

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 109/MP/2022
With IA No. 17/2022**

**Coram:
Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 12th April, 2024

In the matter of:

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 seeking for quashing of the communications containing letters dated 16.12.2020 and 11.2.2022, issued by the Respondents thereby misinterpreting the provision of "Misdeclaration" provided under the Article 11 of the Pilot Agreement for Procurement of Power (PAPP)/ Pilot Power Supply Agreement (PPSA), and accordingly seeking directions upon the said Respondent to refund the amount of Rs. 46.16 lakh already deducted & to not deduct any amount (including Rs. 25.35 crore as indicated in PTC letter dated 11.2.2022) on this account from the monthly energy bills issued / to be issued by the Petitioner along with interest/ carrying cost, and consequent directions to adhere to the provisions of the PAPP/ PPSA in their letter and spirit.

And

In the matter of:

Jindal India Thermal Power Limited,
Habitat India, C-3, Qutub Institutional area,
Katwaria Sarai, New Delhi-110016

...**Petitioner**

Vs.

1. PTC India Limited,
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi-110066

2. Bihar State Power (Holding) Company Limited,
Vidyut Bhawan, Jawahar Lal Nehru Marg,
Patna Bihar-800021

...**Respondents**

The following were present:

Shri Sajjan Poovayya, Sr. Advocate, JITPL
Shri Lakshyajit Singh Bagdwal, Advocate, JITPL
Shri Harshit Singh, Advocate, JITPL

Shri Pulak Srivastava, Advocate, JITPL
Shri Ravi Kishore, Advocate, PTCIL
Shri Keshav Singh, Advocate, PTCIL
Shri Dhruv Tripathi, Advocate, PTCIL
Ms. Anisha Upadhyay, Advocate, BSPHCL
Shri Nishant Kumar, Advocate, BSPHCL

ORDER

Jindal India Thermal Power Limited (hereinafter referred to as the “Petitioner/ JITPL”) has filed the present Petition under Section 79 of the Electricity Act, 2003 (‘the Act’), for quashing the letters dated 16.12.2020 and 11.2.2022, issued by the PTC India Limited (hereinafter “PTC/ Respondent No. 1”) by which it has informed for deducting Rs. 46.16 lakh and further intimated for deducting Rs. 25.35 crores from the monthly energy bills issued by the Petitioner, on an incorrect and complete misinterpretation of “Misdeclaration” provision in terms of Article 11.2.4 of the Pilot Agreement for Procurement of Power (hereinafter referred to as “the PAPP”)/ Pilot Power Supply Agreement (hereinafter referred to as “the PPSA”) dated 26.10.2018 and 29.10.2018, respectively. The Petitioner has made the following prayers:

“(a) Allow the present petition, thereby quashing/ setting aside of the communications/ letters dated 16.12.2020 and 11.02.2022 issued by the Bihar State Power Holding Company Limited and PTC India Limited, respectively, in terms as stated in the present petition;

(b) Hold that there is no Mis-declaration of availability by the Petitioner in terms of Article 11.2.4 of the PAPP/ PPSA, in view of the submissions made in the present petition;

(c) Direct the Respondents to refund the amount which has been illegally deducted/ withheld from the monthly tariff bills of the Petitioner, as detailed in the present Petition, alongwith applicable interest on delayed payment in terms of Article 24 of the PAPP;

(d) Direct the Respondents not to deduct the amounts from the monthly tariff bills based on a wrongful interpretation of ‘Mis-declaration’ provision (Article 11.2.4) of the PAPP/ PPSA as indicated in the letter dated 11.02.2022 vide email dated 11.02.2022 issued by PTC;

(e) Award all litigation cost(s) to the Petitioner;

(f) Pass any other or further orders as this Commission may deem fit in the present facts and circumstances of the case and in the interest of justice.

2. The Petitioner has also filed an Interlocutory Application (IA) No. 17/2022 along with the following prayers:

“(a) Pass an ex-parte ad interim order directing the Respondents not to make any deductions including indicated deduction of Rs. 25.35 crore from the monthly tariff bills of the Applicant, on account of reasons as indicated, or similar to the reasons as stated in the letter dated 11.2.2022 issued by the Respondent No. 1/ PTC vide its email, pending disposal of the present Petition;

(b) Make the ad-interim prayer as per para (a) above absolute after notice to the Respondents, till pending disposal of the present Petition; and

(c) Pass any other or further orders as this Commission may deem fit in the present facts and circumstances of the case and in the interest of justice.”

Submission of the Petitioner

3. The Petitioner has mainly submitted as under:

(a) The Petitioner is a generating company under Section 2(28) of the Act and has set up a 1200 MW (2 X 600 MW) coal-based thermal power plant at District Angul in the State of Odisha.

(b) On 6.4.2018, the Ministry of Power, Government of India introduced a Pilot Scheme for the purpose of facilitating procurement of power of 2500 MW under medium-term open access for a period of 3 years from the generating companies having coal-based thermal power plants. A model Pilot Agreement for Procurement of the Power was also issued by the Ministry of Power. The said scheme was introduced in order to assist the “stressed” power plants on account of the non-availability of long-term PPAs. Vide the said scheme, the tariff of the said generating companies was fixed for a period of three years. The Petitioner was also identified as a stressed asset in terms of the 37th Parliamentary report issued by the Ministry of Power.

(c) On 28.9.2018, in terms of the aforesaid, Respondent No. 2, Bihar State Power (Holding) Company Limited (BSPHCL) granted consent for the procurement of 300 MW power to Respondent No. 1, PTC. Thereafter, under the Pilot Scheme, the Petitioner participated in the bidding process was declared as a successful bidder and was awarded the contract to supply 125 MW power to Respondent No. 2. The Petitioner quoted a tariff of Rs. 4.24/- per unit for the supply of 125 MW power under the relevant provisions of the agreement.

(d) On 26.10.2018, Respondent No. 1, acting as the authorized trader/ aggregator, executed the Pilot Agreement for Procurement of Power (PAPP) with the Petitioner. On 29.10.2018, Respondent No. 1 executed a back-to-back Pilot Power Supply Agreement ('PPSA') with Respondent No. 2.

(e) The Commission, vide its order dated 24.5.2019 in Petition No. 88/AT/2019, adopted the tariff of Rs. 4.24 per unit as envisaged under the provisions of the PAPP/ PPSA, along with the trading margin of 0.05 paise for Respondent No. 1. As per Article 10.1.3 of the PAPP/ PPSA, the distribution licensee shall have the flexibility to procure between 55% to 100% of the aggregate contracted capacity. It means that if Respondent No. 2 procured 55% of power from the Petitioner (out of the total 125 MW), the applicable tariff was to be Rs. 4.24 per unit, and the said tariff would be reduced to Rs. 4.195 per unit (including a trading margin of 5 paise per unit) if 100% power was to be procured by Respondent No. 2.

(f) Bihar Electricity Regulatory Commission, vide an order dated 14.8.2019 in S.M.P. No. 11/2019, removed the aforesaid flexibility. In the said Petition, Respondent No. 2 took the stand that flexibility to procure 55% to 100% contracted capacity should remain. The aforesaid order passed by the Bihar State Electricity Regulatory Commission (BERC) was challenged by Respondent No. 2 before the Appellate Tribunal for Electricity (APTEL) vide Appeal No. 351 of 2019. On 19.1.2021, the APTEL, vide its order dated 19.1.2021, directed BERC to take a fresh view in terms of its findings rendered in the order dated 14.8.2019. Pursuant thereto, BERC, vide its order dated

1.2.2021, allowed the distribution licensees to procure and schedule the power in terms of the PPSA, i.e. the consumer shall not be unnecessarily burdened with higher power purchase cost. Subsequently, the APTEL vide order dated 4.2.2021, based on the findings of the BERC, disposed of the aforesaid Appeal filed by Respondent No. 2, thereby retaining the right of Respondent No. 2 to have the flexibility as contemplated under Article 10.1.3.

(g) Respondent No. 2, vide its letter dated 16.12.2020, informed Respondent No. 1 that there should be a modification of the tariff for the period commencing from March 2020 to May 2020, by alleging that there is a mis-declaration in terms of Article 11.2.4 of the PAPP/ PPSA. In response, Respondent No. 1, vide its email dated 19.4.2021, intimated to the Petitioner that Respondent No. 2, in lieu of its aforesaid communication dated 16.12.2020, deducted an amount of Rs. 46.16 lakh for the period commencing from March' 2020 to May 2020, alleging mis-declaration.

(h) The Petitioner, vide its letter dated 29.4.2021, informed Respondent No. 1 that there is no mis-declaration for the months of March 2020 to May 2020 and to release the deducted amount at the earliest. Subsequently, the Petitioner, vide its email dated 21.6.2021, requested Respondent No. 1 to hold a virtual meeting in order to resolve the issue regarding the illegal deduction of Rs. 46.16 lakh. However, the said meeting could not materialize as there was no confirmation from Respondent No. 1. However, a meeting was conducted on 10.2.2022, wherein the officials of the Petitioner, along with the officials of Respondent No. 1, met with the officials of Respondent No. 2, to resolve the issue. However, nothing conclusive came out of the said discussion.

(i) Respondent No. 2, vide its letter dated 9.7.2021, informed the Respondent No. 1 that the deductions made earlier (to the tune of Rs. 46.16 lakh) are correct in terms of Article 11.2.4 of the PAPP/ PPSA. The above letter of Respondent No. 2 was communicated by Respondent No. 1 to the Petitioner on 10.7.2021.

(j) The Petitioner vide its letters dated 12.7.2021 and 28.7.2021 informed Respondent No. 1 that there is no mis-declaration by the Petitioner for the period commencing from March' 2020 to May' 2020 and the said deduction of Rs. 46.16 lakh is incorrect. However, no response was received from Respondent No. 1 in this regard.

(k) Respondent No. 1, vide an email dated 30.12.2021, intimated to the Petitioner that Respondent No. 2 provided details of calculations qua supply of power from the months of April 2021 to October 2021. The officials of Respondent No. 2 have not charged any compensation but have invoked the mis-declaration Article of the PAPP/ PPSA (Article 11.2.4).

(l) The Petitioner, vide its email dated 6.1.2022, objected to the stand of Respondent No. 1 and informed that the Petitioner has duly notified the availability in terms of the PAPP, which has never been disputed to date by Respondent No. 1 and, as such, there is no case of mis-declaration. Respondent No. 1, vide its letter dated 11.2.2022, informed the Petitioner that there is a mis-declaration and indicated that a deduction is to be made to the tune of Rs. 25,35,05,104/- (Rs. 21,78,37,641/- + Rs. 3,56,67,463).

(m) The Petitioner, vide its letters dated 14.2.2022 and 20.2.2022, intimated Respondent No. 1 that there is no mis-declaration and as such, the Petitioner requested for release of the payment of the deducted amount along with applicable interest, as well as no further deductions on account of alleged mis-declaration. Pursuant to the filing of the present Petition, Respondent No. 1, vide its email dated 14.4.2023, informed the Petitioner that Respondent No. 2 has already deducted an amount of Rs. 31.06 crores earlier for the period of supply of power from April 2021 to March 2022, by alleging mis-declaration.

Hearing dated 21.4.2022

4. The Petition was admitted on 21.4.2022, and notices were issued to the Respondents to file their respective replies. Pursuant to the said notice, Respondent

Nos. 1 and 2 have filed their respective replies, and the Petitioner has filed rejoinders thereof.

5. Respondent No.1 PTC India Ltd., in its reply dated 26.05.2022, has mainly submitted as under:

(a) The PAPP and the PPSA are a back-to-back arrangement, and Respondent No. 1, being a “trader”, has acted as a facilitator only. In this regard, the APTEL, in its judgments in the cases of PTC India Limited v. UERC & Ors., reported in [(2011) ELR (APTEL) 81], Lanco Power Ltd., v. HERC & Ors., reported in [(2011) ELR (APTEL) 1714] and PTC India Limited v. UERC & Ors., reported in [(2016) ELR (APTEL) 1176] has held that a trading licensee in a back-to-back arrangement only acts as a trader.

(b) There is no event of mis-declaration of availability and the same was also informed to Respondent No. 2 vide a letter dated 17.12.2020, wherein it was stated by Respondent No. 1 that there was no event of mis-declaration during any month throughout the contract period. Furthermore, the compensation levied upon Respondent No. 1 is also not applicable.

(c) Respondent No. 1 reiterated its stand in its various letters dated 22.1.2021, 23.2.2021, 15.5.2021, 28.7.2021, 20.10.2021, 6.1.2022, 31.1.2022 and 07.4.2022, wherein it was clarified that there had not been any event of mis-declaration on the part of the Petitioner and any of the amounts deducted by Respondent No. 2 might be released.

(d) Respondent No. 2, vide its letter dated 16.12.2020, did not accept the force majeure event and invoked Article 11.2.4 of the PAPP/ PPSA regarding the misdeclaration of availability, and accordingly, the tariff was modified. Respondent No.1, vide its letter dated 17.12.2020 further informed Respondent No. 2 that the said Article 11.2.4 was not applicable.

(e) Since there is no base for mis-declaration of availability and if the deviation in declared availability is more than 15% of the Contracted Capacity, then compensation as per Article 10.2.3 of the PAPP/ PPSA is applicable. Hence, it

was only on account of the aforesaid that Respondent No. 1 proceeded to raise compensation invoices for the month of April 2021 to August 2021. Further, Respondent No. 2 also calculated the compensation amount vide its email dated 28.12.2021. However, the said Respondent proceeded to invoke Article 11.2.4 of the PAPP/ PPSA.

(f) Any amount deducted by Respondent No. 2 on account of mis-declaration as per Article 11.2.4 should not have been deducted. However, if any deduction is made by the said Respondent on account of the compensation for non-supply of power by the Petitioner as per the provisions of the PAPP/ PPSA, a similar amount shall be deducted by Respondent No. 1 from the monthly energy bills/ invoices raised by the Petitioner.

Hearing dated 14.6.2022:

6. During the course of the hearing on 14.6.2022, the learned counsel for Respondent No. 2 sought time for filing its reply to the Petition. The Respondents were directed not to make any further deduction from the invoices raised by the Petitioner on the ground, which is a subject matter of the present Petition.

Reply by Respondent No. 2:

7. Respondent No. 2, in its reply dated 4.7.2022, has submitted as under:

(a) The APTEL, while passing the order dated 2.2.2021 in Appeal No. 351 of 2019, took into consideration the order of the BERC passed on 1.2.2021, and as a result of the same, the contracted capacity ought to be necessarily treated as 68.75 MW up to 1.2.2021 and 125 MW from 2.2.2021 till the expiry of the PPSA.

(b) Respondent No. 2 started procuring power through Respondent No. 1 in terms of the order passed by the APTEL, and the Petitioner had scheduled zero power to Respondent No. 2, despite the fact that in terms of Articles 10 and 11 of the PPSA, 100% of the contracted capacity ought to have been dedicated to Respondent No. 2.

(c) Article 11.2.5 of the PPSA carves out an exception to Article 11.2.4 of the PPSA, thereby providing that if the contracted capacity is determined to be lower than 100% or the reduced availability notified under Article 11.2.5, then such reduction shall not be treated as an event of mis-declaration. Further, Article 11.2.5 provides that if the contracted capacity or notified available capacity is reduced on account of the de-commissioning due to the force majeure events, which the Petitioner is bound to notify as per Article 15.5 of the PPSA, then such reduction shall not be treated as mis-declaration. However, the Petitioner did not issue any such communication or notify Respondent No. 2 about the same.

(d) During the months of March 2020, April 2020, and May 2020, etc., whenever the availability has been determined to be lower than 68.75 MW and during the months of March 2021, April 2021, and May 2021, etc., whenever the availability has been determined to be lower than 125 MW, an event of mis-declaration has occurred and that Respondent No. 2 has rightfully deducted the said amounts from the monthly energy bills of the Petitioner.

(e) The Regional Load Despatch Centre (RLDC) has no role whatsoever in determining whether an event of mis-declaration has occurred under Article 11.2.4 of the PAPP/ PPSA. Further, the reliance placed by the Petitioner upon the Grid Code is misplaced, since the issue does not involve over/ under scheduling of the power.

Rejoinder by the Petitioner

8. The Petitioner, in its rejoinder dated 14.09.2022 to the Reply of Respondent No. 2, has submitted as under:

(a) The contention of Respondent No. 2 that until 1.2.2021, the contracted capacity was reduced to 68.75 MW, and thereafter, the same has no relevance whatsoever since the subject matter of the present Petition only pertains to the interpretation of Articles 11.2.1 and 11.2.4 of the PAPP/ PPSA for the period from 1.4.2021 to 31.12.2021.

(b) In the aforesaid order of the APTEL and the BERC, there is no such finding wherein it has been stated that there should be a supply of full contracted capacity; instead, the APTEL and the BERC simply retained the “flexibility” provided under Article 10.1.3 for the Bihar Discoms to avail 55% to 100% contracted capacity.

(c) The contention of Respondent No. 2 that the Petitioner did not declare 55% of the contracted capacity in terms of Articles 10 and 11 of the PAPP/ PPSA does not have any basis under the law. Article 11.2.1 of the PAPP/ PPSA provides that declared availability would normally deemed to be 100% at all times unless it is “otherwise notified by the supplier/ aggregator”. In other words, in case the Petitioner is not able to declare 100% contracted capacity, then whatever is declared by the Petitioner would be the “Declared Availability”.

(d) The Declared Availability, as declared by the Petitioner, was duly accepted by Respondents without any opposition. In fact, open access was sought for the said quantum, and accordingly, the Petitioner supplied the exact quantum of power which was declared by it. Additionally, as per the extant provisions of the Grid Code, if an Inter-State Generating Station (‘ISGS’) has deliberately under/over-declared its capacity, then the concerned RLDC may ask the ISGS to explain the said situation. Thereafter, the concerned ISGS is required to demonstrate why it mis-declared its capacity, and accordingly, subject to the decision of RLDC, the ISGS is imposed with penalty as per Regulation 6.4 (20) of the Grid Code. However, there has been no communication from RLDC at any time as to the fact that the Petitioner has under/over-scheduled or mis-declared its availability.

(e) In terms of Article 11.6 of the PAPP/ PPSA, Respondents shall within a period of 10 days of receiving any invoice, notify the Petitioner of any dispute pertaining to the invoice. However, in the present case, Respondent No. 2 never raised any dispute towards the invoice issued by the Petitioner for the power supplied by it in terms of the timelines stipulated in the said provision.

(f) Article 11.2.4 of the PAPP/ PPSA cannot at all be read in isolation of Article 11.2.1, which specifically clarifies the position that the declared availability would be what is notified by the Petitioner. Further, the word “mis-declaration” occurs when the generator is unable to declare/supply/generate electricity against what is declared/notified to the procurer. However, in the present case, the availability which is declared is being supplied as a generation for the said availability.

(g) Respondent No. 2 has failed to understand that during the disputed period in the captioned Petition, the Petitioner at all times has been declaring its availability at 68.75 MW and has been scheduling the said quantum, which it declared.

(h) The contention of Respondent No. 2 that Article 11.2.5 of the PPSA carves out an exception to Article 11.2.4 is misplaced. From a reading of Articles 11.2.4 and 11.2.5, Respondent No. 2 is deliberately leaving out Article 11.2.1 of the PAPP/ PPSA, which specifically mentions, “unless otherwise notified by the Aggregator, the declared availability shall be deemed to be 100% (one hundred per cent) thereof at all times”. Therefore, the contract specifically provides that declared availability would be normally deemed to be 100% of all time unless it is “otherwise notified by the supplier”. This means that the Petitioner can declare availability lesser than 100% as per its plant availability.

(i) Conceptually/ legally, mis-declaration is when the generator is unable to schedule/ generate the electricity against what is declared/ notified to the procurer. In the present case, the availability which is declared is being supplied as a generation for the said availability. There is no dispute between the parties for the declared capacity given by the Petitioner and the energy supplied which is up to the said declared capacity as demanded by Respondents.

(j) Article 11.2.5 of the PAPP/ PPSA is only applicable in the instance when the supplier declares a particular availability/ quantum, and the same is not supplied by it due to reasons such as de-commissioning due to the emergency or a force majeure, then in such a case, the same would not be treated as a mis-declaration. However, in the present case, there is no role whatsoever of

Article 11.2.5; rather, the subject matter is only limited to the interpretation of Articles 11.2.1 and 11.2.4 of the PAPP/ PPSA, as whatever was declared by the Petitioner was in turn duly supplied by it to Respondent No. 2 through Respondent No. 1.

(k) Respondent No. 2 defeats the entire ambit of the Pilot Scheme, which was introduced in order to assist the “stressed” power plants on account of the non-availability of the Power Purchase Agreements (PPAs). However, Respondent has continued to stress the Petitioner by alleging mis-declaration, thereby deducting the amount from the monthly energy bills raised by the Petitioner without any reasons whatsoever that too after taking power for almost 9 months, which was duly supplied by the Petitioner in terms of the PAPP/ PPSA.

Hearing dated 21.2.2023

9. During the course of the hearing, the learned counsel for the Petitioner submitted that the issue in this Petition is covered by the order of this Commission dated 16.12.2022 passed in Petition No. 94/MP/2022. In response, the learned counsel for Respondent No. 2 submitted that, unlike the provisions of Pilot Agreement for Power Purchase (PAPP), Article 11.2.1 of the Pilot Agreement for Power Supply (PPSA) executed between Respondent Nos.1 and 2 provides that “Unless otherwise notified by the Aggregator, the declared Availability shall be deemed to be 100% thereof all time”, and in the present case, Respondent No. 1 being the Aggregator did not notify the reduced declared availability to Respondent No. 2. Respondent No. 2 sought permission to file additional submissions qua the interpretation of Article 11.2.1 of the PPSA. Accordingly, Respondent No. 2 was directed to file its submissions with regard to Article 11.2.1 of the PPSA & the declaration of availability by Respondent No. 1.

Written submissions of the Petitioner

10. The Petitioner, in its written submissions dated 21.4.2023, has reiterated the submissions made in the Petition and rejoinders and has mainly submitted as under:

(a) The issue in the present Petition is no more *res-integra* on account of the final order of this Commission dated 16.12.2022 in Petition No. 94/MP/2022, which was filed by a similarly placed generator against the same Respondents herein. The Commission, in the said order, has categorically held that the “declaration of the reduced availability from that of contracted capacity cannot be considered as an event of Mis-declaration under Article 11.2.4 of the PAPP/PPSA so long as the supplier has been able to duly supply against such reduced availability.” and accordingly, directed Respondent No. 2 to refund the amounts deducted by it on account of the alleged mis-declaration, along with applicable interest.

(b) As per the definition of mis-declaration provided in Article 11.2.4 of the PAPP/PPSA, the declared availability would be deemed to be 100% at all times unless it is “otherwise notified by the Supplier”. This means that declared capacity would normally be 100%. However, if the supplier notifies any other capacity, then it would be termed as declared capacity.

(c) As per Article 11.2.4, in the event the availability at any time is determined to be lower than 100% of the contracted capacity or the reduced availability notified by the Petitioner, the same would be an event of ‘Mis-declaration’ of Availability, and that, on account of such misdeclaration, the availability for the relevant month shall, for the purposes of payment of tariff shall be deemed to be reduced by the same proportion that availability bears to mis-declaration for the entire month. In the present case, Respondent No. 2 wrongfully interpreted Article 11.2.4 by selectively reading it.

(d) The Petitioner, at all times during the disputed period, has been declaring its availability as 68.75 MW and has been scheduling the said quantum which it declared. In other words, whatever was ‘notified’ by the Petitioner, the same was duly scheduled/ supplied by it to the Respondents.

(e) The Commission has time and again interpreted that the term “mis-declaration” is equal to ‘gaming’ to the effect that (i) where a generator “intentionally” mis-declares its availability in order to get commercial gains; (ii) In simpler words, mis-declaration is something where a generator declares ‘X’ quantum of power, and eventually schedules “Y” quantum of power, for which the said generator is liable to be penalized. In support, the Petitioner has relied upon the Commission`s orders dated 9.5.2013 and 13.10.2015 in Petition Nos. 14/MP/2011 and 187/MP/2013, respectively. However, in the present case, there is no event of “Mis-declaration” or “gaming” since whatever availability was declared by the Petitioner (i.e., 68.75 MW), it supplied the exact same quantum of power after availing open access.

Written submissions of Respondent No. 2

11. Respondent No. 2, in its written submissions dated 21.4.2023, has reiterated the submissions made in the reply and has mainly submitted as under:

(a) Respondents No. 1 and 2 are bound by the terms of conditions of the PPSA dated 29.10.20218 as there exists a privity of contract between them. In support, the Respondents have relied upon the Hon’ble Supreme Court judgment in the case of Essar Oil Limited Vs. Hindustan Shipyard Limited and others. The dispute under the present Petition is mainly centred around the question “whether full tariff” is payable in terms of Article 11.2.24 of the PPSA even if the aggregator failed to make available 100% of Contracted Capacity without notifying about reduced availability under Article 11.2.5 of the PPSA dated 29.10.2018?”

(b) Article 11.2.5 of the PPSA carves out an exception to Article 11.2.4 of the PPSA, thereby providing that if the contracted capacity is determined to be lower than 100% or the reduced availability notified under Article 11.2.5, then such reduction shall not be treated as an event of mis-declaration.

(c) Article 11.2.5 of the PPSA also provides that if the reduction in availability is on account of de-commissioning due to emergency or force

majeure events, which Respondent No. 1 herein is bound to notify as per Article 15.5 of the PPSA, then such reduction shall not be treated as mis-declaration. However, Respondent No. 1 did not issue any such notification to Respondent No. 2 about any such event causing a reduction in availability.

(d) On a conjoint reading of the tariff-related provisions of the PPSA and applying the doctrine of harmonious construction on them, it is self-evident that in the event the availability is less than 100% of the contracted capacity or reduced % availability notified in accordance with Article 11.2.5 of the PPSA, the agreed tariff of Rs. 4.29/ kWh shall be proportionally reduced.

(e) As per Article 11.2.1 read with Article 11.2.4 of the PPSA, the “declared availability” can only be qualified to be termed as “reduced availability notified hereunder” when the same is notified by the Aggregator on account of the situations visualized under Article 11.2.5 of the PPSA/ PAPP. Further, from a mere perusal of the provisions under Article 11 titled “Tariff”, it would be amply clear that the term “unless otherwise notified” appearing in Article 11.2.1 means notification in the eventualities mentioned in certain Articles, namely, Articles 11.2.2., 11.2.3 and 11.2.5. Thus, on a bare perusal and plain interpretation of the Articles, it is amply clear that the event of Mis-declaration of Availability would arise in the event Respondent No. 1 fails to notify Respondent No. 2 with regard to the reduced availability of the contracted capacity. Since there was no notification of reduced availability by Respondent No. 1, Respondent No. 2 has rightly paid a reduced tariff in proportion to the availability borne the Mis-declaration for the respective period

(f) The act on the part of the Petitioner to notify Respondent No. 1 was in terms of the PAPP dated 26.10.2018. However, that does not affect the right of Respondent No. 2 accruing out of non-compliance of Article 11.2.1 of the PPSA by Respondent No. 1. The same is submitted in lieu of the “doctrine of privity of contract”, as the Petitioner being a stranger to the PPSA dated 26.10.2018 cannot affect the outcome of the aforesaid agreement.

(g) Respondent No. 2 has placed reliance upon the settled principle of law that the technical laws such as taxation laws, electricity laws and such other

statutes having financial implications have to be given strict interpretation. The language of such statutes has to be construed as it is, and there is no principle of equity in such statutes.

(h) Respondent No. 1 sought relief under Article 16 of the PAPP regarding the force majeure event due to the outbreak of Covid-19, and Respondent No. 2, vide letter dated 13.10.2020, rejected the ground of force majeure. Moreover, through the letter dated 9.7.2021, Respondent No. 2 rejected the submission of Respondent No. 1; it is evident that no force majeure condition was there for essential services, power generation being one of them, thus supplying less power or no power falls under the ambit of mis-declaration.

Hearing dated 24.4.2023

12. The Petitioner and Respondents, vide Record of Proceedings for the hearing dated 24.4.2023, were directed to furnish information called for. Subsequently, the Petitioner filed an Interlocutory Application No. 42/IA/2023 seeking modification of the RoP dated 24.4.2023, whereby the Petitioner submitted that the details/ information/ data as sought by the Commission in the aforesaid RoP was beyond the scope and subject matter of the present petition. The Petitioner had submitted that the issue involved in the present Petition is only limited to the question as to whether there was a mismatch between the availability declared by the Petitioner and the actual schedule of power as contended by Respondent No. 2.

13. Respondent No. 1, in compliance with the RoP dated 24.4.2023, has filed the information called for and has placed on the record all communications exchanged between Respondent Nos.1 and 2. Respondent No. 2 in compliance with the RoP dated 24.4.2023, has filed the information called for.

Hearing dated 25.10.2023

14. The Interlocutory Application No. 42/IA/2023 was listed for the hearing on 25.10.2023. During the course of the hearing, the learned counsel for the Petitioner sought liberty to furnish the information called for vide RoP dated 24.4.2023 and, consequently, sought permission to withdraw the IA. Considering the request, the Petitioner was permitted to withdraw the IA, and accordingly, the IA was disposed of as withdrawn. The Petitioner, by its affidavit dated 18.12.2023, filed its clarifications and information in response to the directions issued vide ROP dated 24.4.2023.

Analysis and Decision

15. We have considered the submissions of the Petitioner and Respondents and perused the documents available on the record. The issue that arises for our consideration is what constitutes an event of “Mis-declaration” under Article 11, in particular Article 11.2.4, of the PAPP/PPSA?

16. We have analyzed the submissions and pleadings, and we find that the case of the Petitioner is that it has not mis-declared its availability in terms of Article 11 of the PAPP/ PPSA and that Respondent No. 2 has wrongfully deducted the amounts from the monthly energy bills raised by the Petitioner upon Respondent No. 2. The Petitioner, in this regard, has relied upon the relevant provisions of the PAPP/ PPSA to contend that there can be no case of mis-declaration, as the Petitioner at all times declared its availability and supplied the same to Respondents.

17. As per Respondent No. 1/ PTCIL, which supports the case of the Petitioner, the reduced availability notified by the Petitioner does not amount to any mis-declaration in terms of Article 11 of the PAPP/PPSA. Respondent No. 1, being a trader, was

constrained to deduct the tariff of the Petitioner on account of the actions of Respondent No. 2.

18. *Per contra*, Respondent No. 2, BSPHCL has submitted that from a reading of the provisions of Article 11 of the PAPP/ PPSA, it is apparent that the Petitioner has mis-declared its availability and, therefore, failed to supply the contracted quantum of power as agreed between them vide the said agreements. In addition, Respondent No. 2 has placed reliance upon Article 11.2.5, which provides that if the contracted capacity or notified available capacity is reduced on account of the de-commissioning due to force majeure events, which the Petitioner is bound to notify as per Article 15.5 of the PPSA, then only the reduction shall not be treated as mis-declaration. However, the Petitioner did not issue any such communication or notify Respondent No. 2 about the same. Therefore, the reduced capacity supplied by the Petitioner amounts to mis-declaration.

19. In order to adjudicate the present dispute, we may examine the relevant provisions of the PAPP and PPSA, which are back-to-back in nature and are extracted hereunder:

Pilot Agreement for Procurement of Power

“Article 5.1 Obligation of the Supplier

5.1.4 The Supplier shall operate and maintain the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the “Normative Availability”).

Explanation:

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Supplier for producing and supplying electrical energy equal to 1000 kWh per mega watt of Contracted Capacity over a period of one hour, after accounting for auxiliary

consumption, and transmission losses upto the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the “**Availability**”). For the avoidance of doubt, the Parties agree that Availability shall, during the months when Appointed Date or the date of Termination occurs, be determined with reference to the number of days when the Power Station was in operation, and shall be determined likewise for any single day of operation. The Parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Supplier for and in respect of scheduling and despatch of electricity under Applicable Laws and the rules and regulations thereunder.

Article 10: Allocation of Capacity

... ..

10.1.3 Supplier shall make available full Contracted Capacity to the Aggregator. The Aggregator shall schedule at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower on RTC basis only. However, Aggregator may schedule any quantum beyond 55% and up to the Contracted Capacity in any time block subject to the Declared Capacity by the Supplier.

10.2.3. In case of deviation in declared Availability from the Supplier side is more than 15% of the Contracted Capacity for which open access has been approved, then the Supplier shall pay to Aggregator a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Supplier shall also pay the applicable transmission charges to the extent not supplied to the Aggregator, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA.

Article 11: Tariff

... ..

Article 11.2: Declaration of Availability

11.2.1 Unless otherwise notified by the Supplier, the declared availability shall, be deemed to be 100% (one hundred percent) thereof at all times.

... ..

11.2.3 The Supplier shall notify, no later than 15 (fifteen) days prior to the commencement of a month, its maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Supplier shall, as soon as may be, notify any modifications of its maintenance schedule and shall

confirm, with or without modifications, the reduction in Availability no later than 48 (forty-eight) hours prior to its occurrence.

11.2.4 In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the "Mis-declaration") shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Tariff, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Supplier under this Agreement.

11.2.5 Notwithstanding the provisions of Clause 11.2.4, any reduction in Availability arising out of de-commissioning due to Emergency or a Force Majeure Event shall not be deemed to be Mis-declaration if the Supplier shall have notified the Aggregator in accordance with the provisions of Clause 16.5.

.....

Pilot Power Supply Agreement

"5.1.4 The Aggregator shall ensure that the Supplier operates and maintains the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the "**Normative Availability**").

Explanation:

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Aggregator for producing and supplying electrical energy equal to 1000 kWh per mega watt of Contracted Capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses upto the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the "**Availability**"). For the avoidance of doubt, the Parties agree that Availability shall, during the months when Appointed Date or the date of Termination occurs, be determined with reference to the number of days when the Power Station was in operation, and shall be determined likewise for any single day of operation. The Parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Aggregator for

and in respect of scheduling and despatch of electricity under Applicable Laws and the rules and regulations thereunder.

... ..

10.1.3 Aggregator shall make available full Contracted Capacity to the Utility. The Utility shall schedule at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower on RTC basis only. However, Utility may schedule any quantum beyond 55% and up to the Contracted Capacity in any time block subject to the Declared Capacity by the Aggregator.

... ..

10.2.3. In case of deviation in declared Availability from the Aggregator side is more than 15% of the Contracted Capacity for which open access has been approved, then the Aggregator shall pay to Utility a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Utility and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Aggregator shall also pay the applicable transmission charges to the extent not supplied to the Utility, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA.

Article 11: Tariff

... ..

Article 11.2: Declaration of availability

11.2.1 Unless otherwise notified by the Aggregator, the declared availability shall, be deemed to be 100% (one hundred per cent) thereof at all times.

11.2.2 In the event that any shortfall in supply of electricity to the Utility occurs on account of any deficiency in transmission between the Despatch Point and Delivery Point, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Aggregator to the Utility forthwith.

11.2.3 The Aggregator shall notify, no later than 15 (fifteen) days prior to the commencement of a month, Supplier's maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Aggregator shall, as soon as may be, notify any modifications of Supplier's maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (forty eight) hours prior to its occurrence.

11.2.4 In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the "Mis-declaration") shall be deemed to have occurred. In such an event, the Availability

for the relevant month shall, for the purposes of payment of Tariff, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Aggregator under this Agreement.

11.2.5 Notwithstanding the provisions of Clause 11.2.4, any reduction in Availability arising out of de-commissioning due to Emergency or a Force Majeure Event shall not be deemed to be Mis-declaration if the Aggregator shall have notified the Utility in accordance with the provisions of Clause 16.5.”

20. From the above provisions, it can be seen that Article 11.2.1 clearly states that unless otherwise notified by the supplier, the declared availability will be deemed to be 100%. Here, the words used are ‘*unless otherwise notified by the supplier/aggregator*’. Therefore, it is clear that if nothing is otherwise notified by the supplier/aggregator, then the availability is deemed to be 100%. In other words, Article 11.2.1 enables the supplier/aggregator to notify a reduced availability, which can be lower than the contracted capacity.

21. The above Article has to be read with Article 11.2.4 of the PAPP/ PPSA, which states that if the declared availability at any given point in time is determined to be lower than 100% of the contracted capacity or “lower than the reduced availability notified,” then the same would lead to an event of mis-declaration and that in such an event, the monthly tariff shall be deducted. From a reading of the said provision, it is apparent that the said provision uses the term ‘*reduced availability notified hereunder*’. Thus, based on the combined reading of Articles 11.2.1 and 11.2.4 of the PPAP/PPSA, an event of mis-declaration will take place (i) in case the supplier does not supply power what is notified by it, or (ii) in the event reduced availability is not notified and the supplier fails to supply full contracted capacity. As seen from the documents placed on record by both the Petitioner and Respondent No. 2, the present case does not fall

within either of the above scenarios as the reduced availability had been notified by the Petitioner and the Petitioner had not failed to supply against such reduced availability as had been notified. It is noted that Respondent No. 1, PTCIL, vide its affidavit dated 9.6.2023, has also placed on record the documents indicating that PTCIL had duly shared/notified the availability of the Petitioner with Respondent No. 2, BSPHCL.

22. As regards the contention of Respondent No. 2 that Article 11.2.5 carves out an exception to Article 11.2.4, the same is incorrect as the said Respondent has failed to take into consideration that Article 11.2.1 needs to be read together with Article 11.2.4, whereby it is categorically stated that *unless otherwise notified by the supplier*, the contracted capacity shall be deemed to be 100% at all times.

23. Moreover, the above interpretation of BSPHCL to Article 11.2.4 and Article 11.2.5 of the PAPP/PPSA to construe an event of Mis-declaration is, in our view, also in conflict with the other provisions of the PAPP/PPSA as noted above. For instance, Article 11.2.3 itself permits the supplier to notify the reduced availability in the event the generating station is under maintenance. It is also pertinent to note that as per Article 5.1.4 of PPAP/PPSA, the minimum normative availability that the supplier is required to attain during a year is only 85%. Furthermore, Article 10.2.3 of PPAP/PPSA also permits the deviation in declared availability from the supplier side up to 15% of the contracted capacity for which open access has been approved and prescribes for the compensation only in the event that the quantum of shortfall is in excess of the permitted deviation of 15%. If the argument of BSPHCL that the supplier is required to declare the availability at 100% of contracted capacity at all times and only exception available to supplier to notify reduced availability is in terms of Article 11.2.5 (i.e. only

in the event of de-commissioning due to emergency or a force majeure event after having notified as per the provisions of Article 16.5), then the above provisions allowing the supplier to notify the reduced availability would be rendered otiose. It is well settled that a contract must be read as a whole, and the intention of the parties must be gathered from the language used in the contract by adopting the harmonious construction of all the clauses contained therein.

24. It is placed before us that a similar issue as raised by the Petitioner in the present Petition was considered by the Commission in Petition No. 94/MP/2022, which was filed by a similarly placed generator SKS Power Generation (Chhattisgarh) Limited and involving the same distribution licensee i.e., the Respondent No. 2, BSPHCL. The said case also involved identical PAPP/ PPSA having similar provisions. In the said Petition, this Commission vide its order dated 16.12.2022, held as under:

“19. In view of the above, we hold that mere declaration of the reduced availability from that of contracted capacity cannot be considered as an event of Mis-declaration under Article 11.2.4 of the PAPP/PPSA so long as the supplier has been able to duly supply against such reduced availability. Accordingly, the deductions made by the Respondent No.2 from the invoices/bill raised by Respondent No.1 for the Petitioner by invocation of Article 11.2.4 of the PPAP/PPSA deserve to be set-aside. Accordingly, we direct the Respondent No.2, BSPHCL to refund the amount deducted by it, by alleging Mis-declaration under Article 11.2.4, to the Respondent No. 1/ PTC within a period of one month from the date of passing of this order along with applicable interest as per PAPP/PPSA, who shall further make the payments to the Petitioner as soon as it is in receipt of the payments from the BSPHCL.”

Although Respondent No.2, BSPHCL, being aggrieved by the aforesaid order, has approached the APTEL in Appeal No. 499 of 2023 along with IA No. 383 of 2023 seeking an interim stay thereon, the APTEL vide its order dated 2.6.2023 did not grant any stay and consequently, dismissed the said IA. While the main Appeal is still

pending for consideration, as such there is no stay on the findings rendered by this Commission in Petition No. 94/MP/2022.

25. Further, Respondent No. 2, BSPHCL, had also sought to argue that in terms of Article 11.2.3 thereof, Aggregator/PTCIL was required to give 15 days' notice before the beginning of the month if there were to be any reduction in the availability as per Article 11.2.1 and that there was no such notification by Respondent No. 1, PTCIL. However, it is observed that the notification of reduced availability is governed by Article 11.2.1, which gives a right to the generator/aggregator to notify a lesser availability. Furthermore, Article 11.2.3 is a specific provision with respect to the maintenance of the power station, and 15 days prior notice is only mandatory when the power station is going for any maintenance in the subsequent month. On a cumulative and harmonious reading of the above provisions, it is clear that in the event there is a reduction in availability, which is required to be notified to the buyer, for reasons other than maintenance, the same can be done at any time in accordance with the provisions of the Grid Code, and that Article 11.2.3 will not be applicable. Thus, the argument of Respondent No. 2 with respect to Article 11.2.3 is not tenable in the present case.

26. In light of the discussions held above, we find and hold that there was no event of Mis-declaration on the part of the Petitioner in terms of Article 11 of the PAPP/PPSA for the period in question. Consequently, the communications/ letters dated 16.12.2020 and 11.2.2022 issued by Respondent Nos. 2 and 1 are hereby set aside.

27. Accordingly, Respondent No. 2, BSPHCL is directed to refund the amount deducted by it by alleging mis-declaration to Respondent No. 1/ PTCIL, as prayed for in the Petition, within a period of one month from the date of passing of this order along

with the applicable interest as per the provisions to PPSA and Respondent No. 1/ PTCIL shall further make the payment to the Petitioner as soon as it is in receipt of the payment from Respondent No. 2, BSPHCL.

28. On a parting note, we must, however, clarify that the scope of our examination in the foregoing paragraphs has been limited to the occurrence of the event of Mis-declaration in terms of Article 11.2.1, Article 11.2.4 and Article 11.2.5 of the PAPP/PPSA as raised in the Petition.

29. Petition No. 109/MP/2022, along with pending IA(s), if any, is disposed of in terms of the above.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson