

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 40/MP/2022

Subject : Petition under Section 79(1)(a) and 79(1)(f) of the Electricity Act, 2003.

Petitioner : NTPC Limited (NTPC)

Respondents : Meghalaya Power Distribution Corporation Limited (MPDCL) and Anr.

Petition No. 47/MP/2022 and IA No.5/2022

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Article 7 of the Power Purchase Agreement dated 13.7.2007 entered into between the National Thermal Power Corporation and the predecessor in interest of the Petitioners i.e. the Meghalaya State Electricity Board.

Petitioner : Meghalaya Power Distribution Corporation Limited (MPDCL) and Anr.

Respondent : NTPC Limited

Date of Hearing : 17.2.2022

Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Parties Present : Ms. Swapna Seshadri, Advocate, NTPC
Shri Anand K. Ganesan, Advocate, NTPC
Ms. Ritu Apurva, Advocate, NTPC
Shri Jai Dhanani, Advocate, NTPC
Shri Amit Kumar, Advocate General, MPDCL
Shri Shaurya Sahay, Advocate, MPDCL

Record of Proceedings

Cases were called out for virtual hearing.

2. Learned counsel for NTPC submitted that the Petition No. 40/MP/2022 has been filed *inter alia* seeking directions to the Respondents 1 & 2 therein and adjudication of certain disputes arisen between the parties under Sections 79(1)(a) and 79(1)(f) of the Electricity Act, 2003 ('the Act'). Learned counsel further submitted that the matter also concerns the statement which was made on behalf of the Respondents through Advocate General of the State of Meghalaya before the Commercial Court in Commercial Case No.2 of 2021 to the effect that a Petition had been filed by them seeking correct statutory remedy of adjudication under Section 79(1)(f) of the Act before the Commission and getting an interim order on the basis

of such a statement. Learned counsel referred to her note of submissions and mainly submitted the following:

(a) On 13.7.2007, NTPC and the erstwhile Meghalaya State Electricity Board ('MSEB') (predecessor in interest of Respondents No. 1 & 2) entered into Power Purchase Agreement ('PPA') for supply of power from the Bongaigaon Thermal Power Station ('BTPS') of NTPC. The said PPA was entered into on account of the requisitioning of power by MSEB, which was subsequently allocated by the Ministry of Power ('MoP'), Government of India vide letter dated 13.10.2008.

(b) Subsequently, the Respondents issued a letter dated 15.5.2015 to MoP requesting surrender of its entire share of 53 MW from BTPS till 2021 due to surplus capacity availability.

(c) Unit-I of BTPS achieved commercial operation on 1.4.2016 and since then, power was being continuously scheduled to the Respondents as per the terms of the PPA dated 13.7.2007. However, the Respondents have been defaulting in the payment due to NTPC since June 2018.

(d) The Respondents vide their letter dated 1.4.2021, without any reservation or condition, acknowledged the payment of Rs 387 crore to NTPC as outstanding and provided a liquidation plan to pay the same. As on date of filing of the Petition, the amount due to the Petitioner was Rs. 531 crore.

(e) Subsequently, the Respondents vide their letter dated 16.4.2021 abruptly sought unilateral termination of the PPA and invoked the Dispute Resolution Clause. Consequently, the Respondents also filed Arbitration Commercial Case No.2 of 2021 under Section 9 of the Arbitration and Conciliation Act, 1996, wherein the Commercial Court vide order dated 22.4.2021 granted an ex-parte ad-interim stay on invocation of Letter of Credit ('LC'). At that point, the Respondents did not point out that the private arbitration of the dispute between the generator and distribution licensee is not valid in terms of the judgment of Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited v. Essar Power Limited [2008 4 SCC 755].

(f) Pursuant to the liberty granted by the Commercial Court in order dated 22.4.2021, NTPC filed Commercial Miscellaneous Case No. 8 of 2021 under Order 39 Rule 4 read with Section 151 of the Code of Civil Procedure, 1908 for vacating the ex-parte ad-interim order, wherein NTPC had also raised the issues on jurisdiction and unilateral termination of PPA by the Respondents.

(g) On 4.5.2021, NTPC issued notice to the Respondents under the provisions of the Central Electricity Regulatory Commission (Regulations of Power Supply) Regulations, 2010 along with letter for continuation of suspension of power supply to the Respondents by NTPC w.e.f. 11.5.2021, which was challenged by the Respondents by Commercial Miscellaneous Case No. 9 of 2021, wherein the Commercial Court by order dated 7.5.2021 directed not to take any action pursuant to the notice dated 4.5.2021 and to maintain the status quo till 11.5.2021 or till the next date of hearing.

(h) On 11.5.2021, the Miscellaneous Case No. 8 of 2021 filed by NTPC came to be dismissed by the Commercial Court. Being aggrieved by the said order, NTPC had filed Arbitration Appeal No.1 of 2021 in the Hon'ble High Court of Meghalaya at Shillong, which was held to be not maintainable and

came to be dismissed by order dated 6.7.2021 with direction to Commercial Court to take-up the application made under Section 9 of the Arbitration Act in its entirety.

(i) Accordingly, the Commercial Court took up the Commercial Case No. 2 of 2021 on 25.11.2021 and during the hearing, the Respondents made a statement that they have filed an appropriate Petition under Section 79(1)(f) of the Act before this Commission and accordingly, the Commercial Court vide order dated 25.11.2021 directed the Respondents to place on record the Petition filed by them before the Commission.

(j) On next date of hearing on 30.11.2021, Advocate General appearing for the Respondents confirmed that Petition had been filed by them before the Commission.5.2 seeking correct statutory remedy for adjudication. Since the above submissions were made by the highest law officer of the State, NTPC did not raise objections against the same and accordingly, the said application was disposed of by the Commercial Court on 30.11.2021 and directed the parties to maintain status quo till the Respondents are given opportunity to effective hearing on the Petition filed before this Commission.

(k) However, even though the order was passed on 30.11.2021, the Respondents had not moved any application for listing of its Petition before the Commission. The Respondents have filed the Petition No. 47/MP/2022 only on 4.2.2022.

(l) In the above background, NTPC has filed the present Petition for setting aside the Respondents' letter dated 16.4.2021; direction that the Respondents to be bound by MoP allocation dated 13.10.2008 and PPA; and to forthwith release outstanding amounts to NTPC. NTPC has also sought direction to the Respondents to clarify the factual aspect of the filing the Petition before this Commission as per the statement made before the Commercial Court, Shillong in Commercial Case No. 2 of 2021 and for imposing heavy costs for misleading NTPC as well as judicial authorities to obtain unfair protection against invocation of LC.

(m) As regards IA No.5 of 2022 in Petition No. 47/MP/2022 filed by the Respondents seeking ex-parte interim reliefs, there is no *prima facie* case or balance of convenience in the favour of the Respondents. No interim relief should be granted in favour of the Respondents and it ought to be directed to pay 50% of outstanding amounts forthwith. The Commission has already held in the number of cases that there cannot be unilateral termination of the MoP allocation and that liability of payment of capacity charges persists till the allocation by MoP subsists.

3. Learned counsel for the Respondents (Petitioner in Petition No. 47/MP/2022) mainly submitted the following:

(a) The contention that the Respondents did not file the Petition before this Commission as per the statement made before the Commercial Court, Shillong is misplaced. They had filed the Petition way back on 22.11.2021 having Reference No. 472/2021. However, since it had certain defects and the filing fees were yet to be paid, it was re-numbered/ re-registered on the subsequent date upon removing of such defects. There is also an admission on the part of both the sides regarding the Respondents having approached the Commission and filed a Petition, as recorded at paragraph 5 of the Commercial Court's order dated 30.11.2021.

(b) PPA dated 13.7.2007 between the parties was entered into on the premise of the MSEB being desirous of purchasing capacity and energy from BTPS and NTPC being willing to sell the capacity and energy from BTPS from the date of commissioning of Unit I. Although, the Unit I of the BTPS was supposed to be operationalized in 2011, it was operationalized belatedly only in 2016.

(c) As per the PPA, the capacity charges were required to be paid in proportion to the allocated capacity.

(d) However, even prior to Unit-I of BTPS could be commissioned, the Respondents surrendered their allocation vide letter dated 15.5.2015. Thus, having surrendered their allocations, the Respondents cannot be laden with the liability of capacity charges, which are to be charges in proportion to the allocated capacity.

(e) Despite not having drawn a single unit of the allocated power, the Respondents have been required to pay approximately Rs.600 crore towards the capacity charges. Reference was made to the details of payment made to NTPC as submitted under Annexure P/22 to Petition No. 47/MP/2022.

(f) NTPC has sought to justify the liability of the Respondents to pay the capacity charges on the basis of Article 2.6.6 of the PPA which provides that the Respondents will continue to be liable to pay capacity charges in proportion to its allocation till the power is reallocated to the other bulk power customers. However, the pre-condition for the applicability of the said Article is that there must be a 'default' by the Respondents. In present case, no default can be attributed to the Respondents as they having already surrendered the allocation vide letter dated 15.5.2015.

(g) The provisions of the PPA do not bar the Respondents from surrendering their allocation. Along with the right to enter into an agreement, the Respondents must have right to terminate the agreement.

(h) The cost of purchase of power from BTPS is exorbitantly high and it is not possible to purchase the power thereof. Thus, in view of the exorbitant cost of power and complete unviability of the purchasing the power under the PPA has rendered the PPA frustrated and therefore, unenforceable.

(i) Several representations were made to Ministry of Power, Government of India regarding unviability of purchase of power at exorbitant rates from BTPS, including representation through Northern Eastern Regional Power Committee in November 2016.

(j) Without prejudice to the above, the capacity charges are in the nature of penalty and, therefore, can only be to the extent of loss suffered. There is no loss suffered on account of surrender of allocation by the Respondents and, therefore, there can be no levy of capacity charges. Even assuming that any loss has occasioned to the Respondents, levy of capacity charges would be contrary to the principles of 'Mitigation of loss' inasmuch as it was for the Central Government/ NTPC to re-allocate the surrendered power to another purchaser.

4. In response to the specific query of the Commission regarding outstanding amounts towards capacity charges of BTPS, learned counsel for NTPC submitted that as on date of filing of the Petition, the outstanding dues were Rs. 531 crore,

which have now increased to approximately Rs. 566 crore. NTPC has only received one tranche of payment from the Respondents for approximately Rs. 200 crore through REC/PFC support. However, after June 2018, they have not made payments towards capacity charges despite having given assurances on various occasions. Learned counsel further submitted that the Respondents had also scheduled the power from BTPS prior to June 2018. She further added that the payment chart exhibited by the Respondents do not relate to their liability of payment of capacity charges in respect of BTPS. In response, learned counsel for the Respondents sought liberty to place on record the details of payments made/ outstanding in respect of BTPS by way of an additional affidavit.

5. After hearing the learned counsel for the parties, the Commission ordered as under:

(a) Admit the Petitions.

(b) The Petitioners to serve copy of their respective Petitions along with IA on the Respondents immediately, if not already served and the Respondents to file their reply including on IA, if any, by 8.3.2022 after serving copy of the same to the Petitioners, who may file their rejoinder, if any, by 23.3.2022.

(c) NTPC and MePDCL are directed to furnish the following details on affidavit by 8.3.2022:

(i) Month-wise details of quantum of energy requisitioned, scheduled and dispatched from the instant generating station under the PPA dated 13.7.2007 till date.

(ii) Month-wise details of total amounts billed (breakup of various sub-heads and late payment charges, if any) by NTPC to the Meghalaya Discoms, as per provisions of PPA dated 13.7.2007 pertaining to BTPS till date.

(iii) Month-wise details of corresponding total payment made by Meghalaya Discoms as per provisions of PPA pertaining to BTPS till date, and outstanding dues till date, along with breakup of principal and late payment surcharges.

(d) The Commission directed the parties to maintain status-quo till the next date of hearing.

(e) Parties to comply with the above directions within the specified timeline and no extension of time shall be granted.

6. The Petitions shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Law)**