply 25 MW power from 1.4.2013. However, the same has not been granted. In absence of open access of 25 MW, the NSPCL generator has not been granted. In absence of open access of 25 MW, the NSPCL generator has not scheduled for supply of 25 MW to DNHPDCL for the full month of April 2013. Hence, DNHPDCL is not liable to pay capacity charges for the 25 MW.

The bill raised by M/s NSPCL, Bhilai for the month of April 2013 includes the capacity charges for 165.5 MW. In absence of open access of 25 MW, the capacity charges should be charges only for 140.5 MW. In this regard, you are requested to refund the surplus payment amount of Rs. 2,10,19,105 (Rupees Two Crore ten lakh nineteen thousand one hundred five only) at the earliest and account capacity charges only for 140.5 MW in subsequent bills until open access for 25 MW is granted. ”

The Respondent, vide its letter dated 24.5.2013, rejected the request of the Petitioner as under:

“This has reference to your letter No.7-8(21)/ELE/2003/Part-III/327 dated 9.5.2013 on the above subject. In this regard, we would like to clarify that Capacity Charges are payable by the beneficiaries based on the total capacity allocated from the Generating Station and not on the energy scheduled by the beneficiaries, as mentioned in your letter.

In this connection, we are reproducing Clause No. 21(1) of CERC (Terms and Conditions of Tariff) Regulations, 2009 as under:

“The fixed cost of a thermal generating station shall be computed on annual basis, based on norms specified under these regulations, and recovered on monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share/allocation in the capacity of the generating station.”



In terms of clause 2.1 of the PPA signed between NSPCL and DNHPDCL on 26.10.07, capacity allocation by NSPCL to Beneficiaries are at 400 KV bus bar of generating station and as per clause 2.3 and 3.0 of above PPA, the responsibility for the drawal of the same is of the beneficiaries.

Further, as per the Tenth Supplementary PPA signed between DNHPDCL (erstwhile UT DNH) and NSPCL on 18.12.12, total capacity allocated to DNHPDCL from Bhilai Expansion Power Plant (2X250MW) w.e.f. 1.4.13 to 31.3.14 is 165.5 MW (100 MW-Firm & 65.5 MW-Temporary). Further, Note-1 mentioned at page no. 3 of above PPA provides as under:

“UT Dadra & Nagar Haveli will obtain Medium Term Open Access from the agency for drawal of above capacity from the Bhilai Project.”

Thus, you will appreciate that as per the provision of above PPA signed between NSPCL & DNHPDCL, it is the responsibility of DNHPDCL to obtain MTOA from the concerned agency (CTU).

Accordingly, NSPCL has raised Bills of Rs. 21,84,36,470/- including Capacity Charges of Rs. 13,91,46,475/- vide Energy Bill dated 4.5.2013 in line with above provisions of CERC Regulations and PPA entered between DNHPDCL and NSPCL.

In view of above, your request for refund of surplus amount of Rs. 2,10,19,105/- by NSPCL to DNHPDCL is not tenable and hence not acceptable to NSPCL. Further, we would request DNHPDCL to obtain MTOA for 25 MW for the period 1.4.2013 to 31.5.2014 from CTU urgently, as DNHPDCL is liable to pay the capacity charges for this 25 MW capacity also.”

”

17. Aggrieved by the rejection of its request, the present petition was filed by the Petitioner on 18.7.2013. The Petitioner has submitted that as per the provisions of the PPA, it was the responsibility of the Petitioner to apply for MTOA for 25 MW. Since MTOA was not available due to transmission constraints, its case is covered under force majeure in terms of clause 8 read with para (viii)(b) of the Annexure I to the PPA. Since the failure on the part of the Petitioner to draw the power is occasioned on account of force majeure event, such non-drawal of power shall not be considered as deemed generation and the Petitioner shall not be held liable for payment of transmission charges. On the other hand, the Respondent has submitted that in terms of various provisions of the PPA (clauses 2.2.1, 2.1.6, 2.1.8, clause 2.3,



clause 5.1, clause 6.1, clause 8.0 and Para VII of Annexure I of the PPA dated 26.10.2017) read with 10th Supplementary Agreement dated 18.12.2012, whatever power is made available by the Respondent at the generation bus bar shall be deemed to be supply of allocated capacity to the Petitioner and notwithstanding the inability of the Petitioner to draw power on account of non-availability of the transmission system, the Petitioner is liable to pay the capacity charges. The Respondent has further submitted that denial of MTOA to the Petitioner cannot be considered as a force majeure event and therefore, non-drawal of 25 MW power by the Petitioner on account of non-availability of the MTOA will amount to deemed generation and the Respondent is entitled for capacity charges for such deemed generation.

18. We have considered the submissions of the Petitioner and the Respondent. The provisions of the PPA dated 26.10.2007 relied upon by the Petitioner and Respondent are extracted as under:

(a) Clause 2.1 of the PPA dated 26.10.2007

"2.1 The allocation of capacity from Bhilai Project to UT Dadra & Nagar Haveli based on their confirmation is as under:

(b) Clause 2.1.6 of the PPA dated 26.10.2007

"2.1.6 Notwithstanding the obligations of Bulk Power Beneficiary(ies) to pay all the dues as per this Agreement including deemed generation as per para(viii) of Annexure-I, NSPCL shall be entitled to divert the share(s) of any Bulk Power beneficiary(ies) to other Bulk power Beneficiaries, in the event of their inability to utilize their full share of power which could be generated by NSPCL at Bhilai Project in accordance with the guidelines of CERC/GOI/other competent authority from time to time including sharing of capacity charges/making timely payment of NSPCL dues. In such a case, Bulk Power Beneficiary(ies) will facilitate supply of power to other Bulk Power Beneficiary(ies) by wheeling such power on their transmission system subject to the availability of transmission system and further subject to payment of wheeling charges as may be applicable. The total charges of Bhilai Project will be payable by Bulk Power Beneficiaries."

(c) Para (viii) of Annexure 1 to the PPA dated 26.10.2007

"(viii) Deemed Generation means for any period the quantum of energy which NSPCL was in a position to generate during such period, but could not generate, as a direct result of:

(a) any direction, issued by WREB/Regional Power Committee/WRLDC/Bulk Power Beneficiary(ies) to reduce or restrict generation for any reason whatsoever, and/or

(b) any failure on the part of Bulk Power Beneficiaries to draw/purchase energy, except the failure occasioned due to Force Majeure condition and/or".

(c) Clause 2.1.8 of the PPA dated 26.10.2007

"2.1.8 Availability of power from the generating station at its 400 KV Bus bar shall be deemed to be supply of allocated capacity to Bulk power Beneficiaries irrespective of availability of transmission system."

(e) Clause 2.3 of the PPA dated 26.10.2007

"2.3 Drawal of Power

The power from the Generating Station shall be drawn by the Bulk Power Beneficiaries directly and/or by method of displacement. Bulk Power Beneficiary(ies) shall draw their share of power from 400 KV busbars of Bhilai Project. For accounting purpose, the power will be deemed to have been delivered at 400 KV bus bar."

(f) Clause 3 of the PPA dated 26.10.2007

"The evacuation of power from Generating Station to Bulk Power beneficiaries through the transmission system/transmission access will be as allowed/implemented by CTU/STU and/or other Agency(ies)/NSPCL's Bulk Power beneficiaries shall enter into Bulk Power Transmission Utility and other Agency(ies)/NSPCL as the case may be for payment of transmission and other charges as applicable for their service which will be settled and paid directly by Bulk Power beneficiaries to the concerned transmission agencies."

(g) Clause 5.1 of the PPA dated 26.10.2007

"5.1 Terms and Conditions:

The tariff and terms & conditions for the energy to be supplied by NSPCL from Bhilai Project shall be determined/approved by CERC/other competent authority from time to time under the Electricity Act, 2003 or any other Act/Rules/Regulations as may be enacted by Govt. of India in this connection. It is further agreed that tariff for Bhilai Project shall be worked out specifically taking into account tariff norms/guidelines enclosed at Annexure-I of this Power Purchase Agreement. Other terms & conditions and parameters not included in this Annexure-I shall be adopted based on tariff norms/guidelines as notified by the Commission/ Govt, of India."



19. The 10th Supplementary Agreement dated 18.12.2012 modified clause 2.1.1 of the PPA dated 26.10.2007 regarding allocation of power by including temporary allocation of 25 MW from the generating station of the Respondent to the Petitioner. After the 10th Supplementary Agreement, the arrangement between the parties for sale of power as per the amended Clause 2.1 of the PPA was as under:

“The allocation of capacity from Bhilai Project to UT Dadra & Nagar Haveli based on their confirmation is as under:

During the operation of Unit-I and Unit-II

Period	Unit-I (MW)	Unit-II (MW)	Total (MW)
From 1.4.2013 (00:00 hrs) to 31.3.2014 (24:00 hrs)	30.5 (temporary)	100 (firm) + 35 (temporary) = 135	165.5
From 1.4.2014 (00:00 hrs) to 31.5.2014 (24:00 hrs)	30.5 (temporary)	100 (firm) + 33.5 (temporary) = 133.5	164

During outage of Unit-II

Period	Unit-I (MW)	Unit-II (MW)	Total (MW)
From 1.4.2013 (00:00 hrs) to 31.3.2014 (24:00 hrs)	50 (firm)	0	50
From 1.4.2014 (00:00 hrs) to 31.5.2014 (24:00 hrs)	50 (firm)	0	50

During outage of Unit –I

Period	Unit-I (MW)	Unit-II (MW)	Total (MW)
From 1.4.2013 (00:00 hrs) to 31.3.2014 (24:00 hrs)	0	100 (firm) + 35 (temporary) = 135	135
From 1.4.2014 (00:00 hrs) to 31.5.2014 (24:00 hrs)	0	100 (firm) + 20.5 (temporary) = 120.5	120.5

Note:

1. UT Dadra & Nagar Haveli will obtain Medium Term Open Access from the concerned agency for drawal of the above capacity from the Billai Project.
2. Temporary power allocation made to UT Dadra & Nagar Haveli would be reviewed/withdrawn after giving one month notice.”

All other clauses of the Power Purchase Agreement signed between NSPCL and UT Dadra Et Nagar Haveli on 26th October, 2007 read with First Supplementary PPA signed on 6th January, 2009. Second Supplementary PPA signed on 29th December, 2009. Third Supplementary PPA signed on 13th May, 2010, Fourth Supplementary PPA signed on 25th August, 2010, Fifth Supplementary PPA signed on 2nd November, 2010, Sixth Supplementary PPA signed on 31st December, 2010, Seventh Supplementary PPA signed on 24th March, 2011, Eighth Supplementary PPA signed on 30th May 2011 and Ninth Supplementary PPA signed on 10th October 2012, would remain unchanged.”

20. According to the above provisions, all other clauses of the PPA dated 26.10.2007 and the provisions of all Supplementary PPAs upto 9th Supplementary Agreement would remain unchanged which means that even for the temporary allocation under 10th Supplementary Agreement, the provisions of the original PPA alongwith amendments would be applicable, except to the extent covered under Note 3 and 4 as extracted above i.e. it is the responsibility of the Petitioner to arrange for MTOA for drawal of power from the bus bar of the generating station and temporary power allocation would be reviewed or withdrawn with one month's notice.

21. As per the provisions of the PPA dated 26.10.2007 as quoted in para 18 above, the allocation of power from the generating station of the Respondent to the Petitioner has been made in terms of Clause 2.1 of the PPA. Originally, the allocation was made for 100 MW which was modified to 140.5 MW under the 9th Supplementary Agreement and to 165.5 MW under 10th Supplementary Agreement. Evacuation of power from the generating station of the Respondent shall be through the transmission systems of CTU/STU for which the Bulk Power Beneficiary i.e. the Petitioner shall be required to enter into Bulk Power Transfer Agreement and pay the

transmission charges. Under clause 2.1.3, the Bulk Power Beneficiary shall draw its share of power from the 400 kV bus bars of the generating station of the respondent. Thus, it is the responsibility of the Petitioner to take delivery of power from the bus bar of the generating station under its own arrangement. Under clause 2.1.8, availability of power from the generating station at its 400 KV Bus bar shall be deemed to be supply of allocated capacity to Bulk Power Beneficiaries irrespective of availability of transmission system. In other words, once the declaration of availability is made by the Respondent, it shall be termed as deemed supply of electricity even if the Petitioner is unable to off-take the power on account of non-availability of the transmission system. Para (viii) of Annexure 1 to the PPA defines deemed generation as the quantum of energy for any period which NSPCL was in a position to generate during such period, but could not generate, as a direct result of (a) directions issued by WRPC/WRLDC/Bulk Power Beneficiaries or (b) failure on the part of the Bulk Power Beneficiaries to draw/purchase energy. As per Clause 2.1.6, the Petitioner has the liability to pay for the deemed generation even if the Respondent diverts its share of power to other beneficiary in the event of the inability of the Petitioner to utilize its full share of power.

22. From the above discussion, it clearly emerges that once the Respondent declares availability of its generation capacity in accordance with the PPA signed with the Petitioner and makes the power available at its 400 kV bus bar, it is treated as deemed supply irrespective of whether the Petitioner off-takes power from the bus bar or not. Further, if NSPCL is in a position to generate specified quantum of power but is prevented from generating on account of the failure on the part of the Petitioner to evacuate power from the bus bar, the corresponding quantum of power would be treated as deemed generation and the Petitioner would be liable to pay the

charges for such deemed generation. The only exception to such deemed generation is if the Petitioner's failure to draw power is occasioned by force majeure condition. Clause 8 of the PPA dated 26.10.2007 defines the force majeure as under:

"8. 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."

23. Perusal of the above provisions reveals that the following conditions are required to be fulfilled to claim relief for force majeure under the PPA:

- (a) 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.
- (b) Force majeure events refer to 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.
- (c) Any party claiming the benefit of force majeure 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.
- (d) 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.

24. The Petitioner has claimed that it is affected by force majeure on account of non-availability of MTOA for 25 MW which is beyond its control. As per the clause 8



of the PPA, the party claiming force majeure has to reasonably satisfy the other party about the existence of force majeure and give a written notice to the other party to that effect. Clause 10.0 of the PPA dated 26.10.2007 deals with notice. The said clause is extracted as under:

10.0 NOTICE:

"All notices required or referred to under this Agreement shall be in writing and signed by the respective authorised signatories of the parties mentioned herein above, unless otherwise notified. Each such notice shall be deemed to have been duly given if delivered or served by registered mail/speed post of Department of Posts with an acknowledgment due to the other parties in terms of Clause 9.0 above."

Thus, as per the PPA, notice has to be given in writing by the authorized signatory. The Respondent has submitted that the Petitioner has not given any notice nor has raised the occurrence of force majeure on account of non-grant of MTOA prior to approaching the Commission. The Petitioner has submitted that even though there was no communication by the Petitioner specifically, the Respondent was aware of the force majeure event and had raised the issue in the Regional Committee meeting. The Petitioner has submitted that in the light of the legal position decided in Calcutta Port Trust v. Anadi Kumar Das, [(2014) 3 SCC 617] and Mohendra Nath Das v. Mohi Lal Koley, [AIR 1918 Cal 529], the purpose of written notice is to enable the other party to become aware of the factual position and to verify the facts and absence of written notice which is procedural cannot be used to defeat the substantive relief under the PPA. Learned counsel for the Petitioner submitted during the hearing that the Petitioner on 9.5.2013 gave a specific communication in writing that open access was not available.

25. We have noted that the Petitioner made an application dated 17.12.2012 to CTU for grant of MTOA for 25 MW for supply of power for the period 1.4.2013



onwards. CTU during December 2012 rejected the application of the Petitioner for MTOA on account of transmission constraint. The Petitioner is well aware that in the absence of MTOA, it would not be able to draw power and the 10th Supplementary Agreement for temporary allocation of 25 MW cannot be given effect to. The Petitioner should have given a notice under clause 8 about the non-grant of MTOA to the Respondent. No such notice was given which goes to show that the Petitioner at that point of time did not consider non-grant of MTOA as an event of force majeure in terms of clause 8 of the PPA or did not intend to invoke the said clause. Hon'ble Supreme Court in Rajasthan State Industrial Development and Investment Corp. v. Diamond and Gem Development Corp. Ltd. {(2013) 5 SCC 470}, Hon'ble Supreme Court has observed about the interpretation of contract as under:

“IV. Interpretation of the terms of contract :

23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.”

In the light of the legal position with regard to the interpretation of contract as noted above, we are of the view that since clause 8 of the PPA provides for written notice about the occurrence of force majeure event, the affected party claiming the benefit of force majeure is contractually obliged to give a notice about the same within a reasonable period. This requirement has not been complied with in the present case. The Petitioner has submitted that in its letter dated 9.5.2013, the Petitioner intimated about the non-availability of MTOA and therefore, the hyper technical contention of the Respondent does not survive. We have quoted the contents of the letter dated



9.5.2013 in para 16 of this order. In the said letter, the Petitioner has mentioned that “in absence of open access of 25 MW, NSPCL generator has not scheduled for supply of 25 MW to DNHPDCL for the full month of April 2013. Hence DNHPDCL is not liable to pay capacity charges for 25 MW.... In the absence of open access for 25 MW, the capacity charges should be only for 140.5 MW....” Thus, the said letter neither gives any reference to clause 8 of the PPA nor force majeure on account of non-availability of MTOA has been claimed. In our view, the Petitioner has not complied with the requirement of notice for force majeure in terms of clause 8 of the PPA.

26. Next question is whether the non-grant of MTOA is a force majeure event in terms of Clause 8 of the PPA. Clause 8 states that 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 which include 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. The Petitioner has submitted that non-grant of MTOA is for reason beyond the control of the Petitioner and hence, the Petitioner is affected by force majeure. Let us first consider the provisions relating to MTOA in the PPA between the Petitioner and Respondent. The Petitioner was made a temporary allocation of 40.5 MW and 25 MW vide 9th and 10th Supplementary Agreements respectively. The Note under 9th Supplementary Agreement provides as under:

“Note:

1. The above Temporary power allocation to UT Dadra & Nagar Haveli is subject to obtaining Medium Term Open Access from the concerned agency by UT Dadra & Nagar Haveli.”

The Note under 10th Supplementary Agreement provides as under:

“Note:



3. UT Dadra & Nagar Haveli will obtain Medium Term Open Access from the concerned agency for drawal of the above capacity from the Billai Project.”

It is noticed that the 9th Supplementary Agreement is subject to obtaining Medium Term Open Access from concerned agency by UT Dadra & Nagar Haveli which means that unless and until the MTOA is obtained, the Agreement does not become valid and binding on the parties. Therefore, obtaining of MTOA is one of the conditions precedent for the Agreement to become valid and binding. On the other hand, 10th Supplementary Agreement vests a contractual obligation on the Petitioner to obtain MTOA, and if the said contractual obligation is not fulfilled, the Petitioner cannot draw the contracted power. The consequence in terms of the provisions of the PPA, particularly clause 2.1.8, regarding deemed availability of power from the generating station shall follow for non-drawal of power on account of failure to obtain the MTOA. Thus, the Petitioner has agreed to the 10th Supplementary Agreement with specific stipulation regarding its liability to get MTOA, which is in deviation of the condition in 9th Supplementary Agreement. It is a common knowledge in the power sector that no system strengthening is carried out for MTOA and MTOA is granted against the margin available in the existing transmission system or transmission system under execution. Therefore, the Petitioner's acceptance of the obligation to obtain the MTOA with the full knowledge that grant of MTOA is subject to availability of spare capacity and having chosen to retain all other provisions of the PPA dated 20.10.2007 including Article 2.1.8 make it abundantly clear that the Petitioner was aware of the consequence of non-grant of MTOA. Therefore, non-grant of MTOA to the Petitioner for 25 MW cannot be considered to be reason beyond the control of the Petitioner.

27. It is further noticed that under the PPA dated 26.10.2007, the liability of the Respondent is to make the power available at the 400 kV Bus bar and it is the responsibility of the Petitioner to arrange for evacuation of power from the bus bar. Clause 2.1.8 says that “the availability of power from the generating station at its 400 kV Bus bar shall be deemed to be supply of allocated capacity to the Bulk Power Beneficiaries irrespective of the availability of transmission system”. In other words, the sale of power takes place at the Bus bar of the generating station irrespective of whether the said power is evacuated by the Petitioner or not. After the title on power for the contracted capacity passes on to the Petitioner at the Bus bar of the generating station, any difficulty in transmission of electricity is entirely to the account of the Petitioner and cannot be covered under force majeure.

28. It is pertinent to mention that 10th Supplementary Agreement provides that “temporary power allocation made to UT Dadra & Nagar Haveli would be reviewed/ withdrawn after giving one month notice.” Thus, the parties have agreed in the 10th Supplementary Agreement to review or withdraw the said temporary allocation of power with one month’s notice. The said provision clearly provided a safety valve to the Petitioner to be relieved from the obligation for drawal of power on account of temporary allocation with one month’s notice. Though the Petitioner was informed about the non-grant of MTOA due to transmission constraints by CTU in December 2012, i.e. more than three months before the scheduled start of MTOA, the Petitioner did not take any steps in terms of Note 4 in the 10th Supplementary Agreement for review or withdrawal of temporary allocation of 25 MW power on account of non-grant of MTOA. The Petitioner had the opportunity and time to come out of the temporary allocation before the scheduled date of scheduling but chose to retain the

10th Supplementary Agreement despite non-availability of MTOA. In our view, non-availability of MTOA cannot be considered as the reason beyond the control of the Petitioner and therefore, the Petitioner is not entitled for the benefit of force majeure in terms of the PPA dated 26.10.2007 read with the 10th Supplementary Agreement.

Issue No. 2: Whether the Petitioner is liable to pay the capacity charges for additional 25 MW contracted under the Supplementary Agreement dated 18.12.2012?

29. The scheduled date of supply of 25 MW power was 1.4.2013. As already stated, the Petitioner could not draw the power due to non-availability of MTOA. At the same time, the Petitioner did not inform the Respondent about non-grant of MTOA. The Respondent raised the bill for capacity charges for the month of April 2013 in the month of May 2013. The Petitioner vide its letter dated 9.5.2013 wrote to the Respondent that on account of non-grant of MTOA, the Respondent has not scheduled 25 MW of power to the Petitioner and sought refund of capacity charges. The Respondent in its reply dated 24.5.2013 replied that in terms of Regulation 21(1) of the 2009 Tariff Regulations, 2.1.8 of the PPA dated 26.10.2007 and the provisions of 10th Supplementary PPA informed the Petitioner, bill for capacity charge has been raised since it is the responsibility of the Petitioner to arrange for MTOA.

30. The Petitioner has submitted that the provisions of deemed generation or deemed supply is applicable in case of firm allocation for which regulations of the Commission provide for firm allocation to the beneficiaries. However, the PPA in question (10th Supplementary Agreement) pertains to temporary allocation of surplus power for which MTOA or STOA are required for evacuation of such power. Therefore, the PPA specifically provides for the obligations to obtain open access on

the Petitioner. If the obligation is not fulfilled on account of non-availability of MTOA which is beyond the control of the Petitioner, the Petitioner has argued that the protection under the force majeure clause is available to the Petitioner.

31. We have considered the submissions of the parties. 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.” Bus-bar 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 bus-bar.” Therefore, under the PPA, the obligation of the Respondent to supply power gets fulfilled when the quantum is declared available at the bus-bar, namely to the extent of the capacity made available at the outgoing feeders irrespective of whether it is under the firm allocation or the temporary allocations made from time to time. In other words, as agreed to by the parties, drawal of power by the Petitioner is not a condition precedent for supply of power. Further, as per Para (viii) of Annexure 1 of the PPA dated 26.10.2007 provides that deemed generation for any period means the quantum of energy which NSPCL was in a position to generate during such period but could not generate as a direct result of failure on the part of Bulk Power Beneficiary to draw or purchase energy except for the failure occasioned due to force majeure condition. We have already come to the conclusion that non-grant of MTOA is not a force majeure condition. However, as per para (viii) of Annexure 1 of the PPA, where the Respondent is in a position to generate but cannot generate on account failure on the part of the Petitioner to draw/purchase energy, generation



equivalent to such capacity shall be treated as deemed generation. Accordingly, the Petitioner has the liability to pay the capacity charges for the period of deemed generation from 1.3.2013 till the 6.3.2014 pursuant to a notice dated 7.2.2014 in terms of Note of 10th Supplementary PPA.

32. In view of the above discussion, we conclude that non-grant of MTOA to the Petitioner for evacuation of 25 MW capacity is not covered under force majeure clause of the PPA. Further, the Respondent was in a position to generate 25 MW capacity in addition to 140.5 MW capacity but could not generate on account of failure of the Petitioner to draw the said capacity on account of non-grant of MTOA. Accordingly, the generation corresponding to the said capacity shall be treated as deemed generation and the Respondent shall be entitled to recover the fixed charges corresponding to the said capacity from 1.3.2013 till 6.3.2014.

33. Petition No.145/MP/2013 is disposed of in terms of the above.

Sd/-
(Dr. M.K.Iyer)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(P. K. Pujari)
Chairperson