

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 94/MP/2022

Coram:

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

Date of Order: 16th December, 2022

In the matter of:

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003, for seeking issuance of urgent directions upon the Respondents for making immediate payment of an amount of Rs. 39,50,89,662/- which has been illegally deducted by them from the monthly energy bills issued by the Petitioner for the period commencing from May' 21 to October' 21, and Rs. 26,50,88,621/- for the period November' 21 to December' 21 by unilaterally revising PAPP/ PPSA tariff on amount of a skewed and deliberate misinterpretation of the "Misdeclaration" provisions provided under the Article 11 of the Pilot Agreement for Procurement of Power ("PAPP")/ Pilot Power Supply Agreement ("PPSA") along with interest/ carrying cost, and consequent judicial command for adhering to the provisions of the PAPP/ PPSA in their letter and spirit.

And

In the matter of:

SKS Power Generation (Chhattisgarh) Limited
Through its Authorized Representative
501B, Elegant Business Park,
Andheri Kurla Road, J.B. Nagar,
Andheri (E), Mumbai- 400059

...Petitioner

Vs.

1. PTC India Limited,
2nd Floor, NBCC Tower, 15 Bhikaji Cama Place,
New Delhi-110066

2. Bihar State Power (Holding) Company Limited (BSPHCL),
Vidyut Bhawan, Jawahar Lal
Nehru Marg, Patna Bihar-800021

...Respondents

The following were present:

Shri Buddy Ranganadhan, Advocate for the Petitioner
Shri Hemant Singh, Advocate for the Petitioner

Shri Lakshyajit Singh Bagdwal, Advocate for the Petitioner
Shri Harshit Singh, Advocate for the Petitioner
Shri Ravi Kishore, Advocate, Respondent No. 1

ORDER

The Petitioner, SKS Power Generation (Chhattisgarh) Limited (SPGCL), has filed the present Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003, for seeking issuance of directions upon the Respondents for making payment of Rs. 39,50,89,662/- illegally deducted by them from the monthly energy bills issued by the Petitioner for the period commencing from May, 2021 to October, 2021, and Rs. 26,50,88,621/- for the period November, 2021 to December 2021 by unilaterally revising PAPP/ PPSA tariff on deliberate misinterpretation of the “Misdeclaration” provisions provided under Article 11 of the Pilot Agreement for Procurement of Power (hereinafter referred to as “PAPP”)/ Pilot Power Supply Agreement (hereinafter referred to as “PPSA”) along with interest/ carrying cost. The Petitioner has made the following prayers:

“(a) Hold that there is no Mis-declaration of availability by the Petitioner in terms of Article 11.2.4 of the PAPP/ PPSA, in view of the submissions made in the present petition;

(b) Direct the Respondents to make payment of Rs. 66,01,78,283/- which has been illegally deducted/ withheld from the monthly tariff bills of the Petitioner, as detailed in the present Petition, alongwith applicable interest/ carrying cost/ late payment surcharge on delayed payment in terms of Article 24 of the PAPP;

(c) Direct the Respondents not to deduct the amounts from the monthly tariff bills based on a wrongful interpretation of ‘Mis-declaration’ provision (Article 11.2.4) of the PAPP/ PPSA;

(d) Award all litigation cost(s) to the Petitioner;

(e) Pass any other or further orders as this Commission may deem fit in the present facts and circumstances of the case and in the interest of justice.”

Submissions of the Petitioner

2. The Petitioner has mainly submitted as under:

(a) The Petitioner is a generating company under Section 2(28) of the Electricity Act, 2003 ('the Act') and has set up a 1200 MW coal based thermal power plant at village Binjkot and Darramuda in Tehsil Kharsia, District Raigarh in the State of Chhattisgarh.

(b) On 6.4.2018, Ministry of Power, Government of India introduced a Pilot Scheme for the purpose of facilitating procurement of power of 2500 MW under medium term open access for a period of 3 years, from the generating companies having coal-based thermal power plants. A model Pilot Agreement for Procurement of Power was also issued by the Ministry of Power, Government of India. The said scheme was introduced in order to assist the "stressed" power plants on account of non-availability of long-term PPAs. Vide the said scheme, the tariff of the said generating companies was fixed for a period of three years. The Petitioner was also identified as a stressed asset in terms of 37th Parliamentary report issued by the Ministry of Power, Government of India.

(c) On 28.9.2018, the Respondent No. 2, Bihar State Power (Holding) Company Limited (in short 'BSPHCL') a distribution licensee operating in the State of Bihar, gave consent for procurement of 300 MW power to the Respondent No. 1, PTC India Ltd. (PTC) who has been granted inter-State trading licence in electricity.

(d) Thereafter, under the Pilot Scheme, the Petitioner participated in the bidding process and was declared as a successful bidder and was further awarded the contract for supply of 75 MW power to BSPHCL. The Petitioner quoted a tariff of Rs. 4.24/- per unit for supply of 75 MW power under the relevant provisions of the agreement.

(e) Accordingly, on 26.10.2018, PTC acting as the authorized trader/aggregator executed the Pilot Agreement for Procurement of Power (PAPP)

with the Petitioner. Subsequently, on 29.10.2018, PTC executed a back-to-back Pilot Power Supply Agreement (PPSA) with BSPHCL.

(f) On 24.5.2019, the Commission vide order dated 24.5.2019 in Petition No. 88/AT/2019 adopted the tariff of Rs. 4.24 per unit as envisaged under the provisions of the PAPP/ PPSA, along with the trading margin of 0.05 paise for PTC. As per Article 10.1.3 of the PAPP/ PPSA, the distribution licensee shall have the flexibility to procure between 55% to 100% of the aggregate contracted capacity. This means that in effect, if the BSPHCL procured 55% power from the Petitioner (out of the total 75 MW), the applicable tariff was to be Rs. 4.24/- per unit, and the said tariff reduces to Rs. 4.195/- per unit (including trading margin of 5 paise per unit) if 100% power was to be procured by the BSPHCL.

(g) Subsequently, Bihar Electricity Regulatory Commission (BERC) vide its order dated 14.8.2019 in S.M.P No. 11/2019 removed the aforesaid flexibility. Furthermore, in the said Petition, BSPHCL took a stand that flexibility to procure 55% to 100% contracted capacity should remain. Aggrieved by the BERC` decision, BSPHCL filed An Appeal No. 351 of 2019 before the Appellate Tribunal for Electricity (APTEL). In the said appeal, BSHPCL took a categorical stand that it should be allowed procure 55% of the contracted capacity and not the entire 100% contracted capacity, along with the right to schedule more based on demand in terms of Article 10.1.3 of the PAPP/ PPSA. APTEL vide its order dated 19.1.2021 remanded the matter to BERC with direction to take a fresh view in terms of its findings rendered in the order dated 14.8.2019 within two weeks.

(h) In compliance of the direction of APTEL, vide order dated 1.2.2021, BERC. allowed the distribution licensees to procure and schedule power as per the terms and conditions of the PPSA in a way that the consumer shall not be un-necessarily be burdened with higher power purchase cost. Based on the finding of BERC, vide order dated 4.2.2021, disposed of the aforesaid Appeal filed by BSPHCL, thereby retaining the right of BSPHCL to have the flexibility as contemplated under Article 10.1.3 PAPP/ PPSA.

(i) On 30.12.2021, BSPHCL after a period of nine (9) months vide an email informed PTC that there shall be a modification of the tariff for the period commencing from 1.4.2021 to 31.10.2021 by alleging that there is a Mis-declaration in terms of Article 11.2.4 of the PAPP/ PPSA. In the said email, PTC further informed the Petitioner that it was verbally informed by the officials of BSPHCL that they have not charged any compensation, but have invoked mis-declaration clause of the PAPP/ PPSA (Article 11.2.4). As such, the Respondents proceeded to deduct a cumulative amount to the tune of Rs. 66,01,78,283/- from the monthly energy bills raised by the Petitioner, thereby unilaterally revising the tariff.

(j) PTC from the period April' 2021 to August' 2021 raised compensation invoices upon the Petitioner in terms of Article 10.2.3 of the PAPP qua default in scheduling power on behalf of the Petitioner. Further, the Petitioner in response to the compensation invoices raised upon it, issued various representations/ letters stating that the said invoices should be based on actuals and not as per the assumptions of PTC.

(k) The Petitioner in response to the aforesaid email dated 30.12.2021 on various occasions vide its emails has time and again requested PTC to clear the outstanding bills with respect to the monthly energy bills raised upon the Respondents, and also intimated the difficulties being faced by the Petitioner on account of such illegal deductions/ non-payment of legitimate tariff. However, there was no response from the said Respondent.

(l) On 5.1.2022, the Petitioner issued a legal notice to PTC on account of illegal deductions made by the said Respondent qua the monthly energy bills/ invoices raised for supply of power in terms of the PAPP/ PPSA. The Petitioner vide the said notice further sought evidence of the invoices, regarding illegal deductions qua the alleged short supply.

(m) The Petitioner vide its letters dated 24.1.2022 and dated 29.1.2022, further requested PTC for immediate release of outstanding payment for the quantum of power supplied in terms of the PAPP/ PPSA. In response of the

legal notice dated 5.1.2022, PTC vide its letter dated 6.2.2022 informed that it has provided the documents and the information sought by BSPHCL.

(n) BSPHCL vide its letter dated 8.2.2022, informed PTC that it has already communicated its stand for deduction of the amount from the monthly energy bills of the Petitioner in terms of the relevant clauses of the PAPP/ PPSA. Furthermore, BSPHCL also informed that due to hearings on tariff petitions for the financial year 2022-23 and other various technical validation sessions/ meetings that are taking place before BERC, it is difficult for holding a meeting and thereafter suggested to hold a meeting during the last week of February, 2022.

(o) On 10.2.2022, the Petitioner and the officials of the Respondents conducted a meeting, wherein the officials of the Petitioner alongwith the PTC met with the officials of BSPHCL to resolve the issue. However, nothing conclusive came out of the said discussion.

(p) The Petitioner from April 2021 to December 2021 has been declaring its availability at 41.25 MW, and has been scheduling the said declared quantum. Based on the said availability of the Petitioner, PTC availed open access for the said quantum of 41.25 MW. Further, PTC at all times during the disputed period provided a pre-filled form being Format-I, wherein the day ahead open access qua the declared availability of the Petitioner was provided which was at all times 41.25 MW. The said Form is then forwarded to the Petitioner only for affixing the company stamp and the signature of the authorized representative. Subsequently, once the pre-filled form is duly signed by the Petitioner, the same is forwarded to PTC in a pre-filled form i.e., Format-II, wherein once again, the declared availability of the Petitioner to supply power was always 41.25 MW.

3. The Petition was admitted on 21.4.2022 and notice was issued to the Respondents to file their respective replies. PTC and the Petitioner have filed reply and rejoinder to the Petition respectively.

4. PTC, in its reply dated 3.6.2022, has mainly submitted as under:

(a) The contention that PTC deducted amounts towards mis-declaration of availability on its own is not correct. PTC was constrained to deduct the amount only when similar amounts were deducted/ less verified from the unpaid bills of BSPHCL.

(b) PAPP and the PPSA being a back-to-back arrangement, PTC being a “trader” has acted as a facilitator only. In support PTC relied upon the judgments passed by the APTEL in the cases of PTC India Limited v. UERC & Ors., reported in (2011) ELR (APTEL) 81 (Para 52); Lanco Power Ltd., v. HERC & Ors., reported in (2011) ELR (APTEL) 1714 (Para 21); and PTC India Limited v. UERC & Ors., reported in (2016) ELR (APTEL) 1176 (Para 8) wherein it has been held that a trading licensee in a back-to-back arrangement only acts as a trader.

(c) There is no event of mis-declaration of availability and the same was also informed to BSPHCL vide letter dated 17.12.2020, wherein it was stated by PTC that there was no event of mis-declaration during any month throughout the contract period. Furthermore, the compensation levied upon PTC is also not applicable.

(d) PTC reiterated its stand in its various letters dated 22.1.2021, 23.2.2021, 15.5.2021, 28.7.2021, 20.10.2021, 31.1.2021 and 7.4.2022, wherein it has been clarified that there had not been any event of mis-declaration on the part of the Petitioner and any of the amounts deducted by BSPHCL may be released.

(e) The Petitioner vide its letter dated 24.3.2020 informed PTC that since on account of the outbreak of COVID-19 pandemic, a force majeure event had occurred, the Petitioner would not be able to supply power. The same was duly informed to BSPHCL also.

(f) On 9.4.2020, The Petitioner vide its letter dated 9.4.2020 again informed PTC that due to outbreak of the COVID-19 pandemic it will not be in a position to supply power to the said Respondent.

(g) PTC being a “trader” forwarded the aforesaid letters to BSPHCL. However, BSPHCL vide a letter dated 13.10.2020 informed the Petitioner that there was no event of force majeure as was claimed by the Petitioner on account of the COVID-19 pandemic.

(h) On 16.12.2020, BSPHCL informed PTC that non-supply of power by the Petitioner on account of occurrence of the pandemic is not covered under force majeure clause and thereafter, BSPHCL invoked Clause 11.2.4 of the PAPP/ PPSA and accordingly, the tariff was modified. PTC further on 17.12.2020 informed BSPHCL that the said Clause 11.2.4 was not applicable.

(i) Since there is no case for mis-declaration of availability and if the deviation in declared availability is more than 15% of the contracted capacity then compensation as per Clause 10.2.3 of the PAPP/ PPSA is applicable. Hence, it was only on account of the aforesaid, that PTC proceeded to raise compensation invoices for the month of April 2021 to August 2021. Further, BSPHCL also calculated the compensation amount vide its email dated 28.12.2021. However, BSPHCL proceeded to invoke Clause 11.2.4 of the PAPP/ PPSA.

(j) PTC always endeavored to resolve the matter amicably and had also organized meeting with the officials of BSPHCL, wherein the representative of the Petitioner was also present. However, the said meeting remained inconclusive.

(k) Any amount deducted by BSPHCL on account of mis-declaration as per Clause 11.2.4 should not have been deducted as the interpretation of the said clause is misplaced. However, if any deduction is made by the said Respondent on account of compensation for non-supply of power by the Petitioner as per the provisions of the PAPP/ PPSA, similar amount shall be deducted by PTC from the monthly energy bills/ invoices raised by the Petitioner.

Hearing dated 15.7.2022

5. During the course of hearing on 15.7.2022, learned counsel for the Petitioner reiterated its submissions made in the Petition and submitted that such unilateral and arbitrary deductions made by BSPHCL has led the Petitioner company to Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016. The application for initiation of CIRP against the Petitioner company has been admitted and the Resolution Professional (RP) having been appointed therein. Consequent to initiation of CIRP, the Petitioner has re-started the supply of power from 9.6.2022. Learned counsel for PTC supported the case of the Petitioner and stated that the deductions carried out by the Respondent, BSPHCL does not amount to a misdeclaration in terms of Article 11 of the PAPP/ PPSA. Learned counsel for BSPHCL sought some time to file reply to the Petition which was allowed.

6. The Respondent No. 2, BSPHCL in its reply dated 25.7.2022, has mainly submitted as follows:

(a) APTEL while passing the order dated 2.2.2021 in Appeal No. 351 of 2019 took into consideration the order of BEREC passed on 1.2.2021 and as a result of the same, the contracted capacity ought to be necessarily treated as 41.25 MW upto 1.2.2021 and 75 MW from 2.2.2021 till the expiry of the PPSA.

(b) BSPHCL started procuring power through PTC in terms of the order passed by APTEL and the Petitioner had scheduled zero power to the BSPHCL, despite the fact that in terms of Article 10 and Article 11 of the PPSA, 100% of the contracted capacity ought to have been dedicated to the BSPHCL.

(c) The contention of BSPHCL that Clause 11.2.5 of the PPSA carves out an exception to Clause 11.2.4 of the PPSA, thereby providing that if the contracted capacity is determined to be lower than 100% or the reduced availability notified under Clause 11.2.5, then such reduction shall not be treated as an event of mis-declaration.

(d) Clause 11.2.5 of the PPSA provides that if the contracted capacity or notified available capacity is reduced on account of de-commissioning due to force majeure events, which the Petitioner is bound to notify as per Clause 15.5 of the PPSA, then such reduction shall not be treated as mis-declaration. However, the Petitioner did not issue any such communication or notified the BSPHCL about the same.

(e) During the months of March 2020, April 2020 and May 2020, etc., whenever the availability has been determined to be lower than 41.25 MW and during the months of March 2021, April 2021 and May 2021, whenever the availability has been determined to be lower than 75 MW, an event of mis-declaration has occurred and BSPHCL has rightfully deducted the said amounts from the monthly energy bills of the Petitioner.

(f) The Petitioner taking recourse of the COVID-19 pandemic, thereby stating that it could not supply power and hence, an event of force majeure has occurred is also misplaced. BSPHCL vide letters dated 13.10.2020 and dated 9.7.2021 rejected the said claim of the Petitioner claiming force majeure and therefore, the same resulted in an event of mis-declaration.

(g) If a pandemic like that of the COVID-19 falls within the ambit of force majeure under the provisions of the PAPP/ PPSA, the party would not relieve from the performance of its contractual obligations. The occurrence of a force majeure event shall have a direct impact on the non-performance and the party seeking relief is also under the duty to mitigate and/ or explore other alternate means of performance.

(h) Regional Load Despatch Centre (RLDC) has no role whatsoever to determine whether an event of mis-declaration has occurred under Clause 11.2.4 of the PAPP/ PPSA. Further, reliance placed by the Petitioner upon the provisions of the Grid Code is also mis-placed, since the issue does not involve over/ under scheduling of power.

7. The Petitioner in its rejoinder dated 29.7.2022 to the Reply of BSPHCL has mainly submitted as under:

(a) The contention of BSPHCL that upto 1.2.2021, the contracted capacity was reduced to 41.25 MW and thereafter, the same has no relevance whatsoever, since the subject matter of the present Petition is only pertaining to interpretation of Article 11.2.1 and Article 11.2.4 of the PAPP/ PPSA for the period from 1.4.2021 to 31.12.2021.

(b) Vide aforesaid order of APTEL and BERC, there is no such finding wherein it has been stated that there should be supply of full contracted capacity, instead, the APTEL and BERC simply retained the “flexibility” provided under Article 10.1.3 for the Bihar Discoms to avail 55% to 100% contracted capacity.

(c) The contention of BSPHCL that the Petitioner did not declare 55% of the contracted capacity in terms of Article 10 and Article 11 of the PAPP/ PPSA also does not have any basis under law. Article 11.2.1 the PAPP/ PPSA provides that declared availability would be normally deemed to be 100% at all time, unless it is “otherwise notified by the supplier/ aggregator”. In other words, in case, the Petitioner is not able to declare 100% contracted capacity, then whatever is declared by the Petitioner, would be the “declared availability”.

(d) Declared availability as declared by the Petitioner was duly accepted by the Respondents, without any opposition. In fact, the open access was sought for the said quantum and accordingly, the Petitioner supplied the exact quantum of power, which was declared by it. Additionally, as per the extant provisions of the Grid Code, if an Inter-State Generating Station (“ISGS”) has deliberately under/ over declared its capacity, then the concerned RLDC may ask the ISGS to explain the said situation. Thereafter, the concerned ISGS is required to demonstrate as to why it mis-declared its capacity, and accordingly, subject to decision of RLDC, the ISGS is imposed, penalty as per Regulation 6.4 (20) of the said Grid Code. However, there has been no communication from RLDC at any time, as to the fact that the Petitioner has under/ over scheduled or mis-declared its availability.

(e) In terms of Article 11.6 of the PAPP/ PPSA, the Respondents shall within a period of 10 days of receiving any invoice notify the Petitioner of any dispute pertaining to the invoice. However, in the present case, the Respondent No. 2 never raised any dispute towards the invoice issued by the Petitioner for the power supplied by it, in terms of the timelines stipulated in the said provision.

(f) Article 11.2.4 of the PAPP/ PPSA cannot at all be read in isolation of Article 11.2.1, which specifically clarifies the position that the declared availability would be what is notified by the Petitioner. Further, the word “mis-declaration” occurs when the generator is unable to declare/ supply / generate electricity against what is declared/ notified to the procurer. However, in the present case, the availability which is declared is being supplied as generation for the said availability.

(g) The Respondent No. 2, BSPHCL has failed to understand that the disputed period in the captioned Petition is for the period from April’ 21 to December’ 21 and that for the aforesaid period, the Petitioner at all times has been declaring its availability at 41.25 MW, and has been scheduling the said quantum which it declared.

(h) The contention of BSPHCL that Article 11.2.5 of the PPSA carves out an exception to Article 11.2.4 is misplaced. From a reading of Articles 11.2.4 and 11.2.5, the Respondent No. 2 is deliberately leaving out Article 11.2.1 of the PAPP/ PPSA, which specifically mentions “unless otherwise notified by the Aggregator, the declared availability shall, be deemed to be 100% (one hundred per cent) thereof at all times”. Therefore, the contract specifically provides that declared availability would be normally deemed to be 100% of all time, unless it is “otherwise notified by the supplier”. This means that the Petitioner can declare availability lesser than 100% as per its plant availability.

(i) Conceptually/ legally, mis-declaration is when the generator is unable to schedule/ generate electricity against what is declared/ notified to the procurer. In the present case, the availability which is declared is being supplied as generation for the said availability. There is no dispute between the parties for

the declared capacity given by the Petitioner and the energy supplied which is up to the said declared capacity as demanded by the Respondents.

(j) Article 11.2.5 of the PAPP/ PPSA, is only applicable in the instance when the supplier declares a particular availability/ quantum, and the same is not supplied by it due to reasons such as de-commissioning due to emergency or a force majeure, then in such a case, the same would not be treated as a mis-declaration. However, in the present case, there is no role whatsoever of Article 11.2.5, rather, the subject matter is only limited to the interpretation of Article 11.2.1 and Article 11.2.4 of the PAPP/ PPSA, as whatever was declared by the Petitioner was in turn duly supplied by it to BSPHCL through PTC.

(k) The contention of BSPHCL that the Petitioner invoked Article 16 of the PAPP/ PPSA for non-supply of power on account of force majeure event of the on-going Covid-19 pandemic is also misplaced and is outside the scope of the Petition on account of the following:

(i) The issue in the present Petition pertains to the interpretation of 'mis-declaration' in terms of Article 11.2.1 and Article 11.2.4 of the PAPP/ PPSA, which means that whether the generator has supplied power to the procurer what was declared by it;

(ii) The Petitioner at all times during the disputed period (*i.e. from 1.4.2021 to 31.12.2021*) supplied the declared quantum of power to BSPHCL through PTC;

(iii) With respect to the issue of force majeure as raised by the BSPHCL, the same is not at all applicable in the present case, on account of the fact that whenever the Petitioner invoked the force majeure provision, it did not give any declaration of availability to the BSPHCL or PTC. In other words, even when there is declaration of availability given as "zero" by the Petitioner, there cannot at all be a case of 'mis-declaration' as being pleaded by BSPHCL. The above allegation of force majeure is nothing but an attempt on the part of BSPHCL is to deviate from the subject matter of the present Petition;

(iv) The reason for BSPHCL to take the plea of force majeure is on account of the fact that during the period from March, 2020 to May, 2020, the Petitioner could not supply power to Bihar Discom (barring few days), and that, the said non-supply of power was on account of certain force majeure events faced by the Petitioner. During such period, the Petitioner pleaded the reason of force majeure for not supplying the power. What is imperative to note herein is that even during the said period, the Petitioner did not “mis-declare”, as the Petitioner notified ‘zero’ availability during the said period.

(l) BSPHCL defeats the entire ambit of the Pilot Scheme, which was introduced in order to assist the “stressed” power plants on account of non-availability of Power Purchase Agreements (PPAs). However, BSPHCL has continued to stress the Petitioner by alleging mis-declaration, thereby deducting the amounts from the monthly energy bills raised by the Petitioner without any reasons whatsoever that to after taking power for almost 9 months, which was duly supplied by the Petitioner in terms of the PAPP/ PPSA.

Hearing dated 9.9.2022

8. During the course of hearing, learned counsels for the Petitioner and PTC reiterated the submissions made in the pleadings. None was present on behalf of the Respondent BSPHCL despite notice. The parties were directed to file written submissions in the matter. PTC, BSHPCCL and the Petitioner have filed their respective written submissions. BSPHCL in its written submissions dated 26.9.2022 has mainly reiterated the submissions made in the reply.

9. PTC, in its written submissions dated 19.9.2022, has mainly submitted as follows:

(a) The issue in the present Petition involves a complete mis-interpretation of the mis-declaration clause provided under Article 11.2.4 of the PAPP/ PPSA, whereby BSPHCL has alleged deducted the amounts from the monthly energy bills raised by the Petitioner to the tune of Rs. 66 crore for the period May, 2021 to December 2021.

(b) PTC was constrained to deduct the aforesaid amounts only when similar amounts were deducted/ less verified from the unpaid bills on the ground of mis-declaration by BSPHCL.

(c) As per Article 11.2.1 and Article 11.2.4 of the PAPP/ PPSA, it is clear that an event of mis-declaration will only occur when the availability of power at any time is determined to be lower than 100% of the contracted capacity or the reduced availability notified by the generator/ aggregator.

(d) In the present case, there has not been any instance(s) where the Petitioner has supplied lower quantum of power than the declared availability.

10. The Petitioner, in its written submissions dated 23.9.2022, has mainly submitted as under:

(a) The Commission has time and again interpreted that the term “mis-declaration” is equal to ‘gaming’ to the effect that (i) where a generator “intentionally” mis-declared its availability, in order to get commercial gains; and (ii) In simpler words, mis-declaration is something where a generator declares ‘X’ quantum of power, and eventually schedules “Y” quantum of power, for which the said generator is liable to be penalized.

(b) The Commission in its order dated 9.5.2013 in Petition No. 14/MP/2011 and order dated 13.10.2015 in Petition No. 187/MP/2013 has deliberated the principle of ‘mis-declaration’ in terms of the Unscheduled Interchange (UI) Regulations and the Grid Code:

(c) However, in the present case, there is no event of “mis-declaration” or “gaming”, since whatever availability was declared by the Petitioner (i.e., 41.25 MW), it supplied the exactly same quantum of power after availing open access.

(d) Even as per Article 11.6 of the PAPP/ PPSA, the Respondent, BSPHCL shall within a period of 10 days from the date of receiving the invoice/ bill shall inform the Petitioner with respect to any discrepancy, if any pertaining to the

said invoice. However, the same was never intimated to the Petitioner BSPHCL at any point of time.

(e) BSPHCL vide its email dated 30.12.2021 through PTC goes to show the allegation of mis-declaration by Bihar Discom is nothing but an afterthought in order to avoid payment of long-standing dues accrued in its favour of the Petitioner under the Power Supply arrangement.

(f) PTC has supported the case of the Petitioner and has submitted that there is no event of mis-declaration on the part of the Petitioner, on account of the fact that the said Petitioner at all times declared what was available and supplied the same to Respondents.

Analysis and Decision

11. We have considered the submissions of the Petitioner and Respondents. The issue that arises for our consideration is what constitutes an event of “Mis-declaration” under Article 11, in particular Article 11.2.4, of the PAPP/ PPSA?

12. The Petitioner has submitted that the Respondent No.2, BSPHCL is completely misinterpreting the term ‘Mis-declaration’ as defined in the Article 11 of PAPP/PPSA. The Petitioner has submitted that as per Article 11.2.1, the declared availability shall be deemed to be 100% of at all times, unless it is “otherwise notified by the Supplier” and thus, a right is given to the Petitioner to either declare 100% of capacity or any other percentage/quantum as it notifies to the procurer. The Petitioner has contended that this reduced availability notified by the Petitioner does not amount to an event of Mis-declaration in terms of Article 11.2.4 of the PAPP/PPSA and that BSPHCL is wrongly interpreting the said article by only reading the part “*In the event that the Availability at any time is determined to be lower than 100% of the Contracted Capacity*” while leaving out the part “*or the reduced Availability notified hereunder*”.

The Respondent No.1, PTC has echoed aforesaid submissions of the Petitioner and has supported the case of the Petitioner.

13. *Per contra*, Respondent No.2, BSPHCL has submitted that from a reading of the provisions of Article 10 and Article 11 of the PAPP/ PPSA, it is apparent that the Petitioner was required to declare the entire contracted capacity as the available capacity and in the event the Petitioner fails to do so, it gives rise to an event of Mis-declaration. BSPHCL has submitted that though the Article 11.2.1 of the PAPP/PPSA has enabling provisions for declaring availability other than 100% of contracted capacity, Article 11.2.4 further clarifies that notification of such reduced availability (i.e. other than 100% of the Contracted Capacity) has to be in accordance with the provisions contained therein. In this context, Article 11.2.5 of the PAPP/PPSA carves out an exception to Article 11.2.4 thereby providing that if the contracted capacity is determined to be lower than 100% or the reduced availability as notified under Article 11.2.5 then such reduction shall not be treated as an event of Mis-declaration. In terms of Article 11.2.5, if the contracted capacity or notified available capacity is reduced on account of de-commissioning due to emergency or a force majeure event, then such reduction shall not be treated as Mis-declaration in terms of Article 11.2.4, provided the procurer has been notified under Article 15.5 of the PPAP/PPSA and in the present case, no such communication had been issued either by the Petitioner or the PTC under the Article 15.5 qua reduction of capacity from that of contracted capacity.

14. In order to adjudicate the present dispute, we may examine the relevant provisions of the PAPP and PPSA, which are of back-to-back in nature. The relevant extract of the provisions of PAPP and PPSA read as under:

“Pilot Agreement for Procurement of Power

Article 5.1 Obligation of the Supplier

5.1.4 The Supplier shall operate and maintain the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the “**Normative Availability**”).

Explanation:

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Supplier for producing and supplying electrical energy equal to 1000 kWh per mega watt of Contracted Capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses upto the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the “**Availability**”). For the avoidance of doubt, the Parties agree that Availability shall, during the months when Appointed Date or the date of Termination occurs, be determined with reference to the number of days when the Power Station was in operation, and shall be determined likewise for any single day of operation. The Parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Supplier for and in respect of scheduling and despatch of electricity under Applicable Laws and the rules and regulations thereunder.

Article 10: Allocation of Capacity

... ..

10.1.3 Supplier shall make available full Contracted Capacity to the Aggregator. The Aggregator shall schedule at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower on RTC basis only. However, Aggregator may schedule any quantum beyond 55% and up to the Contracted Capacity in any time block subject to the Declared Capacity by the Supplier.

10.2.3. In case of deviation in declared Availability from the Supplier side is more than 15% of the Contracted Capacity for which open access has been approved, then the Supplier shall pay to Aggregator a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Supplier shall also pay the applicable transmission charges to the extent not supplied to the Aggregator, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA.

Article 11: Tariff

... ..

Article 11.2 Declaration of Availability

11.2.1 Unless otherwise notified by the Supplier, the declared availability shall, be deemed to be 100% (one hundred percent) thereof at all times.

11.2.2 In the event that any shortfall in supply of electricity to the Aggregator occurs on account of any deficiency in transmission between the Power Station and Delivery Point, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Supplier to the Aggregator forthwith.

11.2.3 The Supplier shall notify, no later than 15 (fifteen) days prior to the commencement of a month, its maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Supplier shall, as soon as may be, notify any modifications of its maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (forty eight) hours prior to its occurrence.

11.2.4 In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the "Mis-declaration") shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Tariff, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Supplier under this Agreement.

11.2.5 Notwithstanding the provisions of Clause 11.2.4, any reduction in Availability arising out of de-commissioning due to Emergency or a Force Majeure Event shall not be deemed to be Mis-declaration if the Supplier shall have notified the Aggregator in accordance with the provisions of Clause 16.5."

Pilot Power Supply Agreement

"5.1.4 The Aggregator shall ensure that the Supplier operates and maintains the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the "**Normative Availability**").

Explanation:

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Aggregator for producing and supplying electrical energy equal to 1000 kWh per mega watt of Contracted Capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses upto the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the "**Availability**"). For the avoidance of doubt, the Parties agree that Availability shall, during the months when Appointed Date or the date of Termination

occurs, be determined with reference to the number of days when the Power Station was in operation, and shall be determined likewise for any single day of operation. The Parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Aggregator for and in respect of scheduling and despatch of electricity under Applicable Laws and the rules and regulations thereunder.

... ..

10.1.3 Aggregator shall make available full Contracted Capacity to the Utility. The Utility shall schedule at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower on RTC basis only. However, Utility may schedule any quantum beyond 55% and up to the Contracted Capacity in any time block subject to the Declared Capacity by the Aggregator.

... ..

10.2.3. In case of deviation in declared Availability from the Aggregator side is more than 15% of the Contracted Capacity for which open access has been approved, then the Aggregator shall pay to Utility a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Utility and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Aggregator shall also pay the applicable transmission charges to the extent not supplied to the Utility, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA.

Article 11: Tariff

... ..

Article 11.2: Declaration of availability

11.2.1 Unless otherwise notified by the Aggregator, the declared availability shall, be deemed to be 100% (one hundred per cent) thereof at all times.

11.2.2 In the event that any shortfall in supply of electricity to the Utility occurs on account of any deficiency in transmission between the Despatch Point and Delivery Point, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Aggregator to the Utility forthwith.

11.2.3 The Aggregator shall notify, no later than 15 (fifteen) days prior to the commencement of a month, Supplier's maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Aggregator shall, as soon as may be, notify any modifications of Supplier's maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (forty eight) hours prior to its occurrence.

Article 11.2.4 In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced

Availability notified hereunder, an event of mis-declaration of Availability (the “Mis-declaration”) shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Tariff, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Aggregator under this Agreement.

11.2.5 Notwithstanding the provisions of Clause 11.2.4, any reduction in Availability arising out of de-commissioning due to Emergency or a Force Majeure Event shall not be deemed to be Mis-declaration if the Aggregator shall have notified the Utility in accordance with the provisions of Clause 16.5.”

15. From the above provisions, it can be seen that Article 11.2.1 clearly states that unless otherwise notified by the supplier, the declared availability will be deemed to be 100%. Here, the words used are ‘*unless otherwise notified by the supplier/aggregator*’. Therefore, it is clear that if nothing is otherwise notified by the supplier/aggregator, then the availability is deemed to be 100%. In other words, the Article 11.2.1 enables the supplier/aggregator to notify a reduced availability thereunder which can be lower than the contracted capacity.

16. The above clause has to be read with Article 11.2.4 of the PAPP/ PPSA, which states that if the declared availability at any given point of time is determined to be lower than 100% of the contracted capacity or “lower than the reduced availability notified”, then the same would lead to an event of Mis-declaration. From a reading of the said provision, it is apparent that the said provision uses the term ‘*reduced availability notified hereunder*’. Thus, based on the combined reading of Article 11.2.1 and Article 11.2.4 of the PPAP/PPSA, an event of Mis-declaration will take place (i) in case the supplier does not supply power what is notified by it (i.e. the reduced availability), or (ii) in the event no reduced availability is notified and the supplier fails to supply full contracted capacity. Admittedly, the present case does not fall within any of the above scenarios as the reduced availability had been notified by the Petitioner

and the Petitioner had not failed to supply against such reduced availability as had been notified.

17. As regards the contention of BSPHCL that Article 11.2.5 carves out an exception to Article 11.2.4, the same is misplaced as BSPHCL has failed to take into consideration that Article 11.2.1 needs to be read together in line with Article 11.2.4 of the PAPP/PPSA, whereby it is categorically stated that unless otherwise notified by the supplier, the contracted capacity shall be deemed to be 100% at all times and thereby enables the supplier to notify the availability lesser than that of contracted capacity.

18. Moreover, the above interpretation of BSPHCL to the Article 11.2.4 and Article 11.2.5 of the PAPP/PPSA to construe an event of Mis-declaration is, in our view, also in conflict with the other provisions of the PAPP/PPSA as noted above. For instance, Article 11.2.3 itself permit the supplier to notify the reduced availability in the event the generating station is under maintenance. It is also pertinent to note that as per Article 5.1.4 of PPAP/PPSA, the minimum normative availability that the supplier is required to attain during a year is only 85%. Moreover, the Article 10.2.3 of PPAP/PPSA also permits the deviation in declared availability from the supplier side up to 15% of the contracted capacity for which open access has been approved and prescribes for the compensation only in the event when the quantum of shortfall is in excess of the permitted deviation of 15%. If the argument of BSPHCL is that the supplier is required to declare the availability at 100% of contracted capacity at all times and only exception available to supplier to notify reduced availability is in terms of Article 11.2.5 (i.e. only in the event of de-commissioning due to emergency or a force majeure event after having notified as per the provisions of Article 16.5), then the above provisions

allowing the supplier to notify the reduced availability would render otiose. It is well settled that a contract must be read as a whole and intention of the parties must be, gathered from the language used in the contract by adopting harmonious construction of all the clauses contained therein.

19. In view of the above, we hold that mere declaration of the reduced availability from that of contracted capacity cannot be considered as an event of Mis-declaration under Article 11.2.4 of the PAPP/PPSA so long as the supplier has been able to duly supply against such reduced availability. Accordingly, the deductions made by the Respondent No.2 from the invoices/bill raised by Respondent No.1 for the Petitioner by invocation of Article 11.2.4 of the PPAP/PPSA deserve to be set-aside. Accordingly, we direct the Respondent No.2, BSPHCL to refund the amount deducted by it, by alleging Mis-declaration under Article 11.2.4, to the Respondent No. 1/ PTC within a period of one month from the date of passing of this order along with applicable interest as per PAPP/PPSA, who shall further make the payments to the Petitioner as soon as it is in receipt of the payments from the BSPHCL.

20. On a parting note, we must, however, clarify that the scope of our examination in the foregoing paragraphs has been limited to occurrence of event of Mis-declaration in terms of Article 11.2.1, Article 11.2.4 and Article 11.2.5 of the PAPP/PPSA as raised in the Petition. We have not expressed any opinion on the aspect(s) as to the permissible limit of the reduced availability that a supplier can notify under the PAPP/PPSA and consequences thereof, if any, as the same being not the subject matter of the present Petition before us.

21. Petition No. 94/MP/2022 is disposed of in terms of the above.

Sd/-
(P.K. Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha)
Member