



नई दिल्ली  
NEW DELHI

याचिकासंख्या./ Petition No. 65/MP/2019

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member

श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 22<sup>nd</sup> of March, 2022

**IN THE MATTER OF:**

**Recovery of money from the Rajasthan Distribution Companies for the power supplied under the Power Sale Agreement dated 26.02.2016 entered into between NTPC Limited and the Rajasthan Distribution Companies.**

**AND**

**IN THE MATTER OF:**

1. NTPC Limited,  
SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi – 110 003
2. NTPC Vidyut Vitaran Nigam Limited,  
Core-7, SCOPE Complex, Institutional Area,  
Lodhi Road,  
New Delhi – 110 003

...Petitioners

**Versus**

1. Ajmer Vidyut Vitaran Nigam Limited,  
Hathi Bhata, Jaipur Road,  
Ajmer – 305 001
2. Jaipur Vidyut Vitaran Nigam Limited,  
Vidyut Bhawan, Janpath,  
Jaipur – 302 005
3. Jodhpur Vidyut Vitaran Nigam Limited,  
New Power House, Industrial Area,  
Jodhpur – 342 003
4. Rajasthan Urja Vikas Nigam Limited,  
400 KV GSS Control Room, Ground Floor,  
Herapura,  
Jaipur (Raj)

... Respondents

**Parties present:** Shri Nishant Kumar, Advocate, NTPCL & NVVNL  
Shri Animesh Kumar, Advocate, NTPCL & NVVNL  
Ms. Utkarsha Sharma, Advocate, NTPCL & NVVNL  
Ms. Shweta Singh, Advocate, NTPCL & NVVNL  
Shri Ashwin Ramanathan, Advocate, RUVNL

### आदेश/ ORDER

The Petitioners, NTPC Limited and NTPC Vidyut Vyapar Nigam Limited(NVVN) have filed the Petition under Section 79 (1) (f) of The Electricity Act, 2003 for adjudication of disputes and for directions for payment of money by the Respondents. The Petitioners are seeking declaration that NTPC is entitled to recover from the Respondents the consideration for the infirm power supplied to the said Respondents during the period from May 2017 to December 2017 i.e. until the declaration of commercial operation of the solar power projects in terms of the provisions of the PPAs and PSA at the rate of Rs 3/kWh along with an additional sum of 7 Paise/kWh towards trading margin. The Petitioners have also prayed that the Respondents be directed to pay an amount of Rs 69.24 Crores together with Delayed Payment Surcharge for the future period from 01.01.2019 till full payment and discharge of the amount due to NTPC.

2. Vide Order dated 14.10.2016 Petition No. 2/TDL/2016, the Commission has permitted NTPC to utilize the trading license issued to NVVN to fulfill its obligations for purchase and resale of Solar Power under the National Solar Mission.

3. The Respondent No. 1 to Respondent No. 3 are the Distribution Licensees in the State of Rajasthan who procure power for distribution and retail supply of electricity to the consumers in the State of Rajasthan.
4. The Respondent No. 4, Rajasthan Urja Vikas Nigam Limited has been authorized by the Distribution Companies of the State of Rajasthan to act on their behalf.
5. The Petitioners have made the following prayers:

*(a) hold that NTPC is entitled to recover from the Respondents the consideration for the infirm power supplied to the said Respondents during the period from May 2017 to Dec 2017 i.e. until the declaration of the commercial operation of the solar power projects in terms of the provisions of the PPAs and PSA at the rate of Rs 3/-kWh along with an additional sum of 7 Paise/kWh towards trading margin;*

*(b) direct the Respondents to pay an amount of Rs 69.24 Cr. (as per Annexure I) together with Delayed Payment Surcharge for the future period from 01.01.2019 till full payment and discharge of the amount due to NTPC;*

*(c) award costs of the petition;*

*(d) pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.*

### **Background**

6. Ministry of New and Renewable Energy (MNRE) formulated the Jawaharlal Nehru National Solar Mission Scheme (JNNSM) for promotion of solar power and for sale of such solar power to the Distribution Licensees in the State including the Respondents to enable them to fulfill their Renewable Purchase Obligation (RPO) in terms of Section 86 (1)(e) of the Electricity Act, 2003.
7. In March, 2015, MNRE issued the 'Guidelines for Selection of 3000 MW Grid – Connected Solar PV Power Projects under Batch-II - State Specific Bundling Scheme' (in short "Guidelines") to facilitate grid connected solar power generation by evolving a mechanism of "bundling" solar power with thermal power from the unallocated quota at NTPC coal based generating stations and onward sale of the bundled power to Distribution Utilities. NTPC agreed to purchase power from the Solar Power Developers (SPDs) as an intermediary and

sell power to the Distribution Licensees after bundling it with the unallocated power of coal based generating stations of NTPC.

8. On 05.03.2015, the presidential sanction was accorded for the said scheme and the role of NTPC was inter alia to sign Power Purchase Agreements (PPAs) with the Solar Power Developers (SPDs) and also sign back to back Power Sale Agreements (PSAs) with the interested State Utilities/Discoms for sale of power. The scheme under Phase-II, Batch-II, Tranche-I also envisaged 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 was to be made available by the Ministry of Power. The bundled thermal power is to be allotted to various States that come forward to (i) provide land for setting up the solar power projects and (ii) purchase a major portion of the bundled solar power for consumption within the State (iii) ensure connectivity to the solar power project.
9. On 21.05.2015, NTPC floated the Request for Selection (RfS) for the Bhadla Solar Park, State of Rajasthan, inviting proposals for setting up and installation of Solar PV Projects in Rajasthan.
10. On 03.07.2015, NTPC floated the RfS for Non-Solar Park, State of Rajasthan.
11. On 26.04.16, 27.04.16, 02.05.16, 12.05.16, 16.06.16, 17.06.16, 02.08.16, 02.09.16, 16.09.16, 06.09.16 (i.e. during the months of April, 2016 to September , 2016), NTPC executed PPAs in respect of the Bhadla Solar Park & Non Solar Park, Rajasthan with SPDs.
12. On 26.02.2016, NTPC executed Power Sale Agreements for Bhadla Solar Park and on 11.05.2016 & 28.07.2016 NTPC executed PSA for Non-Solar Park with Respondent No. 1, Respondent No. 2 and Respondent No. 3 herein on back to back basis, for resale of the power procured from the SPDs along with the thermal power procured from NTPC Limited (bundled power).

### **Submissions of the Petitioners**

13. The Petitioners have submitted that:
  - a) In accordance with the Guidelines, the PPAs and the PSAs, the power injected (when the solar power project is ready but could not be declared under commercial operation pending allocation of power in the Thermal Power Station for bundling with the solar power) is to be paid by the Respondents at the infirm power rate of Rs 3/kWh.

- b) Para 3.13 of MNRE Guidelines under which the bids had been invited from the various SPDs and the PPAs and PSAs are to be entered on back-to-back basis, reads as under:

*3.13 Commercial Operation Date (CoD):*

*The projects commissioned during a month shall be entitled for payment of energy @Rs. 3.00/kWh as infirm power till Commercial Operation Date (CoD). The Project CoD shall be considered 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling. The 25 year tenure of PPA shall commence from Commercial Operation Date.*

- c) In terms of the Regulations notified and Orders passed by the Rajasthan Electricity Regulatory Commission (RERC) under section 86 (1) (e) read with section 181 of the Electricity Act, 2003, the quantum of solar power supplied by NTPC to the Respondents, even as infirm power, is available for adjustment against the Renewal Purchase Obligation (RPO).
- d) During the period from May, 2017 to Dec, 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 generated from various projects into the Grid which has been accounted for drawl of power by Respondent No. 1, Respondent No. 2 and Respondent No. 3.
- e) The quantum of such power injected during the above period is 194.25 MUs amounting to Rs. 58.28 Crores. The Respondents have procured such power as infirm power in terms of the Guidelines, PPAs and PSAs mentioned herein above and are liable to pay at the infirm power rate of Rs 3/kWh.
- f) The Petitioners raised the invoices for the payment of the infirm power at the rate of Rs 3/kWh from the Respondents. The Respondents are also liable to pay the Trading Margin/consideration for NTPC at 7 Paise/ kWh.
- g) The Respondents have failed to pay the amount of the invoices. The Respondents have taken the stand that they are not liable to pay any price to NTPC for the solar power generated and supplied to them till such time the bundled power is available.
- h) The Respondents have submitted that neither they have obligation to pay NTPC for the power injected at the infirm power rate of Rs 3/kWh nor the trading margin of 7 Paise/kWh for the same. The stand of the Respondents is contrary to the terms and

conditions agreed to between the parties as per provisions of the Guidelines and the terms of the PSA read with the provisions of the PPAs entered into with the SPDs.

- i) Even assuming (but not admitting) that the PSA does not have a specific/explicit clause dealing with infirm power, the principle of 'Quantum Meruit', as statutorily provided under Section 70 of the Indian Contract Act, 1872, will apply. Section 70 provides that where a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
- j) Further, in view of the failure on the part of the Respondents to pay the amount due to Petitioners, namely, Rs 3/kWh towards infirm power rate and 7 Paise/kWh as trading margin, the Respondents are liable to pay the Delayed Payment Surcharge at the rate of 1.25% per month as provided for in Article 6.3.3 of the PSA dated 26.02.2016.
- k) Total sum of Rs. 69.24 Crore as on 31.12.2018 is due and outstanding from Respondents 1 to 3 towards the claim of Petitioners above along with interest computed in terms of Clause 6.3.3 of the PSA at the rate of 1.25% per month.

***“6.3.3 Late Payment Surcharge***

*In the event of delay in payment of a Monthly Bill by the Discom thirty (30) days beyond its Due Date, a Late Payment Surcharge shall be payable by the Discom to NTPC at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis. The Late Payment Surcharge shall be claimed by NTPC through the next Monthly Bill.”*

**Submissions by RUVNL (Respondent No. 4) on behalf of Respondent No. 1, Respondent No. 2 and Respondent No. 3**

14. The RUVNL through its reply dated 17.10.2019 has submitted as under:
  - a) The claims made by the Petitioners are de-hors the provisions of the PSA entered into between the parties. There is no basis for such claims being made, when the commercial arrangement between the parties is governed by the provisions of the PSA entered into between the parties.
  - b) The Contracted Capacity was of bundled power and there is no provision in the PSAs for supply of unbundled power, either solar power or thermal power.
  - c) The contention of the Petitioners that the provisions of the PPAs automatically get incorporated in the PSAs and that the Respondents are bound by the terms of the PPAs are wrong.
  - d) Article 13.2 of the PSAs provides that the Agreement (PSA) is for the sole benefit of

the parties to the PSAs and there is no obligation of either of the Party towards any third party to the Agreement. The SPD being a third party to the PSAs, there is no contractual relationship between the SPD and the Respondents.

- e) Article 13.10 provides that the liability of the parties shall be only what is explicitly provided for in the Agreement. There is no provision in the PSAs for the claim presently made. On this count alone, the present claim is liable to be rejected.
- f) The PPAs with the SPDs provide for payment of infirm power and that the PSAs not finding any mention of infirm power shows that there was never any agreement on supply of solar power independently.
- g) Article 6.8.4 of PSAs specifically recognizes that the supply of power prior to the SCoD or capacity not covered by the Agreement can be made to third parties by the SPDs.
- h) Article 4.4.2 of PPAs provides for purchase of infirm or excess power by the Petitioners at a notional support price of Rs. 3/- per kWh. However, the said dispensation is only subject to the condition that such excess energy is accepted by the Discoms. Otherwise, the SPDs are free to sell such excess power to third parties.
- i) In terms of the MNRE Guidelines, which provide for payment of Rs.3/kWh for infirm power to the SPDs, the liability for such payment is on the Petitioners and not on the distribution licensees.
- j) While the MNRE Guidelines were issued in March 2015, the PSAs were entered into only in 2016, wherein the provision for payment for infirm power was intentionally left out. Further, the PPAs were signed after the signing of the PSAs. Therefore, the PPAs could by no stretch be read as a part of the PSAs, as it is a document subsequent to the PSAs.
- k) The PPAs specifically provide for the COD to take place after 30 days from the date when the commissioning is done, which is when the injection of power into the grid begins. This period of 30 days is intended to match the allocation and availability of thermal power for bundling, and that it is for the Petitioners to pursue the matter with the Ministry of Power for allocation of thermal power. In most of the cases the SPDs achieved the COD with a delay even after 30 days from part commissioning. This delay has not even been explained by the Petitioners. Even as per the case of the Petitioners, when the PPAs only provide the COD after 30 days from the commissioning, there is no case for even a claim to be made beyond 30 days.
- l) No consent has been taken of the Respondents for injection of the power by the

generator. The injection has been unilateral, without consent and in fact is an act that ought not to be encouraged. There can be no question of any claim for compensation for such unilateral action on the part of the generator and the Petitioners.

- m) The injection of power being without consent, the question of quantum meruit has no application. It is not that the power was voluntarily accepted and used by the Respondents. On the other hand, such unilateral injection only results in variation in grid operations and does not necessarily help the grid.
- n) In case infirm or any excess power other than the contracted capacity was to be purchased by the Respondents, the SPDs would be first required to make a separate proposal for sale/purchase of such energy. Under no circumstance, can such injection of infirm solar power be done as a matter of right. In a similar matter relating to a PSA with SECI, the SPDs have made separate proposals for purchase of solar power till COD of plant. The PPAs between SECI and the SPDs in that case in fact, include a similar provision such as Article 4.4.2 under the PPAs in this case. It is open to the Respondents to accept or reject such proposals. However, the PSAs in no manner mandate purchase of any other power than the contracted capacity i.e. bundled power. Further, if the Petitioners have agreed to sell the said infirm power without taking the prior permission of the Respondents, the charges for the same can certainly not be passed on.

#### **Rejoinder by Petitioner No. 1 (NTPC)**

- 15. Vide Rejoinder dated 25.11.2019, NTPC has reiterated its submissions made in the plaint and as such, the same have not reproduced herewith for the sake of brevity. Additionally, NTPC has submitted that:
  - a) The issue of the payment for the supply of solar component/energy injected by the SPDs prior to the bundling with the thermal component, the same is covered by the principles laid by this Commission in its Order dated 8.11.2019 in Petition No. 17/MP/2018 in the case of *NTPC Vidyut Vyapar Nigam Limited-v-Ajmer Vidyut Vitaran Nigam Limited &Ors*. In the said Order, this Commission has held that the Buying Utilities are liable to pay for the solar energy even when it had not been bundled along with thermal power.
  - b) The entire scheme is in terms of which the PPA with various SPDs and the back to back PSA with the Rajasthan Distribution Company was entered into pursuant to the State Specific Bundling Scheme.



- c) The provisions of the PPA and the PSA , the terms of the RfS and the documents are inextricable intertwined with one another and all form part of the same transaction. Accordingly, the provisions of the PPA providing for payment of infirm charges, shall also constitute a valid and binding obligation under the PSA.

### **Hearing dated 30.09.2021**

16. The case was called out for virtual hearing on 30.09.2021. During the hearing, the learned counsel for the Petitioners reiterated the claim as made out in the written submission, that 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 NTPC, along with interest of 1.25% per month, payable in terms of Article 6.3.3 of the PSA. Under the JNNSM Scheme, NTPC cannot bear any liability on its own, without a corresponding liability on the Respondents 1 to 3. The quantum of solar power supplied by NTPC to the Respondents, even as infirm power, is available to the Respondents and is being adjusted against the Renewal Purchase Obligation, mandated on them, in terms of the Regulations and the Orders passed by the Rajasthan Electricity Regulatory Commission, under section 86(1)(e) of the Electricity Act, 2003. 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.
17. In response, the learned counsel for the Respondent, RUVNL argued on lines of written submissions, reiterating inter alia that the PPA with SPDs provides for payment of infirm power and but the PSA does not find any mention of infirm power. 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 PPAs by the Petitioners is completely misplaced. Without any provision for payment for nonbundled infirm power under the PSA, the Respondents cannot be held liable to pay the amounts as claimed by the Petitioners. The principle of 'Quantum Meruit' has no application, when there is an express contract in place between the parties;
18. After hearing the parties, the Petition was reserved for Orders.

### **Analysis and Decision**

19. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records. From the submissions of the parties, the following issues arise for adjudication:

***Issue No.1:*** Whether NTPC is entitled to recover from the Respondents the consideration for the infirm power supplied to the said Respondents during the period from May 2017 to Dec 2017 i.e. until the declaration of the commercial operation of the solar power projects in terms of the provisions of the PPAs and PSA at the rate of Rs 3/kWh along with an additional sum of 7 Paise/kWh towards trading margin?

***Issue No. 2:*** Whether the Respondents should be directed to pay an amount of Rs 69.24 Cr. (as per Annexure I) together with Delayed Payment Surcharge for the future period from 01.01.2019 till full payment and discharge of the amount due to NTPC?

20. No other issue was pressed or claimed.
21. We now discuss and analyze the issues.

***Issue No. 1:*** Whether NTPC is entitled to recover from the Respondents the consideration for the infirm power supplied to the said Respondents during the period from May 2017 to Dec 2017 i.e. until the declaration of the commercial operation of the solar power projects in terms of the provisions of the PPAs and PSA at the rate of Rs 3/kWh along with an additional sum of 7 Paise/kWh towards trading margin?

**AND**

***Issue No. 2:*** Whether the Respondents should be directed to pay an amount of Rs 69.24 Cr. (as per Annexure I) together with Delayed Payment Surcharge for the future period from 01.01.2019 till full payment and discharge of the amount due to NTPC?

22. As the Issue No. 1 & Issue No. 2 are inter-connected, the same are taken together for analysis and decision. The Petitioners have submitted that in accordance with the scheme as contained in the Guidelines, PPAs and PSAs, the status of the power injected by the SPDs into the Grid prior to the declaration of CoD of the solar power projects has been specifically provided. Given the back-to-back nature of PPAs and PSAs, such power injected (when the solar power project is ready but could not be declared under commercial operation pending allocation of power in the Thermal Power Station for bundling with the solar power) is to be paid by the Respondents at the infirm power rate of Rs 3/- kWh as per the provisions of Para 3.13 of MNRE guidelines. As such, the Respondents should be directed to pay an amount of Rs

69.24 Crores together with Delayed Payment Surcharge for the future period from 01.01.2019 till full payment and discharge of the amount due. *Per contra*, the Respondents have submitted that the commercial arrangement between the parties is governed by the provisions of the PSAs entered into between the parties. The PPAs with the SPDs provide for payment of infirm power, though there is no mention of infirm power in the PSAs. There was never any agreement on supply of solar power independently. MNRE Guidelines provide for payment of Rs.3/- kWh for infirm power to the SPDs, the liability for such payment is on the Petitioners and not on the distribution licensees.

23. We observe that Clause 3.13 of the Guidelines stipulates as under:

*3.13 Commercial Operation Date (CoD):*

*The projects commissioned during a month shall be entitled for payment of energy @Rs. 3.00/kWh as infirm power till Commercial Operation Date (CoD). The Project CoD shall be considered 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling. The 25 year tenure of PPA shall commence from Commercial Operation Date.*

24. We observe that Clause 3.29 of the RfS stipulates as under:

*3.29 Commercial Operation Date (CoD)*

*The projects commissioned during a month shall be entitled for payment of energy @Rs 3.00/kWh as infirm power till Commercial Operation Date (CoD). The Project CoD shall be considered 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling. The 25 years tenure of PPA shall commence from CoD.*

25. The relevant provisions of the PPAs are as under:

*“Commercial Operation Date” [CoD]: Shall mean the 30 days from the actual part commissioning date of the capacity where upon the SPD starts injecting power from the part commissioned capacity to the Interconnection point/Delivery Point/ Metering point. CoD is intended to match allocation and availability of thermal power for bundling:*

*“Infirm power”:*Shall mean electricity injected into the grid prior to Commercial Operation Date of the Capacity partly commissioned;

**4.4 Right to Contracted Capacity & Energy**

*4.4.1 NTPC, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 153.30 Million kWh (MU) i.e. energy generated corresponding to a CUF of 25% as committed by the SPD. If for any Contract Year, it is found that the SPD has not been able to generate minimum energy*

of 122.64 Million kWh (MU) corresponding to a CUF of 20% (i.e. 25%-5%), 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 PSA as payable to Discoms and shall duly pay such compensation to NTPC to enable NTPC to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff.

4.4.2 Notwithstanding Article 4.4.1, the SPD would be free to sell any capacity which is in excess of the quantum of power agreed to be supplied under this Agreement from Scheduled Commissioning Date either to NTPC or sell in open market. Provided that the SPD shall not be entitled to claim benefit of bundling of power provided in this Agreement in any manner whatsoever on such sale of infirm power or power in excess of the contracted capacity as the case may be. Such **excess energy, if accepted**, by the Discom(s), may be purchased by NTPC at a notional Support Price of Rs. 3/- kWh.

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

5.1 Synchronization, Commissioning and Commercial Operation

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.

26. The relevant provisions of the PSAs are as under:

A. NTPC has been identified by the Govt. of India as the nodal agency for purchase and sale of 33kV and above grid connected 'Solar PV' power under the "State Specific Bundling Scheme" under National Solar Mission by Ministry of Power (MoP), Government of India (GoI).

B. NTPC has also been authorized by MoP, GoI and under the provisions of the National Solar Mission Phase-II, Guidelines for selection of 3000 MW Grid connected Solar PV power Projects under Batch II to bundle the purchased Solar Power with unallocated quota from NTPC thermal power stations on 2:1 on MW basis as per allocations made by MoP, GoI.

C. NTPC shall sign Power Purchase Agreements (PPAs) with Solar Power Developers assigned by parent Company M/s. Rising Sun Energy Pvt. Ltd. (hereinafter referred to as "SPDs") for procurement of 140 MW Solar Power under DCR category on a long term basis @ Rs. 4.35/kWh.

D. NTPC Vidut Vyapar Nigam Limited (NVVN) on behalf of NTPC, will purchase Solar Power from SPDs and sell it to Discom after bundling it with the Thermal Power allocated by MoP, GoI, for this purpose. Further on behalf of NTPC, NVVN will facilitate Daily Scheduling, Billing, Realization, Data Submission and other associated day to day activities for fulfilling the obligations of NTPC as assigned in this agreement.

E. The Parties hereby agree to execute this Power Sale Agreement (PSA) setting out the terms and conditions for the sale of Bundled Power by NTPC to the Discom.

F. The agreed Contracted thermal power from different stations of NTPC for bundling shall be as per the allocation letter to be issued by MoP, GoI from time to time.

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**ARTICLE 5: APPLICABLE TARIFF**

5.1.1 *The Applicable Tariff for Bundled Power shall be derived as per provisions of Schedule-I of this Agreement and the Discom shall make the Tariff Payments to NTPC as per the provision of this Agreement.*

**ARTICLE 6: BILLING AND PAYMENT**

6.1 *General*

6.1.1 *From the commencement of supply of power by NTPC, the Discom shall pay to NTPC the monthly Tariff Payments, on or before the Due Date, in accordance with Tariff as specified in Article 5. All Tariff Payments by the Discom shall be in Indian Rupees.*

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6.3.3 *Late Payment Surcharge*

*In the event of delay in payment of a Monthly Bill by the Discom thirty (30) days beyond its Due Date, a Late Payment Surcharge shall be payable by the Discom to NTPC at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis. The Late Payment Surcharge shall be claimed by NTPC through the next Monthly Bill.*

.....

**6.8 Renewable Purchase Obligation**

...

6.8.3 *NTPC, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond the energy value as committed by the SPD at the time of signing of PPA. If for any Contract Year, it is found that the SPD has not been able to generate minimum 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 NTPC to enable NTPC to remit the amount to Discom. This compensation shall be proportional to the amount of shortfall in solar energy during the Contract Year.*

6.8.4 *Notwithstanding Article 6.8.3, the SPD is free to sell such power to any third party prior to the Scheduled Commissioning Date and any capacity which is in excess of the quantum of power agreed to be supplied under this Agreement from Scheduled Commissioning Date. Provided that the SPD shall not be entitled to claim benefit of bundling of power provided in this Agreement in any manner whatsoever on such sale of infirm power or power in excess of the contracted capacity as the case may be.*

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13.2 *Third Party Beneficiaries*

13.2.1 This Agreement is solely for the benefit of the Parties and their respective successors and permitted assigns and shall not be construed as creating any duty, standard of care or any liability to, any person not a party to this Agreement.

.....  
**13.10 No consequent or Indirect Losses**

**13.10.1 The liability of the Discom and NTPC shall be limited to that explicitly provided in this Agreement.**

*Provided that notwithstanding anything contained in this Agreement, under no event shall NTPC or the Discom claim from one another any indirect or consequential losses or damages.*

.....  
**13.11 Order of priority in application**

*In case of inconsistencies between the agreement(s) executed between the Parties, applicable Law including rules and regulations framed thereunder, the order of priority as between them shall be the order in which they are placed below:*

- i. applicable Law, rules and regulations framed thereunder;*
  - ii. the Grid Code; and*
  - iii. the terms and conditions of this Agreement*
- .....

**SCHEDULE 1: RATE DERIVATION FOR SOLAR POWER AND NTPC POWER**

1) The billing to the Distribution Utilities (Discoms) shall be done by NTPC for realization of amount for solar power component and NTPC thermal power component.

2) The solar power component amount is product of the energy metered and tariff notified by CERC and shall be calculated as under:

$$A(sp) = E(sp) * T(sp)$$

Where

- *A(sp) = Amount realization (in Rs.) for Solar Power for the applicable Month;*
- *E(sp) = No. of units (kWh) metered at SPD Delivery Point and verified by the Energy Accounts for the applicable Month;*
- *T(sp) = Tariff (in Rs./kWh) as agreed in the respective NTPC-SPD PPA;*

27. From the above, the Commission observes that Article 5.1.6 of the PPAs stipulates that the projects shall be entitled for payment of energy @ Rs. 3.00/ kWh as infirm power till CoD. Article 4.4.2 of the PPAs stipulates that the SPDs would be free to sell any capacity which is in excess of the quantum of power agreed to be supplied from SCoD either to NTPC or sell in open market. The SPD shall not be entitled to claim benefit of bundling of power provided in this Agreement in any manner whatsoever on such sale of infirm power or power in excess of the contracted capacity as the case may be. Such excess energy, *if accepted*, by the Discom(s), may be purchased by NTPC at a notional Support Price of Rs. 3/- kWh. Further,

as per Article 6.8.4 of the PSAs, the SPDs are free to sell such power to any third party prior to the SCoD and any capacity which is in excess of the quantum of power agreed to be supplied from SCoD.

28. The Commission notes that a harmonious reading of Article 6.8.4 of the PSAs and Article 4.4.2 of the PPAs reveals that the SPDs were free to sell infirm power/ power in excess of the contracted capacity to any third party. The SPDs were not entitled to claim benefit of bundling of power in any manner whatsoever on such sale of infirm power or power in excess of the contracted capacity as the case may be. Further, only the excess energy, *if accepted*, by the Discom(s), is to be purchased by NTPC at a notional Support Price of Rs. 3/- kWh.
29. The Commission observes that NTPC has submitted that there was injection of infirm power generated from the projects into the grid which has been accounted for drawl of power by Respondent No. 1, Respondent No. 2 and Respondent No. 3. NTPC has also submitted the statement of Joint Meter Reading issued by Rajasthan Discoms for the solar project by Mahindra Susten Private Limited from period of 01.10.2017 to 01.11.2017 as a sample whereas the Respondents have submitted that merely injecting power into the grid by SPDs does not mean that the Respondents have procured the power from them or is liable to pay for such power.
30. The Commission observes that NTPC has relied upon the statements (sample) of Joint Meter Reading to prove that there was injection of infirm power generated from the projects into the Grid and the same has been accounted for drawl of power by the Respondents. We note that Infirm Power has been defined in the PPA between NTPC and SPD as “electricity injected into the grid prior to Commercial Operation Date of the capacity partly commissioned”. Article 4.4.2 of the PPA provides as under:

*“4.4.2 Notwithstanding Article 4.4.1, the SPD would be free to sell any capacity which is in excess of the quantum of power agreed to be supplied under this Agreement from Scheduled Commissioning Date either to NTPC or sell in open market. Provided that the SPD shall not be entitled to claim benefit of bundling of power provided in this Agreement in any manner whatsoever on such sale of infirm power or power in excess of the contracted capacity as the case may be. Such **excess energy, if accepted**, by the Discom(s), may be purchased by NTPC at a notional Support Price of Rs. 3/- kWh.”*

31. However, we observe that NTPC has failed to bring on record any document conveying the acceptance of Respondent Discoms to purchase the infirm power or any drawal requisition from the Respondent Discoms to prove that the infirm power was injected at the request of the Respondents Discoms. Therefore, the provisions of Article 4.4.2 have not been complied with for sale of infirm power to Respondent Discoms.
32. NTPC has further submitted that even assuming (but not admitting) that the PSA does not have a specific/explicit clause dealing with infirm power, the principle of ‘Quantum Meruit’, as statutorily provided under Section 70 of the Indian Contract Act, 1872, will apply. We note that Section 70 of the Indian Contract Act provides as under:
- “70. Obligations of Person enjoying benefit of non-gratuitous act.- where Where a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. “*
33. This section has three elements, namely, (a) that the person claiming the benefit under this section was acting lawfully when he was delivering anything to the other party; (b) that he did not intend to do it gratuitously; and (iii) that the other party did enjoy the benefits voluntarily.
34. In the present case, the PPA defines infirm power as injection of electricity into the grid prior to commercial operation date. Supply of infirm power to Discoms can take place only with the prior acceptance of the Discoms. Further, there is no provision for supply of infirm power in the PSA. In the absence of any consent or acceptance from Discoms or provision in the PSA, it cannot be said that NTPC was supplying infirm power to the Discoms. The nature of electricity is such that once injected into the grid, it has to be accounted for against some entity by the concerned State Load Despatch Centre (SLDC) or Regional Load Despatch Centre (RLDC). Therefore, we do not consider the Joint Meter Reading (sample) submitted by NTPC in support of its claim that Discoms have consented to draw the infirm power as a valid proof of consent of Discoms for the supply of infirm power from the NTPC. The very fact that Discoms have been disputing the injection of infirm power as unilateral and without their consent goes to establish that the Discoms have neither accepted nor enjoyed the benefits of infirm power voluntarily. In our view, the requirements of Section 70 of the Contract Act, 1872 are not met in the present case and accordingly, no



relief can be granted under the said provision.

35. Accordingly, the prayer of the Petitioner for recovery of the consideration for infirm power from the Respondent Discoms is rejected. The issues are decided accordingly.
36. The Commission makes no order as to cost.
37. Accordingly, the Petition No. 65/MP/2019 is disposed of.

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(पी. के. सिंह)  
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