

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 145/MP/2013

Subject : Petition for adjudication of dispute arising out of Power Purchase Agreement dated 18.12.2012 entered between the petitioner and the respondent.

Date of hearing : 1.10.2013

Coram : Shri V.S.Verma, Member
Shri M. Deena Dayalan, Member

Petitioner : DNH Power Distribution Company Limited

Respondent : NTPC-SAIL Power Company Limited, (NSPCL)

Parties present : Shri Anand K. Ganesan, Advocate for the petitioner
Shri C. Basu, NSPCL
Shri S.D Jha, NSPCL

Record of Proceedings

At the outset, learned counsel for the petitioner submitted as under:

(a) On 18.12.2012, the petitioner and the respondent had entered into PPA for procurement of electricity on medium term basis for the period from 1.4.2013 to 31.5.2013 and an additional 65.5 MW power allocation was made on medium term basis in view of the surplus capacity available from the generating station. Pursuant to this, the petitioner was required to obtain Medium Term Open Access (MTOA) from CTU for drawal of the capacity from the generating station.

(b) On 17.12.2013, the petitioner applied for grant of MTOA for 25 MW which was rejected due to transmission constraint in the region and non-availability of the transmission lines. Without MTOA being available, the petitioner was not in a position to draw the power from the generating station of the respondent..

(c) The petitioner vide its letter dated 9.5.2013 informed the respondent that in absence of MOTA of 25 MW power, the capacity charges should be claimed

only for 140.5 MW power and the respondent was requested to refund the surplus amount. In response, the respondent in its letter dated 24.5.2013 had clarified 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. The respondent was further intimated that since the petitioner is not able to get the approval for wheeling of 25 MW power which is not scheduled, DNHPDCL is not liable to pay capacity charges for the 25 MW power.

(d) The non-availability of MTOA for 25 MW power amounts to force majeure condition and is covered under section 56 of the Indian Contract Act which provides for the consequences of impossibility of performance of the contract. The contract becomes void the moment the performance of the contract becomes impossible. The moment, CTU rejected the application for grant of MTOA for the reason of transmission constraint, the PPA dated 18.12.2012 became void and the parties ought to be placed in the same position as though the PPA was not in existence.

2. The representative of the respondent submitted as under:

(a) As per clause 2.1.1 of the PPA dated 18.12.2012, 165.5 MW capacity has been allocated to the respondent for the period from 1.4.2013 to 31.3.2014. Out of 165.5 MW, 100 MW and 65.5 MW (40.5+25 MW) capacity have been allocated to the petitioner under long term and medium term, respectively with stipulation that the respondent will obtain MTOA from CTU for drawal of above power.

(b) NSPCL neither received any communication from the petitioner regarding denial of MTOA by CTU nor received any notice in respect of termination of agreement dated 18.12.2012.

(c) The petitioner could have utilized 25 MW power under STOA. The petitioner has been drawing additional capacity beyond its long term allocation of 100 MW since October 2009.

(d) The representative of the respondent requested for short time to file reply to the petition.

3. In response to the Commission's query regarding scheduling of 25 MW power, the representative of the respondent submitted that generation is getting adversely affected as it is not getting adequate schedule from the petitioner. He further submitted that since the PPA is still valid, NSPCL is not able to supply 25 MW power to any other utility.

4. The Commission directed the respondent to file the details of generation of last six month from the generating station and loss suffered by it, on affidavit, with an advance copy to the petitioner on or before 17.10.2013.

5. The respondent was directed to file its reply by 15.10.2013, with an advance copy to the petitioner, who may file its rejoinder, if any, by 25.10.2013.

6. The Commission observed that since the parties have argued on merits, there is no requirement of further hearing.

7. Subject to above, order in the petition was reserved.

By order of the Commission

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