



नई दिल्ली  
NEW DELHI

याचिका संख्या /Petition No.: 229/MP/2018

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson  
डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member  
श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 09<sup>th</sup> of January, 2020

**IN THE MATTER OF:**

Petition under Section 79 (1) (b) and (f) and other applicable provisions of the Electricity Act, 2003.

**AND IN THE MATTER OF:**

Prayatna Developers Private Ltd.  
7B, Sambhav House, Judges  
Bungalow Road, Bodakdev,  
Ahmedabad - 380015,  
Gujarat

...Petitioner

**VERSUS**

1. National Thermal Power Corporation Ltd.  
Core-7, SCOPE Complex, 7,  
Institutional Area, Lodi Road,  
New Delhi – 110003
2. Uttar Pradesh Power Transmission Corporation Ltd. (UPPTCL)  
Shakti Bhawan,  
Ashok Marg, Lucknow,

Uttar Pradesh - 226 019

3. Uttar Pradesh Power Corporation Limited (UPPCL)  
Shakti Bhawan,  
14, Ashok Marg, Lucknow,  
Uttar Pradesh - 226 019
4. Dakshinanchal Vidyut Vitran Nigam Limited (DVVNL)  
Urja Bhavan,  
Sikandra, Agra  
Uttar Pradesh -282007

...Respondents

**Parties Present:** Shri Buddy A. Ranganadhan, Advocate, PDPL  
Shri Raunak Jain, Advocate, PDPL  
Ms. Poorva Saigal, Advocate, NTPC  
Shri Nishant Gupta, NVVN

### आदेश/ ORDER

The Petitioner, Prayatna Developers Private Limited is engaged in the business of developing 5 X 10 MW Solar Power Projects at Mahoba, U.P. The Petitioner has filed the present petition under Section 79 (1) (b) and (f) and other applicable provisions of the Electricity Act, 2003 against the impugned action of National Thermal Power Corporation by which NTPC has threatened to invoke the Performance Bank Guarantees submitted by the Petitioner because of delay in commissioning of the Projects.

2. The Respondent No. 1, National Thermal Power Corporation (hereinafter referred to as 'NTPC') has been identified by the Government of India as the Implementation Agency for setting up of Grid-connected Solar PV Power Projects under State Specific Bundling Scheme and for facilitating purchase and sale of 33 kV or above Grid-connected solar PV Power under the National Solar Mission of Government of India.
3. The Respondent No. 2, the Uttar Pradesh Power Transmission Corporation Ltd. (hereinafter referred to as 'UPPTCL') is a State Transmission Utility under Section 39 of the Electricity Act 2003 operating in the State of Uttar Pradesh.

4. The Respondent No.3, the Uttar Pradesh Power Corporation Limited (hereinafter referred to as 'UPPCL') is operating as a Bulk Supply Licensee for electricity in the State of Uttar Pradesh.
5. The Respondent No.4, the Dakshinanchal Vidyut Vitran Nigam Limited ((hereinafter referred to as 'DVVNL') is the distribution licensee operating in the southern part of the State of Uttar Pradesh. DVVNL has authorized UPPCL to execute/sign the PPAs and also to carry out the necessary relevant works on its behalf.
6. The Petitioner has made the following prayers :
  - a) *Direct the Respondent No. 1 to refund the amount deducted as liquidated damages from the running bills of the Petitioner amounting to Rs. 1 (Rupees One) crore along with interest from the date of the said deductions;*
  - b) *Hold and declare that the SCoD of the Petitioner stands extended by 10 days as a result of the delay caused by the Respondents in sealing the 33 kV meters of the Petitioner's power plants;*
  - c) *Pass any such further or other orders as this Commission may deem fit and proper in the facts and circumstances of the present case.*

**Brief facts of the case**

7. In March 2015, MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for State Specific Bundling Scheme.
8. On 12.08.2015, NTPC issued the Request for Selection (hereinafter referred to as 'RfS') Document for setting up Grid Connected Solar-PV Power Projects (10 MW x 5 Projects) in the State of Uttar Pradesh.
9. On 15.03.2016, the Petitioner was declared successful bidder in the RfS and Letters of Intent (hereinafter referred to as 'LOI') were issued in favour of the Petitioner.

10. On 18.05.2016, the Petitioner entered into five PPAs of 10 MW each with NTPC for sale of power of 10 MW each, at a tariff of Rs. 4.78/kWh.
11. On 03.02.2017, the Petitioner requested NTPC to confirm presence of its officials to witness sealing of energy meters as per UPPTCL Regulations, which require sealing/inspection of energy meters at 33kV and 132 kV sides of Pooling Sub-station at Solar Plant as well as STU sub-station by UPPTCL officials.
12. On 03.03.2017, the Petitioner wrote to UPPTCL, requesting to impart the necessary instructions to DVVNL to approve and inspect the metering scheme as well as sealing of meters.
13. On 22.03.2017, UPPTCL informed the Petitioner that the jurisdiction of UPPTCL lies only upto the point of connectivity (the delivery point) i.e. 132 kV Pooling substation.
14. On 28.03.2017, the Petitioner again wrote to NTPC to instruct concerned authority for CT/PT inspection & meter sealing at 33 kV end of Solar Project.
15. On 04.04.2017, NTPC informed to the Petitioner that as per Grid Code, the responsibility of meter installation on all interconnections, and other identified points for recording of actual net MWh interchanges and MVARh drawal lies with CTU/STU in accordance with Central Electricity Authority (Installation and Operation of Meters) Regulations 2006 (hereinafter referred to as 'CEA Regulations. 2006') and NTPC has no role to play in the meter sealing activity.
16. On 07.04.2017, the Petitioner wrote to DVVNL requesting them to approve the metering arrangement.
17. On 12.04.2017, the Petitioner requested NTPC to intervene on its behalf with UPPCL and DVVNL for inspection and sealing of 33kV metering system.

18. On 21.04.2017, NTPC informed the Petitioner and UPPCL that for operationalization of Clause 6.8.3 of the PSA, UPPCL has to carry out the inspection and sealing of the 33kV metering unit-wise.
19. On 21.04.2017, DVVNL appointed one of its officers to inspect the CT/PT for the Petitioner's Project.
20. On 9.05.2017, DVVNL informed that it does not have the jurisdiction to seal 33kV meters.
21. On 10.05.2017, the Petitioner again wrote to NTPC to either instruct UPPCL/DVVNL directly to complete the inspection and sealing of CT, PT and energy meters on 33 kV side on an urgent basis or allow Petitioner to get the inspection and sealing of CT, PT and energy meters at 33 kV level done by NABL accredited agency and dispense with requirement of inspection and sealing by UPPCL/UPTCL/DISCOM.
22. On 26.05.2017, the Petitioner requested for a joint meeting between NTPC, UPPCL, UPPTCL and DVVNL, for synchronization, sealing and Joint Meter Reading of metering system at 33 kV level.
23. On 27.05.2017, a joint meeting was held between UPPTCL, the Petitioner and DVVNL for protection testing of 10 MW X 5 Power Projects.
24. On 28.05.2017, the Petitioner was to commission the projects since it was the Scheduled date of Commissioning (hereinafter referred to as 'SCoD') as per PPAs.
25. On 02.06.2017, the Petitioner wrote to UPPCL requesting them to direct DVVNL to seal the 33 kV meters. Further, UPPCL wrote to DVVNL directing them to seal of the meters.
26. On 05.06.2017, meters were tested and sealed by the DVVNL at the 33 kV end.
27. On 07.06.2017, the projects got commissioned.

28. On 21.12.2017, the Petitioner wrote to NTPC seeking extension of 10 days for commissioning the Project.
29. On 24.01.2018, NTPC wrote to the Petitioner that in terms of Clause 4.1 and 4.5 of the PPAs dated 18.05.2016, it is the responsibility of the Petitioner to connect its Solar PV Plant to the STU network and any delay on account of the same cannot be grounds for extension.
30. On 30.01.2018, the Petitioner wrote to NTPC stating that the delay in sealing of meters by the Licensee amounts to Force Majeure like situation.
31. On 8.03.2018, NTPC wrote to the Petitioner that as per Clause 12 of CEA Regulations, 2006, all the meters were to be sealed by licensee.
32. On 10.03.2018, the Petitioner requested NTPC not to encash the PBG of Rs 1 crore.
33. On 04.04.2018, NTPC denied extension of time in terms of the provisions of the PPAs.
34. On 13.04.2018, instead of encashing the PBG, NTPC acceded to the request of the Petitioner that the Liquidated Damages may be deducted from the monthly bill, subject to an undertaking by the Petitioner clarifying that the said deduction is done at Petitioner's request and would not be a ground for claiming of full/partial LPSC in any way for the said amount deducted and that the rebate for the payment may be deducted on the total amount due including the amount of LD deducted.
35. On 24.04.2018, the Petitioner provided the undertaking that Rs 1 Crore may be deducted from the monthly bill and the same shall not form ground for claiming Late Payment Surcharge.
36. On 22.05.2018, the Petitioner served the notice for Arbitration on NTPC.
37. On 21.06.2018, NTPC denied to accept any merit in the claim made by the Petitioner and stated that the Petitioner can proceed to file a petition before the Central Commission for adjudication of the dispute.

38. Hence, the Petition.

### **Submissions of the Petitioner**

39. The Petitioner has submitted that MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for State Specific Bundling Scheme. On 12.08.2015, NTPC issued the RfS for setting up Grid Connected Solar-PV Power Projects (10 MW x 5 Projects) in the State of Uttar Pradesh. It was declared successful bidder in the RfS and LOI was issued in its favour. On 18.05.2016, five PPAs of 10 MW each were executed with NTPC for sale of power of 10 MW each, at a tariff of Rs. 4.78/kWh.
40. The Petitioner has submitted that vide its letter dated 03.02.2017 it informed NTPC that the projects are in advanced stage of execution and requested that officials of NTPC may be present to witness the inspection/sealing of energy meters. As per the UPPTCL regulations, there is prescribed procedure which includes inspection/sealing of energy meters at 33 kV & 132 kV side of Pooling Sub-station at Solar Plant as well as STU sub-station by UPPTCL officials. On 03.03.2017, the Petitioner wrote to UPPTCL, requesting to impart the necessary instructions to DVVNL to approve and inspect the metering scheme as well as sealing of 33 kV meters. NTPC remained silent on the above mentioned letter and only on 04.04.2017 conveyed that it has no role to play in 33 kV meter sealing activity. Subsequently, the Petitioner requested NTPC on 07.04.2017, 12.04.2017 and 19.04.2017 and 21.04.2017 to direct UPPCL to seal 33 kV meters. On 21.04.2017, NTPC informed the Petitioner and UPPCL that since the PPAs had been signed unit-wise for each of the five units of 10 MW each, it is necessary to have an energy value for each unit. This requires reading of individual meters unit-wise and as per PSA, for RPO, CUF monitoring is required for each project individually. Therefore, for operationalization of Clause 6.8.3 of the PSA, UPPCL may carry out the inspection and sealing of the 33kV metering unit-wise. Even after NTPC's direction, DVVNL refused to carry out inspection and sealing of 33 kV meters stating that the same was not under its purview. Petitioner held multiple meetings with UPPCL, UPPTCL and DVVNL and finally on 02.06.2017, UPPCL agreed that 33 kV ABT meters would be sealed by DVVNL and necessary directives to DVVNL were issued.

41. The Petitioner has submitted that SCoD of the projects was on 28.05.2017 as per PPAs. However, after much persuasion and follow-up, the 33kV meters were tested and sealed by DVVNL at the 33 kV end on 05.06.2017 and the project was actually commissioned on 07.06.2017. Sealing of 33 kV meters by DVVNL and UPPTCL on 05.06.2017 indicates that it has always been their obligation to seal the meters. It is apparent from the Certificate issued by the Chief Electrical Inspector on 19.05.2017, that the plant was ready for synchronization on 27.05.2017 which was further confirmed during the joint site visit between UPPTCL, DVVNL and the Petitioner, wherein the Minutes of Meeting also indicates that the plant was ready for synchronization.
42. The Petitioner has submitted that NTPC has threatened to encash the PBGs in respect of the five Projects. The delay of 10 days caused in the commissioning of the Projects was beyond the reasonable control of the Petitioner and was due to delay caused by UPPTCL/PPCL/DVVNL in sealing 33 kV ABT meters installed at the plant-end. The delay caused was mainly due to delay in meter sealing at 33 kV end and conduct of the NTPC/UPPCL/DVVNL who were also parties to the PSA. The PPAs executed between the Petitioner and NTPC is a back-to-back arrangement with the PSA in turn signed by NTPC with the DISCOMS in the State. Therefore, failure of the Respondents themselves to comply with the terms of the PSA cannot result in levy of Liquidated Damages on the Petitioner under the PPAs, when such failures have not at all been caused by the Petitioner.
43. The Petitioner has submitted that NTPC even failed to consider MNRE's O.M. dated 28.07.2017 in which it is directed to take due cognizance of the fact that delays of any kind on the part of the State Government Authorities/PSUs like land allotment, transmission/evacuation, approvals/connectivity permission or force majeure, the competent authority in the State/NTPC/SECI etc. may consider providing extension of time as per contractual agreements.
44. The Petitioner has submitted that Clause 2.8 of U.P. Electricity Grid Code, 2007, Clause 6 of UPERC's Notification No. UPERC/Secy/Regulation/419 dated 18.06.2009 under Schedule-A and U.P. Electricity Grid Code stipulates that sealing shall be governed by the CEA Regulations, 2006, U.P. Electricity Grid Code and amendments thereof. Further, Clause 2 of



CEA Regulations, 2006 stipulates that it was the duty of the purchaser, which includes NTPC and ultimate buyer i.e. UPPCL & DVVNL which receives electricity from the Petitioner, to provide for meter sealing to all meters used for accounting and billing purpose including meters at 33 kV end of the Petitioner's Pooling Sub-Station.

45. The Petitioner has submitted that the issue of applicability of certain aspects like connectivity to the lines and common facilities on the basis of project in the solar park or under Open Category, already stands settled. NTPC vide its letter dated 16.11.2016 has informed that as per the provisions of the RfS documents, pooling is not allowed and it is not in conformity with JNNSM Phase 2 Batch-II Guidelines. Since the issue was settled long back, it could not be a reason for transferring responsibility of sealing of meters from its own, being a Buyer, to the Petitioner.
46. The Petitioner has submitted that as the projects are outside the Solar Park, the Petitioner is required to get technical feasibility of connectivity from STU, i.e. UPPTCL. UPPTCL in turn is mandated to abide by the UPERC's Regulations while providing connectivity to such projects. If UPPTCL allows connectivity separately for five project of 10 MW each, to its Grid, sub-station would be a complete waste of national resources and thus has been avoided in the Central and State Regulations. MNRE has kept this spirit and allowed pooling explicitly in the JNNSM, Phase II, Batch III and IV guidelines for non-solar park projects as well as prescribed a metering arrangement, which can be followed for pooling of projects. A common interconnection point/delivery point facilitated with the metering scheme still ensures a separately identified project.
47. The Petitioner has submitted that it is a settled law that a party claiming damages has to necessarily demonstrate actual loss suffered by it and the levy cannot be for the unjust enrichment and in this case Respondents have failed to put on record the actual loss suffered by them due to delay in commissioning of the Petitioner's plant by 10 days. The quantum of damages, if at all they are payable, have to be necessarily ascertained by a competent Court of Law. The Petitioner placed its reliance on the judgments of the Hon'ble Supreme Court in the case titled *Maula Baux Vs. Union of India* [1969 (2) SCC 554], *Union of India Vs. & Ors. Rampur Distillery & Chemical Co. Ltd.* [(1973) 1 SCC 649], *Kailash Nath Associates Vs. DDA* [(2015) 4 SCC 136], *M. Lachia Setty and Sons Ltd. Vs. Coffee Board* [(1980) 4 SCC

636], *M/s Gangotri Enterprises Ltd. Vs. Union of India [(2016) 11 SCC 720]* and *Union of India Vs. Raman Iron Foundry [(1974) 2 SCC 231]*.

48. The Petitioner has submitted that purpose of levy of liquidated damages under the PPAs is to indemnify NTPC from any liquidated damages which are in turn levied by the DISCOMS on NTPC for failing to fulfil their targeted RPOs. In the present case, the delay in sealing of 33 kV meters has been caused by the DISCOMS themselves. In such a situation, the DISCOMS cannot be permitted to take advantage of their own wrong and further recover liquidated damages from the Petitioner through NTPC. Neither has NTPC shown any actual loss caused due to delay in commissioning of Petitioner's power plant, nor have the DISCOMS shown any loss or penalty levied by any appropriate authority due to non-fulfilment of RPOs during the period of 10 days as a direct result of the Petitioner's delay in commissioning of the plant. Hence, there is no question of levy of any Liquidated Damages on the Petitioner.

#### **Submissions of Respondent No. 1 (NTPC)**

49. The Respondent No.1 has submitted that in terms of Article 4.6 of the PPAs, it is entitled to encash the Performance Bank Guarantee (hereinafter referred to as 'PBGs') of the Petitioner for recovering the liquidated damages (amounting to Rs. 1 Crore ) for the delay of 10 days in achieving the commissioning of its 10 X 5 MW Solar Power Project.

##### ***a. Obligation of the Petitioner to get the meter sealed***

50. The Respondent No.1 has submitted that the responsibility to obtain all clearances including the meter sealing from the State Transmission Utility or the Distribution Licensee was solely with the Petitioner. The Respondent No.1 has placed its reliance on Clause 3.5(c) of the MNRE Guidelines, Clause 3.9.2 of the RfS and Article 3 & Article 4 of the PPAs. The inability of the Petitioner to commission the projects on SCoD cannot be construed as a Force Majeure Event. The time taken to co-ordinate and follow up with the concerned authorities and the implications thereof is entirely on account of the Petitioner.

##### ***b. Delay on the part of the distribution licensee (if any) in sealing the meters is not a force majeure event***

51. The Respondent No.1 has placed its reliance on the judgment of the Hon'ble Supreme Court in the case titled *Alopi Prasad & Sons Limited v Union of India (1960) 2 SCC 793* wherein it was held that *"It is a settled principle that in an executory contract, the parties may face in the course of its implementation, with a turn of events which they did not anticipate such as abnormal rise or fall in the price or sudden depreciation of currency, unexpected obstacle to execution or the like but the same cannot affect the bargain"*.
52. The Respondent No.1 has submitted that any delay on account of taking approvals for connecting project to the Interconnection Facilities at the Interconnection Point including the co-ordination with the concerned authorities/agencies for sealing the meter, cannot be said to be beyond the reasonable control of the Petitioner. The Respondent No.1 has placed its reliance on the judgment of the Hon'ble High Court of Madras in the case of *SPIC SMO –v- Tamil Nadu Electricity Board, (2013) 1 CTC 500*. Further, the time taken for getting the meters sealed by DVVNL cannot be a Force Majeure Event within the meaning of Article 11 of the PPAs, so as to entitle the Petitioner to an extension of time under Article 4.5 of the PPAs.

***c. Reliance on the MNRE Letter dated 28.07.2017 is misconceived***

53. The Respondent No.1 has submitted that the reliance by the Petitioner on the letter dated 28.07.2017 issued by the MNRE is misconceived. The said Letter dated 28.07.2017 has to be read along with the Letter dated 03.07.2017 issued by the MNRE which stipulates *"to ensure that projects are commissioned on time as per the Contractual Agreement and no time extension shall be given for any project. Strict action may please be ensured as per Contractual Agreements for delays if any."*
54. The Respondent No.1 has submitted that there is no provision under Article 4.5 of the PPAs dealing with extension of time on account of the delay due to connectivity with STU/CTU. As per Article 4.5.1 (a) of the Solar Park PPAs extension of time on account of the delay on the part of the Solar Park Implementation Agency (SPIA) in giving connectivity exists since land and connectivity is to be provided by the SPIA. However, in a Non-Solar Park PPAs (as

in the instant case) the entire responsibility for the land, connectivity with CTU/STU lies with the Petitioner.

### **Submissions through Rejoinder**

55. The Petitioner vide Rejoinder filed on 07.02.2019 has reiterated the submissions made in the petition. As such, the same have not been reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

***a. Obligation of the Petitioner to get the meter sealed***

56. The Petitioner has submitted that MNRE Guidelines, RfS and PPAs, which are relied upon by the Respondent nowhere state that inspection and sealing of energy meters is the obligation of the Project Developer. NTPC has tried to shift the obligation of the State Transmission Utility and/or the Distribution Licensee to inspect and seal the energy meters. As per Article 7 of the PPAs, the meters are to be sealed by the utilities / licensees in accordance with the CEA Regulations, 2006. As per Regulation 12 of the CEA Regulations, 2006, it is the responsibility of the Buyer/licensee i.e. NTPC and other respondents, to seal the meter. It is the responsibility of the Petitioner to obtain all necessary clearances and approvals for obtaining connectivity with the grid. However, the delay caused by the STU/DISCOMS in discharging their obligation and sealing the meters, cannot be fastened on the Petitioner

***b. Delay on the part of the STU/ distribution licensee (if any) in sealing the meters is not a force majeure event***

57. The Petitioner has submitted that from various letters and communications sent by the Petitioner, it is evident that it had put its best all-around efforts to address the issue of 33 kV ABT meter sealing with the competent authorities within the given timeline. Repeated interventions were sought from NTPC, UPPTCL, UPPCL and DVVNL. However, the delay has been caused in meter sealing at 33 kV end due to their conduct. The said delay was beyond the control of the Petitioner and in no manner can be attributable to the Petitioner.

***c. Reliance on the MNRE letter dated 28.07.2017 is misconceived***

58. The Petitioner submitted that NTPC has failed to consider MNRE's O.M. dated 28.07.2017 in which it is directed to take due cognizance of the fact that delays of any kind on the part of the State Government Authorities/PSUs like land allotment, transmission/evacuation, approvals/connectivity permission or force majeure, the competent authority in the State/NTPC/SECI etc. may consider providing extension of time as per contractual agreements.
59. The Petitioner has submitted that as per Article 7.1.1 of the PPAs, it is required to follow the CEA regulations. NTPC vide its Letter dated 04.04.2017 has admitted that, "*...responsibility of meter installation on all interconnections, and other identified points for recording of actual net MWh interchanges and MVARh drawals in accordance with CEA Regulations, 2006, lies with CTU/STU concerned...*". Therefore, admittedly as per contractual arrangement, the responsibility to inspect/seal the meters is with the CTU/STU/DISCOM concerned.

#### **Written Submissions of the Petitioner**

60. The Petitioner has submitted that:

##### ***a. Responsibility for sealing the meters***

61. In terms of Article 7.1.1 of the PPAs, the installation and sealing of meters and all matters incidental thereto is to be as per the CEA Regulations, 2006 as amended from time to time. Regulation 7(1)(c) read with Regulation 12(1)(a)(i) of the CEA Metering Regulations requires the sealing of "*interface meters*" by both the Supplier and the Buyer. Under the PPAs, the Supplier is the Petitioner and the Buyer is Respondent No.1 (NTPC). The U.P. Utilities are, under the PPAs, not the "Buyers" of the electricity. It is therefore the joint responsibility of the Petitioner and NTPC to ensure the sealing of the meters.
62. NTPC has sought to rely upon the definition of "Buyer" in Regulation 2(1)(h) of the CEA Metering Regulations to contend that under the said definition "Buyer" means the generating company, licensee, consumer whose system receives electricity from the system of the

generating company or licensee, and therefore contends that the “Buyer” under the said Regulations would be UPPCL and not NTPC. It is pertinent to mention here that as per Article 7.1.1 of the PPAs categorically requires the “*SPD and NTPC*” to follow and be bound by the CEA Metering Regulations. NTPC has therefore agreed to be bound by the CEA Metering Regulations and cannot today take the defense that it is not bound by the said Regulations. The definition of “Buyer” in the CEA Metering Regulations uses the expression “... *generating company or licensee or consumer whose system receives electricity.....*”. Further, the expression “*whose system receives electricity*” obviously qualifies only the expression “*consumer*” and could not necessarily apply to the expression “*licensee*” for the simple reason that the Electricity Act, 2003 recognizes a licensee who does not have a “*system*” such as Respondent No. 1.

63. The Act contemplates a licensee (such as a Trading Licensee), to also be a “Buyer” under Section 2(71) of the Electricity Act, 2003, therefore, Regulations could not exclude a Trading Licensee from the ambit of “Buyer” as contemplated under the Act. Further, the definition of “*licensee*” under Section 2(39) of the Electricity Act, 2003 means a person who has been granted a license under Section 14. The definition of “Buyer” under Regulation 2(1)(h) of the CEA Metering Regulations covers the “*licensee*” and it is nobody’s case that NTPC is not a “*licensee*”.
64. The context of Regulation 12(1) contemplates a context and meaning different from what is contemplated under the definition of “Buyer”. As such, the expression “Buyer” in Regulation 12(1)(a)(i) would necessarily take within its ambit a person who enters into a contractual obligation to “buy” electricity. It is settled law that the meaning in the definition must give way to the contextual reference of a word in a substantive provision when such context so requires. The Petitioner has placed its reliance on the judgment of the APTEL in the case of *M/s JSW Steel Ltd. & Ors. Vs. Maharashtra Electricity Regulatory Commission & Ors.*, Judgment dated 27.03.2019 in Appeal Nos. 311 & 315 of 2018.
65. UPPCL/ UPPTCL had an issue with the sealing of the 33 KV meters. Since the “*Delivery Point*” under Clause 2.0 of the PPAs was at the 132 KV level, the requirement to have the 33 KV meters sealed by UPPCL / UPPTCL was foisted on the Petitioner by NTPC vide its Letter dated 21.04.2017.

66. As per Regulation 12(1)(a)(iii) of the CEA Metering Regulations, the sealing of energy accounting and audit meters could have been done by the generating company i.e. the Petitioner itself. It was only on the insistence of NTPC that the sealing of the 33 KV energy accounting and audit meters was required to be done by the UPPCL / UPPTCL. However, UPPCL / UPPTCL were not ready to undertake the sealing of the 33 KV meters since they did not have any contractual agreement with the Petitioner.

***b. NTPC is barred from claiming, levying or recovering Liquidated Damages***

67. The delay in sealing of the meters was clearly an “*event or circumstance*” that wholly or partly prevented or unavoidably delayed the commissioning of the plant by the SCoD which was entirely beyond the control of the Petitioner. It was therefore, a “*force majeure*” event in terms of Clause 11.3.1 of the PPAs. NTPC cannot benefit in any event, from its own wrong. Whether the present case comes within the confines of force majeure or not, ultimately, NTPC cannot stand to gain by its own wrongful acts as described hereinabove.

68. The Petitioner’s projects were fully ready before the SCoD as is clear from the following events:-

- a. On 31.03.2017, the Petitioner for the second time sent the 30 day advance notice prior to synchronization of the plant.
- b. On 19.05.2017, the Chief Electrical Inspector had granted permission to charge the PV Project. This was full nine days before the SCoD i.e. 28.05.2017.
- c. On 26.05.2017, i.e. two days before the SCoD, the Petitioner once again informed NTPC that the plant is ready for charging, synchronization and commissioning.
- d. The sealing of the 33 KV meters was, in fact, carried out by UPPCL on 05.06.2017 and the plant was commissioned immediately thereafter on 07.06.2017.

69. If the plant had not been ready prior to 28.05.2017, it could never have been commissioned within two days of the sealing of the meters.

70. NTPC has admittedly and undisputedly not suffered any loss at all on account of the plant not having been commissioned on time. The person claiming Liquidated Damages has

necessarily to prove loss / injury actually having been suffered and further prove the quantum of such loss if such loss is capable of computation. Only if the loss is proved to be incapable of computation, could such person claim the amount of Liquidated Damages straight away. The Petitioner has placed its reliance on the case of *Kailash Nath Associates Vs. DDA*” [(2015) 4 SCC 136] and in the case of *M/s Godawari Green Energy Limited Vs. NTPC Vidyut Vyapar Nigam Limited & Ors.*, Judgment dated 11.10.2017 in Petition No. 304/MP/2013.

***c. Back to Back Contracts***

71. The PPAs between the Petitioner and NTPC and the PSA between NTPC and the UP Discoms are alleged to be on back-to-back basis. The Petitioner is unable to accept or deny such contentions since NTPC has not provided the Petitioner with a copy of the PSA executed between NTPC and UP Discoms. However, without prejudice to the same and on a demurer, without admitting the same, even assuming that the PPAs and the PSA were on a back-to-back basis, there is and will be no privity of contract between the Petitioner and the UP Discoms. The Petitioner has placed its reliance on the Judgment of *Zonal General Manager, IRCON International Limited v. Vinay Heavy Equipments*, (2015) 13 SCC 680.

***d. Solar Park PPAs vis-à-vis the current PPAs***

72. NTPC contends that simply because a specific clause pertaining to delays by Governmental Authorities is provided for in the Solar Park PPAs cannot be a ground in the current PPAs. A contract has to be interpreted on the terms contained therein. It cannot be interpreted with reference to a term which may or may not exist in an unconnected hypothetical agreement. NTPC being an instrumentality of the State is bound to act fairly, reasonably and in an unbiased straight forward manner and not to take undue advantage either of its own wrong or undue advantage of the misfortune of the Petitioner. The terms of the current PPAs are amply clear and in terms thereof, the present petition is liable to be allowed.

***e. MNRE Letter dated 28.07.2017***



73. The MNRE Letter dated 28.07.2017, on its terms applies to all Solar Generators and not only to Solar Park Developers. The letter categorically contemplates that if there are any delays due to Governmental or other Authorities, then extension of time for commissioning ought to be granted by the concerned procurers as per the terms of the contract. This is, in fact, in line with the philosophy adopted in the CERC Tariff Regulations, 2019-2014 of this Commission which also specifically contemplates the delays by various Govt. Authorities and its treatment for the same.

**Written Submissions of the Respondent No. 1**

74. The Respondent No. 1 vide written submissions filed on 07.10.2019 has reiterated the submissions made in the reply as such the same have not been reproduced for the sake of brevity. Additionally, it has submitted that:

***a. Obligation of the Petitioner to get the meter sealed***

75. The Respondent No.1 has submitted that the consequences of the mistake/mis-interpretation of the provisions of the CEA Regulations, 2006 on the part of the Petitioner in assuming that NTPC had a role to play in the meter sealing, would have to be borne by the Petitioner. Regulation 12 of the CEA Regulations, 2006 provides that the sealing shall be done by the buyer/licensee and 'Buyer' is a defined term under the CEA Regulations, 2006.

*“Buyer’ means any generating company or licensee or consumer whose system receives electricity from the system of generating company or licensee;”*

Therefore, NTPC would not be a 'buyer' for the purposes of sealing the meters in terms of the CEA Regulations, 2006.

***b. Delay on the part of the distribution licensee (if any) in sealing the meters is not a force majeure event:***

76. The Respondent No. 1 has submitted that the time taken for getting the meters sealed by the DVVNL cannot be a Force Majeure Event within the meaning of Article 11 of the PPAs, so

as to entitle the Petitioner to an extension of time under Article 4.5 of the PPAs. In terms of Article 4.5 of the PPAs, the Petitioners are eligible for an extension of time only if there has been a force majeure event or an event of default on the part of the Respondent. Since the PPAs expressly provides that the procurement of all consents required for connectivity to the STU network, is the sole responsibility of the Petitioner to be at their own costs and risks, it is entirely for the Petitioner to make such arrangement for obtaining such connectivity.

77. The Respondent No. 1 has submitted that since it was within the reasonable control of the Petitioner to approach the concerned authority in time and arrange for the compliance with the requirement of sealing the meters, it cannot be held to be a Force Majeure event. This is particularly, when Article 11.4.1 of the PPAs specifically recognizes ‘(i) any event or circumstance which is within the reasonable control of the Parties’ as a Force Majeure Exclusion. The Respondent No.1 has placed its reliance on Judgement of the Hon’ble High Court of Delhi dated 18.12.2018 in O.M.P. (Comm) 481/2016 in the matter of *NTPC Vidyut Vyapar Nigam Limited –v- Precision Technik Private Limited*; Judgment of the Hon’ble High Court of Madras in the case of *SPIC SMO –v- Tamil Nadu Electricity Board, (2013) 1 CTC 500*; Judgment of the Hon’ble Supreme Court in the case of *Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522*; *Pasithea Infrastructure Ltd. v. Solar Energy Corporation of India, 2017 SCC OnLine Del 12562*; *Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 SCC 80*.

***c. Reliance on the MNRE letter dated 28.07.2017 is misconceived – distinction between open category developer and solar park category developer***

78. The Respondent No. 1 has submitted that letter dated 28.07.2017 has to be read along with the Letter dated 3.07.2017 issued by the MNRE which says due to falling prices of solar cells/modules project developers may get undue benefits at the cost of Government if project duration is extended. In view of this, it is important that already awarded projects are commissioned on time as per the Contractual Agreement and no time extension would be given for any project.

***d. Proof of actual loss***

79. The Respondent No. 1 has submitted that as per settled law, a stipulation of Liquidated Damages could either be a genuine pre-estimate of damages or by way of penalty depending on the nature of the provision. If it is a genuine pre-estimate of damages, there is no requirement to prove damage or loss. The Respondent No.1 has placed its reliance on the judgment by the Hon'ble Courts in following cases: *Fateh Chand case (1964) 1 SCR 515*; *Maula Bux (1969) 2 SCC 554*; *Surjit Kaur –v- Naurata Singh (200) 7 SCC 379*; *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705*; *Construction Design case AIR 2015 SCC 1282*; *Kailash Nath –v- Delhi Development Authority (2015) 4 SCC*; *BSNL case (2011) 1 SCC 394*; *Ultratech Cement v Sunfiled Resources, decision dated 21.12.2016 passed by Hon'ble High Court of Bombay in Appeal No.881 of 2005 in Arbitration Petition No. 35 of 2004 and Mahadeoprasad –v- Siemens (India) Limited 1933 ILR Vol. LX Cal. 1379*.
80. The Respondent No. 1 has submitted that the APTEL has already examined the issue of the liability to pay liquidated damages and considered the difficulty in calculating the actual loss in various matters and held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence that actual loss incurred. The Respondent No.1 has placed its reliance on *PTC India Limited -v- Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243*; *Lanco Kondapalli Power Limited -v- Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755*.
81. The Respondent No.1 has further submitted that liquidated damages as specified in the PPAs should be awarded and the Petition filed is liable to be dismissed with costs. The Respondent No.1 has placed its reliance on following cases: *Dalmia Solar Power Ltd. –v- NTPC Vidyut Vyapar Nigam Ltd, Order dated 14.03.2017 in OMP (COMM) 120/2017*; *Bharat Sanchar Nigam Ltd. -v- Reliance Communication Ltd. (2011) 1 SCC 394*; *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705*; *Kailash Nath Associates -v- Delhi Development Authority (2015) 4 SCC 136*; *Construction and Design Services -v- Delhi Development Authority, AIR 2015 SC 1282*; *Ultratech Cement Ltd -v- Sunfield Resources Pty Ltd Judgment dated 21.12.2016 in Appeal 881 of 2005 (2016 SCC Online Bom 10023)*; *Chettinad Power Corporation Limited -v- Power Grid Corporation of India Limited, order dated 08.03.2017(CERC)*; *Raichur Sholapur Transmission Company Limited v. Power Grid Corporation of India Limited, order dated 24.01.2019 (CERC)*.

## Analysis and Decision

82. The Petition was admitted on 13.12.2018 and came up for hearing on 27.02.2019, 23.07.2019 and was reserved for Orders on 27.09.2019. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records. The brief facts of the case are as under:
83. The Petitioner was declared as successful bidder in the RfS issued by NTPC for setting up Grid Connected Solar-PV Power Projects (10 MW x 5 Projects) in the State of Uttar Pradesh. On 18.05.2016, the Petitioner executed five PPAs of 10 MW with NTPC for sale of power of 10 MW each. On 03.02.2017, the Petitioner informed NTPC that its projects were in advance stage of execution and requested that officials of NTPC may be present to witness the inspection/sealing of 33 kV ABT meters installed at the plant-end as stipulated by the UPPTCL regulations or provide NOC/waiver for the same. On 04.04.2017, NTPC informed the Petitioner that it has no role to play in sealing activity of 33 kV ABT meters installed at the plant-end. Subsequently, the Petitioner requested NTPC on 07.04.2017, 12.04.2017 and 19.04.2017 and 21.04.2017 to direct UPPCL to seal 33 kV ABT meters installed at the plant-end. On 21.04.2017, NTPC informed the Petitioner and UPPCL that since the PPAs had been signed unit-wise therefore it was necessary to have an energy value for each unit. Since unit-wise reading of individual meters was required, therefore, UPPCL may carry out the inspection and sealing of the 33kV metering. However, DVVNL refused to carry out inspection and sealing of 33 kV meters stating that same is not in its purview. Petitioner held multiple meetings with UPPCL, UPPTCL and DVVNL and finally on 02.06.2017, UPPCL agreed that 33 kV ABT meters would be sealed by DVVNL and issued necessary directives to DVVNL. The meters were tested and sealed by the DVVNL at the 33 kV end on 05.06.2017 and the projects were actually commissioned on 07.06.2017. It is pertinent to note that SCoD of the projects was on 28.05.2017 as per PPAs. Therefore, there was a delay of 10 days in commissioning of the projects. The Petitioner has submitted that the delay of 10 days was caused because of delay in sealing of the 33kV ABT meters by UPPTCL/DVVNL and was beyond the reasonable control of the Petitioner. The Petitioner has requested that accordingly, the SCoD may be extended upto 07.06.2017 and liquidated damages may not be levied. *Per Contra*, the Respondent No.1 has submitted that as per PPAs, the responsibility to obtain all clearances including the meter sealing from the State Transmission Utility or the

Distribution Licensee was solely with the Petitioner. The inability of the Petitioner to commission the projects on SCoD cannot be construed as a Force Majeure Event. In terms of Article 4.6 of the PPAs, it is entitled to encash the Performance Bank Guarantee of the Petitioner for recovering the liquidated damages (amounting to Rs. 1 Crore) for the delay of 10 days in achieving the commissioning of its 10 X 5 MW Solar Power Project.

84. From the submissions of the parties, the following issues arise before this Commission:

*Issue No. 1: Whether the delay in achieving Scheduled Commissioning Date by the Petitioner was due to delay in sealing of the 33 kV ABT meters installed at the plant-end by the Respondents? and Whether the circumstances of delay in sealing of the 33 kV ABT meters installed at the plant-end were beyond the reasonable control of the Petitioner?*

*Issue No. 2: Whether as a result of the delay caused in sealing of the 33 kV ABT meters installed at the plant-end by the Respondents, the Scheduled Commissioning Date of the projects of the Petitioner needs to be extended by 10 days?*

*Issue No. 3: Whether the Respondent No. 1 should be directed to refund the amount deducted as liquidated damages from the running bills of the Petitioner amounting to Rs. 1 (Rupees One) Crore along with interest from the date of the said deductions?*

85. No other issue was pressed or claimed.

86. We now discuss the issues one by one:

*Issue No. 1: Whether the delay in achieving Scheduled Commissioning Date by the Petitioner was due to delay in sealing of the 33 kV ABT meters installed at the plant-end by the Respondents? and Whether the circumstances of delay in sealing of the 33 kV ABT meters installed at the plant-end were beyond the reasonable control of the Petitioner?*

**AND**

*Issue No. 2: Whether as a result of the delay caused in sealing of the 33 kV ABT meters installed at the plant-end by the Respondents, the Scheduled Commissioning Date of the projects of the Petitioner needs to be extended by 10 days?*

87. The Petitioner has submitted that as per PPAs, the Scheduled Commissioning Date of the projects was on 28.05.2017. However, DVVNL sealed 33kV ABT meters on 05.06.2017 due to which it could achieve commissioning of its projects on 07.06.2017, thereby causing delay of 10 days which was beyond its reasonable control. As such, the SCoD of the projects may be extended upto 07.06.2017 and liquidated damages may not be levied. **Per Contra**, the Respondent No.1 has submitted that the responsibility to obtain all clearances including the meter sealing from the STU/DISCOMS was solely with the Petitioner. As such, the inability to commission the projects on SCoD cannot be construed as a Force Majeure Event. Respondents are entitled to encash the PBGs for recovering the liquidated damages.

88. The Commission observes that various definitions of the *Guidelines for Selection of 3000 MW Grid - Connected Solar PV Power Projects under Batch-II - State Specific Bundling Scheme*, stipulates as under:

*"Inter-connection point/Delivery point/Metering point" shall mean the point at 33kV or above where the power from the Solar Power Project is injected into the Pooling Substation at the Solar Park or STU/CTU substation as applicable. The Metering shall be done at this interconnection point where the power is injected into the Pooling Substation at the Solar Park or STU/CTU system i.e. Delivery Point. For interconnection with grid and metering, the developers shall abide by the relevant CERC Regulations, Grid Code, and Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 as amended and revised from time to time.*

*"Pooling Substation" shall mean an intermediary Substation where more than one Solar PV Project may connect for further connectivity through a common transmission line to STU / CTU System for evacuation of power.*

89. The Commission observes that relevant provisions of the RfS dated 12.08.2015, stipulates as under:

*"Clause 3.5 (C): Connectivity with the Grid*

*(i) The Solar Power Plant shall be designed for inter-connection with the Pooling Substation at the Solar Park or STU / CTU substation as applicable through dedicated transmission line/cable at voltage level of 33 kV and above.*

*In case the Project is being set - up on Land other than at Solar Park, the Solar Power Developer shall submit a letter from the STU / CTU along with RfS confirming technical feasibility of connectivity of plant to STU / CTU substation."*

*“3.9 Technical Criteria and Connectivity with the Grid*

.....  
*3.9.2 Connectivity with the Grid*

*(i) The Solar Power Plant should be designed for inter-connection with the STU/CTU substation through dedicated transmission line / cable at voltage level of 33kV. The project developers should indicate to the transmission Licensee the location (..) of its proposed project. In this regard, the Bidder shall submit a letter from CTU/STU along with the response to RfS confirming technical feasibility of connectivity of the Plant to STU/CTU substation at the indicated location as per Format 6.10*

*(ii) The entire cost of Transmission from the Project up to the interconnection point including cost of construction of line, wheeling charges, losses etc. (as applicable) will be borne by the Project Developer and will not be reimbursed by NTPC or met by the STU/CTU/DISCOMS.*

*(iii) The responsibility of getting Transmission Connectivity and access to the transmission system owned by the STU/CTU will lie with the project Developer and shall be at the cost of the SPD.”*

90. The Commission observes that various provisions of PPAs dated 18.05.2016, stipulates as under:

*“Guidelines*

*shall mean Guidelines for Selection of Grid Connected Solar PV Projects under ‘Stale Specific Bundling Scheme’ under Batch-II Tranche I of NSM Phase-II issued by MNRE, GoI”*

*“Delivery Point”/ “Interconnection Point”/ “Metering Point*

*Shall mean the point at 33 kV or above at the STU Sub Station where the power from the Solar Power Project is injected into the STU System. The SPD shall abide by the relevant CERC Regulations, Grid Code and Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 as applicable, amended and revised from time to time.”*

*“Pooling Substation*

*Shall mean an intermediary Substation where more than one Solar PV Project may connect for further connectivity through a common transmission line to STU/CTU System for evacuation of power.”*

*“Interconnection Facilities*

*shall mean the facilities on SPD’s side of the Delivery Point/interconnection point/Metering point for sending and metering the electrical output in accordance with this Agreement and which shall include, without limitation, all other transmission lines and associated equipments, transformers, relays, switching equipments, protective devices, safely equipments and, subject to Article 7, the*

*Metering System required for supply of power as per the terms of this Agreement.”*

**“ARTICLE 3: CONDITIONS SUBSEQUENT**

**3.1. Satisfaction of conditions subsequent by the SPD**

*The SPD agrees and undertakes to duly perform and complete all of the following activities including financial Closure at the SPD’s own cost and risk within 210 days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by NTPC:*

- a) The SPD shall obtain all Consents, Clearances and Permits required for supply of power to NTPC as per the terms of this Agreement. NTPC has no obligation to recommend to any department/agency or the Govt, for the grant/permission for the Solar Power project. The Solar Power Developer shall on his own obtain permissions/sanctions from Govt, authorities, if any required for establishing the project;*
- b) The SPD shall make Project Financing Arrangements for its Projects(s) and shall provide necessary documents to NTPC in this regard;*
- c) The SPD shall be solely responsible and make arrangements for Land & associated infrastructure for development of the Project and for Connectivity with the STU/CTU System for confirming the evacuation of power by the Scheduled Commissioning date;*
- d) The SPD shall furnish the necessary documents to establish possession in the name of the Project Developer of the required land/ Lease Agreement;*
- e) The SPD shall fulfill the technical requirements according to criteria mentioned under Clause 3.5 (B) of NSM Guidelines for Selection of Grid-connected Solar-PV Power Projects under “State Specific Bundling Scheme” of Batch-II, Tranche-1 of NSM Phase- II and produce the documentary evidence of the same.*
- f) The SPD shall submit to NTPC the relevant documents as stated above, complying with the Conditions Subsequent, within 210 days period from the Effective Date.*
- g) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection / Metering / Delivery Point*

**ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT**

**4.1 SPD’s Obligations**

**4.1.1. The SPD undertakes to be responsible, at SPD’s own cost and risk, for:**

- a) Land & associated infrastructure for development of the Project, Connectivity with the STU/ CTU System and all clearances related thereto;*
- b) Obtaining all Consents, Clearances and Permits other than those obtained under Article 3.1 and maintaining all Consents, Clearances and Permits in full force and effect during the Term of this Agreement;*
- c) Designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices.*
- d) The commencement of supply of power up to the Contracted Capacity to*



- NTPC no later than the Scheduled Commissioning Date and continuance of the supply of , power throughout the term of the Agreement;*
- e) Connecting the Power Project switchyard with the Interconnection Facilities at the Interconnection point /Delivery Point /Metering point;*
  - f) Owning the Power Project throughout the Term of Agreement free and clear of encumbrances, except those expressly permitted under Article 15;*
  - g) Maintaining its controlling shareholding prevalent at the time of signing of PPA up to a period of one (1) year for the selected Solar-PV Power Projects (selected under the “State Specific Bundling Scheme” of Batch-II Tranche-1 of NSM Phase- II after commencement of supply of power; and*
  - h) Fulfilling all obligations undertaken by the SPD under this Agreement.*

#### *4.2 Information regarding Interconnection Facilities*

- 4.2.1. The SPD shall be required to obtain all information from concern authorities with regard to the Interconnection Facilities as is reasonably necessary to enable it to design, install and operate all system equipments and apparatus on the SPD’s side of the Interconnection point /Delivery Point /Metering point to enable delivery of electricity*
- 4.2.2. The SPD has to bear entire cost of Transmission from the project up to the interconnection point including cost of construction of line, losses etc. and the same will not be reimbursed by NTPC or met by the STU/ Discoms;*
- 4.2.3. The responsibility of getting Transmission Connectivity and Access to the Transmission system owned by the STU will lie with the Project Developer and its cost is to be borne by SPD;*
- 4.2.4. The SPD shall not be entitled to any deemed generation in case of any delay in connectivity to the Project. NTPC shall not be liable for any damage or loss due to loss of Grid connectivity or any other event related to Grid for what so ever reasons;*

#### **ARTICLE 7: METERING**

##### **7.1 Meters**

- 7.1.1 For installation of Meters, Meter testing, Meter calibration and Meter reading and all matters incidental thereto, the SPD and NTPC shall follow and be bound by the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, the Grid Code, as amended and revised from time to time.*
- 7.1.2 The SPD shall bear all costs pertaining to installation, testing, calibration, maintenance, renewal and repair of meters at SPD’s side of Delivery Point/Metering point/Interconnection point.*
- 7.1.3 The SPD shall be responsible for regular downloading and transmission of metered data to the concerned agencies.*

##### **7.2 Reporting of Metered Data and Parameters**

- 7.2.1 The grid connected solar PV power plants will install necessary equipment for regular monitoring of solar radiation, ambient air temperature, wind speed and other weather parameters and simultaneously for monitoring of the electric power generated from the plant.*

- 7.2.2 *Online arrangement would have to be made by the solar power developer for submission of above data regularly for the entire period of this Power Purchase Agreement to the concerned Ministry.*
- 7.2.3 *Reports on above parameters on monthly basis shall be submitted by the Solar Power Developer to MNRE/MOP through NTPC for entire period of PPA.*
- .....”

91. From the above, the Commission observes that the Guidelines for Selection of Grid Connected Solar PV Projects under ‘Stale Specific Bundling Scheme’ under Batch-II Tranche I of NSM Phase-II issued by MNRE, Government of India were applicable to the Petitioner. As per above mentioned Guidelines, the Inter-connection point/Delivery point/Metering point has been defined as the point at 33kV or above where the power from the Solar Power Project is injected into the Pooling Substation at the Solar Park or STU/CTU substation. The Metering was to be done at this interconnection point and the Petitioners were mandated to abide by the relevant CERC Regulations, Grid Code, and CEA Regulations, 2006 as amended and revised from time to time.
92. The Commission observes that as per Clause 3.5 (C) (i) and Clause 3.9.2 of the RfS, the Solar Power Plant was to be designed for inter-connection with the Pooling Substation at the Solar Park or STU / CTU substation as applicable through dedicated transmission line/cable at voltage level of 33 kV and above. However, in case the project was being set-up on land other than at Solar Park, the SPD has to submit a letter from the STU/CTU along with RfS confirming technical feasibility of connectivity of plant to STU/CTU substation.
93. The Commission observes that as per PPAs dated 18.05.2016, the Delivery Point/ Interconnection Point/Metering Point was the point at 33 kV or above at the STU Sub Station where the power from the Petitioner was to be injected into the STU System. Interconnection Facilities on the Petitioner side included without limitation, all other transmission lines and associated equipments, transformers, relays, switching equipments, protective devices, safely equipments and the Metering System required for supply of power as per the terms of this Agreement. Article 3 of the PPAs mandated that the Petitioner shall be solely responsible and make arrangements for Land & associated infrastructure for development of the Project and for Connectivity with the STU/CTU System for confirming the evacuation of power by the Scheduled Commissioning date. The Petitioner was also to make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection/

Metering /Delivery Point. Article 4 of the PPAs further mandated that it was the responsibility of the Petitioner to make arrangements at its own cost and risk for Connectivity with the STU/ CTU System and all clearances related thereto and connecting the Power Project switchyard with the Interconnection Facilities at the Interconnection point /Delivery Point /Metering point. However, the Commission observes that Article 7 of the PPAs stipulated that for installation of Meters, Meter testing, Meter calibration and Meter reading *and all matters incidental thereto*, the Petitioner and Respondent No.1 had to abide by the CEA Regulations, 2006, the Grid Code, as amended and revised from time to time and the Petitioner had to bear all costs pertaining to installation, testing, calibration, maintenance, renewal and repair of meters at the Petitioners side of Delivery Point/Metering point/Interconnection point. In view of the above, the Commission is of the view that the term “*all matters incidental thereto*” includes meter sealing and for the said purpose the Petitioner and Respondent No.1 had to abide by the CEA Regulations, 2006.

94. The Commission observes that UPERC’s Notification No. UPERC/Secy/Regulation/419 dated 18.06.2009 under Schedule-A Procedure for Long-Term Open Access:–

*“6. METERING*

*6.1 Metering arrangements shall be guided by the Regulation 16.*

*6.2 All other matters which are not covered in Regulation 16 regarding type, standards, ownership, location, accuracy class, installation, operation, testing and maintenance, access, sealing, safety, meter reading and recording, meter failure or discrepancies, anti-tampering features, quality assurance, calibration and periodical testing of meters, additional meters and adoption of new technologies etc. shall be governed by the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, U.P. Electricity Grid Code and amendments thereof.”*

95. The Commission observes that the Regulation 2.8 of the U.P. Electricity Grid Code, 2007 stipulates that:-

*“2.8 Transmission Licensee*

*2.8.1 Every Transmission licensee shall comply with technical standards of construction of Electrical plants, Electric lines and connectivity with the grid and safety requirements as specified by the CEA, and follow the principles and procedures as specified in this code and/or Indian Electricity Grid Code as applicable to the intra State Transmission system....”*

96. The Commission observes that relevant provisions of the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 stipulates that:-

*“12. Sealing of meters -*

*(1) Sealing Arrangements*

*(a) All meters shall be sealed by the manufacturer at its works. In addition to the seal provided by the manufacturer at its works, the sealing of all meters shall be done as follows at various sealing points as per the standards given in the Schedule:*

*(i) Sealing of interface meters, shall also be done by both the supplier and the buyer.*

*(ii) Sealing of consumer meters shall be done by the licensee.*

*(iii) Sealing of energy accounting and audit meters shall be done by the licensee or generating company as the case may be.*

*(b) A tracking and recording software for all new seals shall be provided by the manufacturer of the meter so as to track total movement of seals starting from manufacturing, procurement, storage, record keeping, installation, series of inspections, removal and disposal.*

*(c) Seal shall be unique for each utility and name or logo of the utility shall be clearly visible on the seals.*

*(d) Only the patented seals (seal from the manufacturer who has official right to manufacture the seal) shall be used.*

*(e) Polycarbonate or acrylic seals or plastic seals or holographic seals or any other superior seal shall be used.*

*(f) Lead seals shall not be used in the new meters. Old lead seals shall be replaced by new seals in a phased manner and the time frame of the same shall be submitted by the licensee to the Appropriate Commission for approval.*

*(2) Removal of seals from meters*

*(a) Interface meters*

*Whenever seals of the interface meters have to be removed for any reason, advance notice shall be given to other party for witnessing the removal of seals and resealing of the interface meter. The breaking and re-sealing of the meters shall be recorded by the party, who carried out the work, in the meter register, mentioning the date of removal and resealing, serial numbers of the broken and new seals and the reason for removal of seals.*

*(b) Consumer meters*

*Seal of the consumer meter shall be removed only by the licensee. No consumer shall tamper with, break or remove the seal under any circumstances. Any tampering, breaking or removing the seal from the meter shall be dealt with as per relevant provisions of the Act.*

*(c) Energy accounting and audit meters*

*Seal of the energy accounting and audit meter shall be removed only by the generating company or the licensee who owns the meter.”*

97. The Commission observes that from the conjoint reading of the Notification No. UPERC/Secy/Regulation/419 dated 18.06.2009 of UP Electricity Regulatory Commission under Schedule-A Procedure for Long Term Open Access along with U.P. Electricity Grid Code, 2007, the matters regarding, inter-alia, metering, connectivity with the grid, safety requirements etc. are governed by CEA Regulations, 2006. Further, as per Regulation 12(1)(a)(i) of the CEA Regulations, 2006 the sealing of interface meters had to be done by both the supplier (the Petitioner) and the buyer (NTPC).

98. The Commission observes that vide letter dated 03.02.2017, the Petitioner informed the Respondent No. 1 as under :-

*“....We are in process of getting necessary approvals on important documents such as 33 kV & 132 kV metering SLD, Switchyard Layout, Earthing Calculations etc. required for power evacuation / COD in line to the prescribed Grid/STU norms. As per the UPPTCL regulations, there is prescribed procedure which includes inspection/sealing of energy meters as 33 kV & 132 kV side of Pooling Sub-station at Solar Plant as well as STU sub-station by UPPTCL officials. We shall abide by the above procedure laid down by UPPTCL.*

*In this regards, we request NTPC to confirm presence of officials from NTPC/Third Party representative to witness inspection/sealing of energy meters or provide NOC/waiver for the same.*

*....”*

99. The Commission observes that Respondent No. 1 vide its letter dated 04.04.2017 informed the Petitioner as under: –

*“As per Grid Code, the responsibility of meter installation on all interconnections, and other identified points for recording of actual net MWh interchanges and MVarh drawals in accordance with CEA Regulations, 2006, lies with CTU/STU concerned. All concerned entities (in whose premises the special energy meters are installed) shall take weekly meter readings and transmit them to RLDC/SLDC.*

*It is therefore to mention here that NTPC has no role to play in the meter sealing activity.”*

100. The Commission observes that Respondent No. 1 vide its letter dated 21.04.2017 informed the Petitioner/UPPCL as under:-

*“This is in reference to your letter dated 28.03.2017; vide which you have requested NTPCL to witness and approve 33 kV metering scheme, CT/PT Inspection and meter*

*sealing arrangements for 50 MW (10 MW x 5) Solar Power projects in Non Solar Park at Mahoba, Uttar Pradesh.*

*In this reference Power Sale Agreement (PSA) has been signed between NTPCL and Uttar Pradesh Power Corporation Limited (UPPCL) on 15.03.2016 for 50 MW solar projects in Non Solar Park in Uttar Pradesh. The Power Purchase Agreement (PPA) in this reference was also signed between NTPCL and M/s. Prayatna Developers Private Ltd. on 18.05.2016.*

*Clause 4.1.1 of the PSA signed with UPPCL provides as under:*

*“4.1.1. The arrangements for metering of Solar Power supplied at the SPD Delivery Point shall be as per the provisions of NTPCL-SPD PPA. .... The metering arrangements shall comply with the norms of SERC/CEA as applicable.”*

*Also Clause 6.8.3 of the said PSA signed with UPPCL provides as under:*

*“6.8.3.....if for any Contract Year, it is found that the SPD has not been able to generate minimum energy value as agreed at the time of signing of the PPA , on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PPA as payable to Discom and shall duly pay such compensation to NTPCL to enable NTPCL to remit the amount to Discom. This compensation shall be proportional to the amount of shortfall in solar energy during the Contract Year.”*

*Since the PPA has been signed unit wise for each of the five units of 10 MW each, it is necessary to have an energy value for each unit. This requires the reading of individual meters unit wise. As per the PSA, for Renewable Purchase Obligation (RPO), CUF monitoring is required for each project. For operationalisation of Clause 6.8.3 of the PSA entered into as indicated, UPPCL may like to carry out the inspection and sealing of 33 kV metering unit wise.  
You are therefore requested to take kind actions accordingly.”*

101. The Commission observes that the Petitioner vide its letter dated 10.05.2017 informed the Petitioner/UPPCL as under:–

“ ...

1. Dispense with requirement of inspection and sealing of CT, PT and energy meters at 33 kV level and agree that 132 kV joint meter reading shall be equally apportioned in 5 PPA of 10 MW each.
2. Either instruct directly to UPPCL/DISCOM to complete the inspection and sealing of CT, PT and energy meters on 33 kV side on an urgent basis.
3. Allow us to get the inspection and sealing of CT, PT and energy meters at 33 kV level done by NABL accredited agency and dispense with requirement of inspection and sealing by UPPCL/UPTCL/DISCOM.
4. Instead of inspection and sealing by UPPCL/UPPTCL/DISCOM representative. NTPC shall depute their representative for inspection and sealing of CT, PT and

*energy meters at 33 kV level.”*

102. The Commission notes that as per Regulation 12(1)(a)(iii) of the CEA Regulations, 2006 the sealing of interface meters had to be done by both the supplier (the Petitioner) and the buyer (NTPC). The Petitioner vide letter dated 03.02.2017 requested NTPC that since it was in process of getting necessary approvals on important documents such as 33 kV & 132 kV metering, NTPC may confirm presence of officials from NTPC/Third Party representative to witness inspection/sealing of energy meters or provide NOC/waiver for the same. UPTCL vide letter dated 22.03.2017 informed the Petitioner that jurisdiction of UPPTCL lies only upto the point of connectivity i.e. 132 kV pooling station and beyond that UPPTCL would not inspect or seal any meter and they may approach the procurer/NTPC in case of sealing of meters at 33 kV end of plant. However, NTPC vide its letter dated 04.04.2017 informed the Petitioner that as per Grid Code, the responsibility of meter installation on all interconnections, and other identified points for recording of actual net MWh interchanges and MVARh drawals in accordance with CEA Regulations, 2006, lies with CTU/STU (UPPTCL) and NTPC has no role to play in the meter sealing activity. NTPC vide its letter dated 21.04.2017 further stated that since the PPAs have been signed unit-wise for each of the five units of 10 MW each, it is necessary to have an energy value for each unit. This requires the reading of individual meters unit-wise and as per the Power Sale Agreement for Renewable Purchase Obligations, Capacity Utilization Factor monitoring is required for each project individually. Further, for operationalisation of Clause 6.8.3 of the PSA, UPPCL has to carry out the inspection and sealing of 33 kV metering unit wise. It is pertinent to mention here that NTPC has not placed impugned PSA on records. On 10.05.2017, the Petitioner again wrote to NTPC to either instruct directly to UPPCL/DVVNL to complete the inspection and sealing of CT, PT and energy meters on 33 kV side on an urgent basis or allow Petitioner to get the inspection and sealing of CT, PT and energy meters at 33 kV level done by NABL accredited agency and dispense with requirement of inspection and sealing by UPPCL/UPTCL/DISCOM. However, UPPCL vide its letter dated 02.06.2017, directed DVVNL to seal the 33 kV metering system of the Petitioner. On 05.06.2017, 33 kV ABT meters installed at the plant-end were tested and sealed by DVVNL.

103. The Commission observes that various provisions of the PPAs stipulates as under:

*“Scheduled Commissioning Date shall mean 28<sup>th</sup> May 2017 i.e. thirteen (13) months from the Effective date;”*

**“ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION**

**5.1 Synchronisation, Commissioning and Commercial Operation**

- 5.1.1 *The SPD shall give the concerned RLDC/SLDC and NTPC atleast sixty (60) days advanced preliminary written notice and atleast thirty (30) days advanced final written notice, of the date on which it intends to synchronize the respective units of Power Project to the Grid System.*
- 5.1.2 *Subject to Article 5.1.1, the Power Project may be synchronized by the SPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code, CEA guidelines and CERC Regulations then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.*
- 5.1.3 *The synchronization equipment shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.*
- 5.1.4 *The SPD shall immediately after each synchronization/de-synchronization, inform the sub-station of the Grid System to which the Power Project is electrically connected in accordance with the applicable Grid Code.*
- 5.1.5 *The SPD shall commission the Project within thirteen (13) Months from the Effective Date.*
- 5.1.6 *The project shall be entitled for payment of energy @ Rs. 3.00 per kWh as infirm power till Commercial Operation Date (CoD). The Project CoD shall be considered after 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling.*
- 5.1.7 *The 25 year tenure of PPA shall commence from Commercial Operation Date.  
...”*

**“ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF PROJECT**

**4.5 Extensions of Time**

4.5.1 *In the event that the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:*

- a) *any NTPC Event of Default; or*
- b) *Force Majeure Events affecting NTPC, or*
- c) *Force Majeure Events affecting the SPD,*

*the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.2, for a reasonable period but not less than ‘day for day’ basis, to permit the SPD or NTPC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or NTPC, or till such time such Event of Default is rectified by NTPC.”*



4.5.2 Subject to Article 4.5.7, in case of extension occurring due to reasons specified in Article 4.5.1, any of the dates specified therein can be extended by NTPC, subject to the condition that the Scheduled Commissioning Date would not be extended by more than three (3) months.

4.5.2.1 In case extension is required to be given beyond 3 months due to delay for reasons specified in Article 4.5.1, NTPC will approach MNRE, who will be authorised to decide on further extension.”

*“ARTICLE 11: FORCE MAJEURE*

*11.1 Definitions*

*11.1.1 In this Article, the following terms shall have the following meanings:*

*11.2 Affected Party*

*11.2.1 An affected Party means NTPC or the SPD whose performance has been affected by an event of Force Majeure.*

*11.3 Force Majeure*

*11.3.1 A ‘Force Majeure’ means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidable delays an Affected Party in the performance if its obligations under this Agreement, but only if and to extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

*a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado; or*

*b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or*

*c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.*

*d) An event of Force Majeure identified under NTPC- Discom PSA, thereby affecting delivery of power from SPD to Discom.*

*11.4 Force Majeure Exclusions*

*11.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

*a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;*

*b. Delay in the performance of any contractor, sub-contractor or their agents;*

*c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*

*d. Strikes at the facilities of the Affected Party;*

- e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and*
  - f. Non-performance caused by, or connected with, the Affected Party's:*
    - i. Negligent or intentional acts, errors or omissions;*
    - ii. Failure to comply with an Indian Law; or*
    - iii. Breach of, or default under this Agreement.*
- .....”

104. The Commission observes that the Petitioner vide its letter dated 28.01.2017 informed the Petitioner/UPPCL as under:–

*“This has reference to above mentioned PPA. we are happy to inform you that we are in the advance stage of construction of 5x10 MW Solar Projects at Mahoba in the State of Uttar Pradesh.*

*Further, we are pleased to inform you that we are planning synchronization of 50 MW (5x10 MW) Solar Projects with Grid by 30-Apr-17.*

*Kindly consider this letter as advance preliminary notice under Article-5 of PPA, wherein SPD shall have to give written notice to concerned NTPC and RLDC/SLDC at least Sixty (60) days prior to synchronization of plant co Grid System.*

*This is for your kind information and further action at your end please.”*

105. The Commission observes that the Scheduled Commissioning date of the projects was 28.05.2017. As per Article 5 of the PPAs, the Petitioner was mandated to give the concerned RLDC/SLDC and NTPC atleast sixty (60) days advanced preliminary written notice and atleast thirty (30) days advanced final written notice, of the date on which it intends to synchronize the respective units of Power Project to the Grid System. The Petitioner vide letter dated 28.02.2017 gave advance preliminary notice to NTPC that its 5x10 MW Solar Projects at Mahoba in the State of Uttar Pradesh were at the advance stage of construction and it is planning synchronization of 5x10 MW Solar Projects with Grid by 30.04.2017. Further, as per certificate dated 19.05.2017, the Chief Electrical Inspector, Government of U.P. issued the Electrical Safety Certificate in respect of the 5 X 10 MW Solar Power Projects of the Petitioner, transmission line and switchyard. Chief Electrical Inspector also granted permission for charging of 5 x 10 MW Solar PV projects.

106. The Commission observes that the 5 x 10 MW Solar PV projects of the Petitioner were ready for synchronisation even before 28.05.2017 i.e. SCoD. The 33 kV ABT meters installed at the plant-end were sealed by DVVNL only on 05.06.2017 and the projects were then

commissioned on 07.06.2017. The Commission is of the view that the delay in commissioning the project was due to delay in sealing of the 33 kV ABT meters installed at the plant-end by the Respondents. As per Article 7 of the PPAs, the Petitioner and NTPC were to follow and were bound by CEA Regulations, 2006. As per CEA Regulations, 2006, the sealing of 33 kV ABT meters installed at plant-end to be done by the supplier (the Petitioner) and the buyer (NTPC) as it was their joint responsibility. As per communications dated 03.02.2017 and 10.05.2017 it is noted that the Petitioner requested NTPC for execution of sealing process of the 33 kV ABT meters installed at plant-end. However, NTPC neither got the same sealed through UPPTCL/UPPCL/DVVNL nor gave NOC to enable the Petitioner to seal the meters. As per Article 4.5.1 (a) of the PPAs the Scheduled Commissioning Date and the Expiry Date can be deferred in case of NTPC event of default. Accordingly, the Commission holds that delay of 10 days viz. from 28.05.2017 (SCoD) to 07.06.2017 (commissioning of 5 X 10 MW projects) caused due to delay of sealing of the 33 kV ABT meters installed at the plant-end by the Respondents needs to be condoned. The Commission extends the SCoD of 5 X 10 MW solar power projects of the Petitioner to 07.06.2019.

***Issue No. 3: Whether the Respondent No. 1 should be directed to refund the amount deducted as liquidated damages from the running bills of the Petitioner amounting to Rs. 1 (Rupees One) Crore along with interest from the date of the said deductions?***

107. In view of the discussions held in Issue No.1 and Issue No. 2 above the Scheduled commissioning date of 5 x 10 MW Projects stand extended to 07.06.2019. Accordingly, the Respondent No.1 is directed to refund the amount deducted as liquidated damages from the running bills of the Petitioner amounting to Rs. 1 (Rupees One) Crore along with interest within sixty days of the date of this Order.

108. Accordingly, Petition No. 229/MP/2018 stands disposed of.

Sd/-  
आई. एस. झा  
सदस्य

Sd/-  
डॉ एम. के. अय्यर  
सदस्य

Sd/-  
पी. के. पुजारी  
अध्यक्ष