



ORDER
OF
WEST BENGAL ELECTRICITY REGULATORY COMMISSION
IN THE MATTER OF
CASE NO. OA-268/17-18

APPLICATION BY M/S NIPPON POWER LIMITED SEEKING DIRECTION BY THE
COMMISSION UPON WBSEDCL TO PAY RS. 253.18 LAKH ALONG WITH
INTEREST @ 1.25% TO M/S NIPPON POWER LIMITED.

PRESENT:

SRI SUTIRTHA BHATTACHARYA, CHAIRPERSON
SRI DURGADAS GOSWAMI, MEMBER
SRI PULAK KUMAR TEWARI, MEMBER

DATE: 22.09.2021



CASE IN BRIEF

- 1.0 The petition submitted by M/s Nippon Power Limited (NPL) is in regard to supply of power to West Bengal State Electricity Distribution Company Limited (WBSEDCL) from its 3 MW hydro generating plant at Darjeeling to the point of inter-connection as per the present Power Purchase Agreement entered between NPL and WBSEDCL on 16.11.2010 effective from 30.03.2007 for a period of 35 years. In their petition NPL contends, the power supply line being used for transmission of power to the inter-connection point is a transmission line and not a distribution line as is being claimed by WBSEDCL. Accordingly, they have prayed before the Commission to pass an order directing WBSEDCL to pay NPL a sum of Rs. 253.18 lakh along with interest @ 1.25% as per clause 2.8 of the PPA dated 16.11.2010 and to amend the PPA by replacing the words "distribution line" with the words "transmission line" and by replacing the words "90%" with the words "95%" in clauses 3.2, 3.3 and 3.4 of the PPA.
- 2.0 On perusal of the petition along with the documents submitted by NPL, the Commission admitted the matter and decided to hear it. Accordingly, several hearings took place, the last one being held on 9th November, 2020 wherein certain directions were given to both NPL and WBSEDCL and the next date of hearing was decided to be fixed upon compliance of the directions. While WBSEDCL has complied with the direction of the Commission, NPL has not complied with for the reasons best known to them. However, in this context, it may be mentioned that NPL, after expiry of almost three years and that too when the Commission is under finalization of the order, has prayed before the Commission for amendment to their original application under case no. OA-268/17-18 just a few days before the date of hearing held on 9th November, 2020.
- 3.0 The next hearing was fixed on 26th April, 2021 which was ultimately postponed at the request of NPL. The Commission fixed further hearing on 14th July, 2021 wherein NPL was absent without assigning reason against their absence and/or making prayer for time although WBSEDCL attended the same.
- 4.0 It is observed that NPL has been lingering the matter for some reasons or other. It



is also observed that earlier postponement of hearing on request from NPL was made on several occasions viz. i) hearing on 03.05.2019 due to unavoidable circumstances, ii) hearing on 10.06.2019 due to unavailability of Advocate & MD, iii) hearing on 11.07.2019 due to unavailability of MD, iv) hearing on 17.07.2019 due to unavailability of MD and v) hearing on 19.09.2019 was also postponed. The Commission has reason to interpret from the conduct of the petitioner that NPL may not have much to say before the Commission so as to justify its prayer and therefore, it was directed during the hearing held on 14th July, 2021 that WBSEDCL shall submit their written argument on the matter within two/three days upon examination of which the Commission shall dispose of the matter with final direction. NPL was also at liberty to file written argument but it did not prefer to file the same.

- 5.0 In view of direction given by the Commission in the hearing held on 14th July, 2021, WBSEDCL submitted their written arguments along with additional submission vide their letter No. REG/SERC/RC/Nippon/161 dated 15.07.2021.

SUBMISSIONS BY THE PARTIES

- 6.0 The contention of the petition submitted by NPL is that presently NPL has been supplying power to WBSEDCL from its 3 MW hydro generating plant at Darjeeling to the point of inter-connection as per the present Power Purchase Agreement entered into between NPL and WBSEDCL on 16.11.2010 effective from 30.03.2007 for a period of 35 years. NPL contends, the power supply line being used for transmission of power to the inter-connection point is a transmission line and not a distribution line contrary to claim of WBSEDCL. As a result, WBSEDCL is not making the payments to NPL for deemed generation loss as per the scale applicable for transmission line outages. Accordingly, they have prayed before the Commission to pass an order directing WBSEDCL to pay NPL a sum of Rs. 253.18 lakh along with interest @ 1.25% and to amend the PPA by replacing the words "distribution line" with the words "transmission line" and by replacing the words "90%" with the words "95%" in paragraphs 3.2, 3.3 and 3.4 of the PPA.
- 7.0 NPL further contends that in the earlier PPA executed in 1997 between NPL and



West Bengal State Electricity Board (WBSEB) (the ancestor entity of WBSEDCL) this line was treated as transmission line and availability of transmission line was pegged at 96% whereas the agreement signed in 2010 erred to define the line in contravention of the definition of consumer, transmission line and distribution system as contained in the Electricity Act, 2003. NPL also referred to Regulation 23 of the West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2007 and prayed before the Commission to direct WBSEDCL to make corrections in the PPA and to pay the loss arising out of this incorrect description of the line in the PPA.

8.0 However, during the course of the hearings, NPL preferred to file an amendment petition to the original petition in the case, in question, for the reasons as given below:

- a) It is a law binding upon the Commission by virtue of the notification dated 30.03.1992, issued by the Ministry of Power, Government of India, which inter-alia states that "in case of reduced generation due to reasons beyond the control of the generating company, the energy loss on account of spillage shall be considered as deemed generation limited to the design energy." This point was not highlighted in the principal petition which prompted them to file amendment petition.
- b) There are several judgements by the Supreme Court that at any stage before the delivery of the judgement, amendment to principal petition is allowed so far as it is not contrary to character and nature of the suit. NPL is ready to submit the cutting of such judgements, if asked for.

Upon being asked by the Commission as to quote the section of law under which the notification issued by the Ministry of Power, Government of India is binding upon the Commission, NPL could not provide the same.

9.0 The submissions of WBSEDCL are as follows:

- a) The Petitioner has claimed amounts for the period starting from 2007-08 till 2016-17 in the Petition. It is submitted that the reliefs sought for by the



Petitioner for the period prior to 24.01.2015 cannot be entertained or allowed by this Commission, since the same would be otherwise barred by limitation prescribed for an ordinary suit before a civil court.

- b) WBSEDCL relied upon certain judgements of Hon'ble Supreme Court of India such as, order dated 16.10.2015 between AP Power Coordination Committee vs. Lanco Kondapalli Power Limited [(2016) 3 SCC 468] (para 30 and 31); Nabha Power Limited vs. Punjab State Power Corporation Limited [(2018) 11 SCC 508] (Nabha Power)] (para 49, 72) and argued that Commission has no scope to interpret / interfere with the PPA already signed between the parties.
- c) The 33kV line is admittedly a distribution line considering the definition of "distribution system" under Section 2 (19) of the Electricity Act, 2003 which provides that wires and associated facilities of the "distribution system" can emanate from the delivery points on the generating station connection. Further, the definition of "transmission line" under Section 2 (72) of the Electricity Act excludes the lines which are an essential part of the distribution system of a licensee.
- d) The Hon'ble Appellate Tribunal for Electricity ("Hon'ble Tribunal") in its decision in Appeal No. 30 of 2012 titled as Orissa Power Transmission Corporation Limited v OERC & Ors. held that the definition of "transmission lines" under Section 2 (72) of the Electricity Act is a residual definition. The Hon'ble Tribunal held that "all high-pressure cables and overhead lines which are not essential part of distribution system of a licensee are transmissions lines. Therefore, we have to examine as to whether a line in question is a part of distribution network or not. If it is not a part of distribution network, only then it could be transmission line. As we have observed that last mile connection is part of distribution network, therefore, it cannot be a transmission line".
- e) The Hon'ble Appellate Tribunal also held that even where line emanating from a transmission sub-station is being used to distribute power, the same will be treated as part of the distribution system and not transmission system.
- f) If supply from the Petitioner's generating station to WBSEDCL is to be treated



as a transmission system, the same cannot be done without a license. WBSEDCL is a distribution licensee and thus cannot engage in the business of transmission of electricity.

- g) Merely because the 33kV line is emanating from the generating station for evacuation of power to 33 kV sub-station, it does not qualify to be a transmission line. The 33kV line connecting the Petitioner's generating station to 33 kV Sub-station of WBSEDCL is in fact a distribution line and not a transmission line. Therefore, the obligation of WBSEDCL is to ensure a minimum 90% availability of the distribution line and not 95%/96%, which is being successfully maintained by WBSEDCL.
- h) The claims of the Petitioner are contrary to the terms of the PPA dated 16.11.2010. The issues raised by the Petitioner are governed by PPA dated 16.11.2010. The earlier PPA dated 04.11.1997 has no relevance in the present case.
- i) The PPA dated 16.11.2010 replaced the PPA dated 04.11.1997 accommodating the changes mutually agreed upon by the Petitioner and WBSEDCL which is evident from the recitals of the PPA dated 16.11.2010.
- j) As per Clause 3 of the PPA dated 16.11.2010, it indicates that – a) the interconnection point was identified as the 33kV incoming bay located at Bijonbari 33/11 kV sub-station of WBSEDCL, b) WBSEDCL is liable to compensate only if availability of the distribution line is less than 90%.
- k) The PPA dated 16.11.2010 is completely unambiguous with respect to the fact that WBSEDCL's liability is only with respect to availability and maintenance of the distribution line. The parties had consciously and voluntarily decided the minimum threshold of availability of distribution line to be set at 90% in accordance with Regulation 23.2 of West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2007.
- l) The Petitioner, by seeking amendment to the clear and unambiguous terms of the 2010 PPA, is attempting to vary the terms of the agreement in a manner



which is contrary to the original intention of the parties. The Petitioner is seeking to phrase the 2010 PPA on the basis of its financial convenience and assign such meaning to words which were never intended by either of the parties at the time of entering into the contract.

- m) In light of the judgements issued by the Hon'ble Supreme Court in the matter of Bank of India – Vs – K. Mohandas & Ors. [(2009) 5 SCC 313] and Nabha Power Ltd. – vs – Punjab State Power Corporation Limited [(2018) 11 SCC 508], it is submitted that the clear and unambiguous words used in a contract reflect the true intention of the parties. The subsequent conduct of the parties cannot be a substitute for the explicit terms of a contract. Further, this Commission cannot imply words in a contract which are conspicuous by its absence. It cannot amend, modify or vary the terms of the contract and should read the contract as per its express terms.
- n) WBSEDCL, on multiple occasions, requested the Petitioner to construct an alternative 33kV bay so that another 33kV line may be made available for evacuating power from the Petitioner's generating sub-station to Lodhama sub-station in case of outage from the 33kV line to the Bijanbari sub-station. The intention was to safeguard against loss due to outage.
- o) However, the Petitioner failed to construct an alternate 33kV bay for this purpose. Despite this, WBSEDCL acted in a bona fide manner and decided to construct one four pole isolator arrangement at the end of Petitioner's sub-station as an alternative mechanism for evacuation of power generated by Petitioner to Lodhama 33 kV sub-station. This is evident from the Minutes of Meeting dated 26.09.2012.
- p) The delay caused in construction of alternative evacuation mechanism was solely due to the non-cooperation on the part of the Petitioner. This is evident from the fact that the Petitioner deposited the payment of INR 2,81,557 on account of its share of cost for installation of isolator arrangement on 18.07.2013 i.e., after completion of construction of isolator arrangement despite repeated requests. Nevertheless, the alternative mechanism for



power evacuation was commissioned on 29.10.2013.

- q) The annual availability of distribution line improved significantly from November 2013 onwards post completion of above alternate arrangement which is clear from the availability status submitted by the Petitioner in the present petition.
- r) It is established facts that the non-availability of line for evacuation of power before 29.10.2013 was solely because of the omissions on part of the Petitioner as it failed to construct an alternate 33kV bay despite numerous requests, or even provide necessary support to WBSEDCL.
- s) On these grounds WBSEDCL stated that the petition is not maintainable.

OBSERVATIONS OF THE COMMISSION

10.0 The Commission observes that it is a misinterpretation on the part of NPL that amendment petition is allowed during the pendency of the judgement. The amendment is allowed on the following grounds as per the law of CPC:

- a) The amendment petition is maintainable on being established that the matter intended to be amended either by addition, alteration and/or exclusion on the factual aspect was not known to the petitioner when the principal petition was filed in spite of exercise of due diligence.
- b) The amendment petition cannot be entertained on factual aspect at any stage when the factual aspect intended to be amended was known to the petitioner or could have been known to the petitioner in exercise due diligence at the time of filing the principal petition. Moreover, according to the provision of Code of Civil Procedure the amendment petition should to be filed at the earliest opportunity when this amendment petition has been filed long after 3 years.

11.0 It is also observed that NPL has not made any submission before the Commission on the date of hearing on 14th July, 2021 as to why the Amendment petition should be allowed by remaining absent in the hearing far less to substantiate the contentions made before the commission in support of its prayer for amendment and therefore,



the said amendment petition is liable to be dismissed considering the same as not pressed.

- 12.0 It is further observed that in terms of clause 3.2 of the PPA dated 16.11.2010 the 33kV line emanating from the generating station for evacuation of power to 33 kV sub-station of WBSEDCL is owned by NPL. WBSEDCL is maintaining the line on payment of annual maintenance charge by NPL to WBSEDCL as mutually decided and stipulated in the PPA. In terms of clause 3.4 of the PPA, WBSEDCL shall ensure a minimum of 90% availability of the line as provided for distribution lines in WBERC (Open Access) Regulations, 2007. The obligation of distribution licensee/ transmission to maintain the availability of distribution line and transmission line as stipulated in WBERC (Open Access) Regulations 2007 is applicable for open access. Since this is not a case of open access the obligation for maintaining a minimum percentage of availability by WBSEDCL cannot be decided as per provision of WBERC (Open Access) Regulations 2007 (in short 'open access Regulations'). Rather, it shall be settled as mutually decided in the PPA.'
- 13.0 The dispute relates to as it is found from the principal petition whether the power supply line is a transmission line or distribution line and secondly whether the petitioner is entitled to get the claim amount along with interest. As observed in paragraph 12 above this is a line being maintained by WBSEDCL not in its discharge of function as a licensee but as a competent entity and perhaps NHL doesn't have the wherewithal.
- 14.0 Section 2(72) shall be harmoniously read with Section 2(73) and Section 10(1) of the Electricity Act, 2003. This is a case of distribution licensee maintaining dedicated transmission line arising out of arrangement made between licensee and generator who is responsible for maintenance of such line in terms of Section 10 Subsection 1 of the Act. This maintenance does not however, arise out of any statutory responsibility of distribution licensees.
- 15.0 It is open to NHL who is the owner of the line to make its own arrangements vis a vis the line or mutually negotiated with WBSEDCL remembering that it is not related to open access and thus open access Regulation should have no contextual application.



ORDER

16.0 With the above observations of the Commission, the prayer of NPL for directing WBSEDCL to pay NPL an amount of Rs. 253.18 lakh along with interest @ 1.25% accrued thereon as per clause 2.8 of the PPA dated 16.11.2010 is dismissed and the other prayer to amend the clauses 3.2, 3.3 and 3.4 of the PPA is considered to be redundant owing to the premises set forth in body of the discussion.

17.0 Let a copy of the order be served upon NPL and WBSEDCL.

Sd/-
(PULAK KUMAR TEWARI)
MEMBER

Sd/-
(DURGADAS GOSWAMI)
MEMBER

Sd/-
(SUTIRTHA BHATTACHARYA)
CHAIRPERSON

DATE: 22.09.2021

Sd/-
SECRETARY