

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 65/MP/2019

- Subject : Petition for recovery of money from the Rajasthan Distribution Companies for power supplied from June, 2017 to April, 2018 under the Power Sale Agreement dated 26.2.2016 entered into between NTPC Limited and the Rajasthan Distribution Companies.
- Petitioners : NTPC Limited & NTPC Vldyut Vitaran Nigam Limited
- Respondents : Ajmer Vidyut Vitaran Nigam Limited & 3 ors
- Date of Hearing : **30.9.2021**
- Coram : Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member
- Parties Present : Shri Nishant Kumar, Advocate, NTPCL & NVVNL
Shri Animesh Kumar, Advocate, NTPCL & NVVNL
Ms. Utkarsha Sharma, Adcovate, NTPCL & NVVNL
Ms. Shweta Singh, Advocate, NTPCL & NVVNL
Shri Ashwin Ramanathan, Advocate, RUVNL

Record of Proceedings

Case was called out for virtual hearing.

2. During the hearing, the learned counsel for the Petitioners, NTPC and NVVN, mainly submitted the following:

(a) The Jawaharlal Nehru National Solar Mission Scheme ('the JNNSM Scheme') under Phase-II, Batch-II, Tranche-I envisaged the bundling of solar power (3000 MW) with unallocated thermal power (1500 MW) in the ratio of 2:1 (in MW terms), for which the required 1500 MW power is to be made available by MOP, GOI. The role of the Petitioner, NTPC was inter alia to sign Power Purchase Agreements (PPAs) with the Solar Power Developers (SPDs) and also to sign back to back Power Sale Agreements (PSAs) with interested State Utilities/ Discoms for the sale of power.

(b) The guidelines issued by MNRE, GOI provides that in the event of supply of power by the solar power projects before their commercial operation date, the same shall be treated as an infirm power. Pursuant to the competitive bidding, SPDs were selected for generation and supply of solar power to the Petitioner, NTPC on the terms and conditions contained in the bidding documents.



(c) PPA was entered into between the Petitioner NTPC and Rising Bhadla 1 Private Limited, one of the selected SPD, on 12.5.2016. The Petitioner NTPC also signed PSAs for Bhadla Solar Park on 26.2.2016 and for Non-Solar Park on 11.5.2016 and 28.7.2016 with Respondents 1 to 3, on a back to back basis, for resale of the power procured from the SPDs along with thermal power procured from NTPC (bundled power) on the terms and conditions contained in the PSA.

(d) As per paragraph 3.13 of the MNRE guidelines and the PPAs/ PSAs entered into by the Petitioner NTPC on back-to-back basis, the power injected by the SPDs prior to the declaration of commercial operation of the solar power projects, is to be paid by the Respondents at the infirm power rate of Rs 3/kWh.

(e) During the period from May, 2017 to December, 2017 i.e. till the declaration of the commercial operation of the solar power projects set up by the SPDs, there was injection of infirm power into the grid, which has been accounted for drawl of power by Respondents 1 to 3. The quantum of such power injected during the above period is 194.25 MU amounting to Rs. 58.28 crores.

(f) The Petitioner NTPC raised invoices on the Respondents, for payment of the infirm power at the rate of Rs 3/kWh, along with the trading margin of 7 paise/kWh. The Respondents have failed to pay the amount of the invoices and have wrongly taken the stand that they are not liable to pay any price for the solar power generated and supplied to them, till such time the bundled power was made available.

(g) A total amount of Rs. 69.24 crore, as on 31.12.2018, is due and outstanding from the Respondents 1 to 3, towards the claim of the Petitioner NTPC, along with interest of 1.25% per month, payable in terms of Article 6.3.3 of the PSA. Under the JNNSM Scheme, the Petitioner NTPC cannot bear any liability on its own, without a corresponding liability on the Respondents 1 to 3.

(h) The quantum of solar power supplied by the Petitioner, NTPC to the Respondents, even as infirm power, is available to the Respondents for being adjusted against the Renewal Purchase Obligations, mandated on them, in terms of the Regulations and the orders passed by the Rajasthan Electricity Regulatory Commission, under section 86(1)(e) read with section 181 of the Electricity Act, 2003.

(i) Even assuming (but not admitting) that the PSA does not have a specific clause dealing with infirm power, the principle of 'Quantum Meruit', as statutorily provided under Section 70 of the Indian Contract Act, 1872, will apply

3. In response, the learned counsel for the Respondent, RUVNL referred to the reply and mainly submitted as under:

(a) There is no basis for the claims of the Petitioners, when the commercial arrangement between the parties is governed by the provisions of the PSA dated 26.2.2016, which provide for the terms and conditions on which power was to be procured by the Respondents from the Petitioners.



(b) In terms of the provisions of the PSAs, the procurement was only of bundled power. The Petitioner No. 2, acting on behalf of the Petitioner NTPC was required to procure solar power from SPDs on a long term basis, at the rate of Rs. 4.35/- per kWh, bundle the solar power with the thermal power allocated by the MOP, GOI and thereafter, supply the bundled power to the Respondents, on the terms and conditions as provided in the PSA. There is no provision in the PSA for supply of unbundled power, either solar power or thermal power.

(c) The fact that the PPA with SPDs provide for payment of infirm power and that the PSA does not find any mention of infirm power, would show that there was never any agreement on supply of solar power independently.

(d) Article 6.8.4 of the PSA specifically recognizes that the supply of power prior to the Scheduled Commissioning date or capacity not covered by the agreement can be made to third parties by the SPD. However, Article 4.2.2 of the PPA provides for the purchase of infirm or excess power as the case may be, by the Petitioner, subject to the condition that such excess energy is accepted by the discoms. No consent has been taken from the Respondents for injection of the power by the generator.

(e) Admittedly, the Respondents are not privy to the PPA signed by the Petitioner NTPC with the SPDs and, therefore, any reliance on the provisions of the PPA by the Petitioners is completely misplaced. Without any provision for payment for non-bundled infirm power under the PSA, the Respondents cannot be held liable to pay the amounts as claimed by the Petitioners.

(f) The principle of 'Quantum Meruit' has no application, when there is an express contract in place between the parties;

4. The Commission, after hearing the parties, reserved its order in the Petition.

By order of the Commission

Sd/-
(B. Sreekumar)
Joint Chief (law)

