

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 73/MP/2022

Coram:

Shri Jishnu Barua, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 29th November, 2023

In the matter of:

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 inter alia seeking recovery of compensation from the Respondent for deviation from the scheduled power under the Power Purchase Agreement dated 7.3.2019 entered into between the Petitioner and the Respondent.

And

In the matter of:

DB Power Limited,

Office Block 1A, 5th Floor, Corporate Block,
DB City Park, DB City, Arera Hills,
Opposite MP Nagar,
Zone-I, Bhopal-462016

...Petitioner

Versus

NTPC Vidyut Vyapar Nigam Limited,

2nd Floor, Core-5, Scope Complex,
7, Lodhi Road, Institutional Area,
New Delhi-110003

...Respondent

Parties Present:

Shri Deepak Khurana, Advocate, DBPL
Ms. Swapna Seshadri, Advocate, NVVNL
Ms. Ritu Apurva, Advocate, NVVNL
Shri Karthikeyan M., Advocate, NVVNL
Shri Arvind Patle, NVVNL
Shri Vikas Kumar, NVVNL

ORDER

The Petitioner, DB Power Limited (DBPL), has filed the present Petition under Section 79 (1) (b) and (f) of the Electricity Act, 2003 (hereinafter referred to as 'the

Act'), read with the Power Purchase Agreement dated 7.3.2019 (NVVN-DBPL PPA) executed between DBPL (Petitioner) and NTPC Vidyut Vyapar Nigam Limited (NVVN/Respondent) seeking direction to the Respondent, NVVN to pay Rs. 7,82,71,830/- (as on 31.1.2022) against the invoices raised by the Petitioner and the Late Payment Surcharge of Rs. 1,87,66,459/- as per the provisions of the PPA. The Petitioner has made the following prayers:

“(a) Pass an Order directing the Respondent to pay an amount (as on 31.01.2022) of Rs 7,82,71,830/- (Rupees Seven Crore Eighty-Two Lakhs Seventy-One Thousand Eight Hundred and Thirty only) against the invoices raised by the Petitioner under the PPA as well as the late payment surcharge of Rs 1,87,66,459/- (Rupees One Crore Eighty-Seven Lakhs Sixty-Six Thousand Four Hundred and Fifty-Nine only);

(b) Pass an Order directing the Respondent to pay the entire Late Payment Surcharge at the rate of 15% p.a. (Fifteen per cent per annum) as per PPA on the outstanding amount till the actual date of payment;

(c) Pass such order(s) as this Commission may deem fit and proper in facts and circumstances of the present case.”

Background

2. The Petitioner, DB Power Limited (DBPL), has set up a 1200 MW coal based Thermal Power Plant (2 units x 600 MW each) at village Badadarha, Janjgir Champa, in the State of Chhattisgarh. In the present case, the Petitioner supplied power to the Respondent from its generating station located in the State of Chhattisgarh. The Petitioner is supplying power to more than one State and has a composite scheme for the generation and sale of electricity as envisaged under Section 79(1) (b) of the Act. Presently, the Petitioner is supplying 208 MW of power to Tamil Nadu Generation and Corporation Ltd. under a long-term PPA, 311 MW of power to Rajasthan Discoms through PTC India Ltd. under a long-term PPA and 5% of the net generated power to the State of Chhattisgarh under a long term PPA. A Letter of intent dated 26.2.2019 (“LOI”) was issued in favour of the Petitioner by the

Respondent for the supply of 50 MW power on short-term basis by the Petitioner at Respondent's 400/220 KV bus (as applicable) at Muzaffarpur sub-station end of Muzaffarpur (Bihar)- Dhalkebar transmission line for the period from 1.4.2019 to 30.6.2020. Thereafter, the Petitioner and the Respondent executed a Power Purchase Agreement (hereinafter referred to as 'NVVN-DBPL PPA') dated 7.3.2019 for the supply of 50 MW power by the Petitioner to Respondent for the period from 1.4.2019 to 30.6.2020.

3. The Petitioner has filed the present Petition seeking payment of Rs. 9,70,38,289/- towards Energy Compensation Bills for the supply period of from 1.4.2019 to 30.6.2020 including Late Payment Surcharge (LPS) amounting to Rs. 1,87,66,459/-. According to the Petitioner, the Respondent had refused to make payment of the Petitioner's dues on the grounds that the reduction in demand for power by Nepal Electricity Authority (NEA) due to the outbreak of the Covid-19 Pandemic constitutes a Force Majeure Event under the PPA.

Submissions by the Petitioner

4. The Petitioner, has mainly submitted as under:

(a) During the currency of the PPA, in terms of discussion held between the parties, an additional quantum of power was agreed to be supplied under the PPA, from time to time.

(b) In terms of Article 3.7 of the PPA, both parties are required to ensure that the actual scheduling does not deviate by more than 15% of the contracted power, i.e. 50 MW as per the approved open access on a monthly basis. The said provision stipulates that in case the deviation from the Respondent's side is more than 15% of contracted energy for which open access has been allocated on a monthly basis, the Respondent shall pay compensation at Rs.1.00 per kWh for the quantum of shortfall in excess of

permitted deviation of 15%. Likewise, in case the deviation is from the Petitioner's side, the Petitioner is liable to pay such compensation.

(c) On multiple instances, the deviation from Respondent was in excess of 15%, i.e., Respondent's power offtake was less than 85% of the power stipulated in the provision of the PPA. Pursuant to the said deviations, the Petitioner raised invoices for the compensation in terms of Article 3.7 of the PPA. Details of the said invoices are as under:

S. No.	Invoice No.	Supply Month	Invoice Date	Amount (In Rs.)
1	100005620	March 2020	09.04.2020	10,20,000
2	100005745	April 2020	14.05.2020	2,50,01,100
3	100005860	May 2020	10.06.2020	3,16,20,000
4	100006107	June 2020	18.07.2020	2,06,30,730

(d) On 1.7.2020 and 11.7.2020, Respondent requested the Petitioner for withdrawal of the invoices for compensation raised for the period March 2020 to June 2020 alleging that owing to the existence of force majeure conditions in Nepal due to the Covid-19 pandemic and lockdown, which in turn reduced the demand for power and purportedly prevented NEA from scheduling power, the entity purchasing power from Respondent, i.e., Nepal Electricity Authority (hereinafter referred to as "NEA"), had drastically reduced its demand for power.

(e) The Respondent had the obligation under Article 3.9 of the PPA to immediately intimate to the Petitioner of the occurrence of the event claimed as force majeure, and in no case later than 24 hours from the time of the occurrence of the said event. The Respondent had failed to meet this requirement even if it was to be assumed that the Covid-19 pandemic and associated lockdown qualifies as a force majeure event under the PPA. This shows that the purported claim in relation to the force majeure is an afterthought.

(f) The Petitioner, vide its letter dated 10.3.2021, rightfully refused to withdraw the compensation invoices raised against Respondent and demanded payment of the amount due under the compensation invoices along with an LPS in line with Article 3.6 of the PPA. The Petitioner pointed out that the non-offtake of power has resulted in a substantial loss of opportunity to the Petitioner.

(g) The Respondent, vide its letter dated 21.4.2021, denied the legitimate and valid claims of the Petitioner in order to evade its liability to the Petitioner and claimed itself as an intermediary agency in the purchase of power from the Petitioner for resale of the power to NEA. It was further asserted that the procurement of power purchased from the Petitioner was entirely for the resale of the same to NEA on a back-to-back basis. On this pretext, Respondent attempted to erroneously apply the definition of force majeure event under Article 10 of its PPA executed with NEA (hereinafter referred to as "NEA PPA") to the Petitioner.

(h) Mentioning the force majeure provision of the NEA PPA by the Respondent is entirely misconceived and untenable inasmuch as the Respondent has never even furnished a copy of the NVVN - NEA PPA to the Petitioner, and therefore, there is no question of there being any back-to-back contracts in the present case. The Petitioner, vide letter dated 21.5.2021, denied the contentions of the Respondent and demanded payment of the due amount from the Respondent.

(i) The Respondent, vide its letter dated 10.6.2021, once again denied the legitimate claim of the Petitioner.

(j) Reduction in demand/supply of power for sale to NEA is not contemplated as an event of force majeure under the PPA. Merely because the performance of the Respondent's obligations under the NVVN-DBPL PPA has become onerous or burdensome due to the imposition of lockdown on account of the Covid-19 pandemic, the same will not qualify as an event of force majeure.

(k) At the time of execution of the PPA, the parties were fully aware of their rights and obligations, including the obligation to pay energy compensation bills, which is not correlated to the offtake of power by NEA. Therefore, the Respondent cannot be permitted to renege from its contractual obligations. It is trite that the terms of the contracts ought to be honoured and that parties in a contract agree to risks which are expressed through the terms thereof.

(l) On 24.3.2020, the Ministry of Home Affairs (MHA), Government of India, in exercise of powers under Section 10 (2) (l) of the Disaster Management Act, 2005 issued Guidelines on measures to be taken by the Central Government and State Governments for containing the spread of Covid-19 in India (MHA Guidelines). In terms of the MHA Guidelines, a lockdown was imposed in the country and all government, commercial and private establishments were directed to be closed except for those providing essential services. In terms of Clause 4 (g) of the MHA Guidelines, power generation, transmission and distribution were recognized as essential services and thus exempted from the lockdown.

(m) On 25.3.2020, the Ministry of Power (MoP), issued a letter stating that power generation and supply were essential services and were exempted from the restrictions imposed by lockdown. MoP further clarified that since power generation utilities, including Independent Power Plants (IPPs), supply of inter-State electricity to the grid, and their operations were critical for maintaining power supply across the country. Accordingly, MoP requested all the State Secretaries to ensure that the restrictions of lockdown did not hamper the movement of staff and raw materials for these power plants.

(n) The Commission, vide its Order dated 20.01.2022 in Petition No. 594/MP/2020, has recognized and held that the Covid-19 pandemic and associated lockdown does not constitute a force majeure event.

(o) The Respondent, NVVN, had itself claimed compensation from NEA for non-off take of power for the months of March, April and May 2020 since it

was the Respondent's own stand that the reduction in demand was not a force majeure.

(p) In addition to the principal amount of Rs. 7,82,71,830/- payable by the Respondent, the Petitioner is also entitled to LPS amount of Rs 1,87,66,459/- with further LPS on the outstanding amounts in terms of Clause 10 of the PPA.

(q) The Respondent has failed to make payments towards energy compensation bills for the supply of power by the Petitioner during the months of March, April, May, and June 2020 by the due dates. Accordingly, the Petitioner is entitled to claim LPS on the pending energy compensation bills.

(q) This Commission is the Appropriate Commission under Section 79 (1) (b) of the Act and has the jurisdiction to adjudicate on the present dispute. The Petitioner has a composite scheme for generation as the generation and sale of power are taking place in more than one State.

Hearing dated 14.6.2022

5. Notice was issued to the Respondent to file its reply. The parties have filed their respective reply and rejoinder.

Submissions by the Respondent

6. The Respondent, in its reply dated 9.9.2023, has mainly submitted as under:

(a) A nationwide lockdown was imposed in Nepal because of which all industrial and commercial activities (barring essential services) ceased, resulting in a drastic reduction in power demand in Nepal.

(b) Inability to schedule power during the period of lockdown imposed in Nepal on account of Covid-19 is a force majeure event in terms of Article 10 of the NVVN-NEA PPA and equally a force majeure event under the NVVN-DBPL PPA.

(c) The intensity and the scope of the Covid -19 pandemic, do not need an intimation / separate notice, as it was declared a pandemic on 11.3.2020 by the World Health Organization (“WHO”). The notifications of the Government of India and the Government of Nepal are sufficient to establish the force majeure.

(d) The adverse impact of the Covid-19 pandemic and its impact on the commercial and economic environment of the country have been recognized by different courts and granted relief to contracting parties that were impacted by the Covid-19 pandemic. In this regard, reliance was placed on the decisions of the Hon`ble High Court of Delhi in the cases of MEP Infrastructure Developers Ltd. v. SDMC in WP (C) Mo. 2241 of 2020 and Halliburton Offshore Services Inc. v. Vedanta Ltd., [OMP (I) (Comm) No. 88 of 2020].

(e) Power demand for NEA remains stable for each normal month. The power demand drastically decreased during the period from March 2020 to June 2020, when the economy of Nepal was hit due to the Covid-19 lockdown. It was impossible for the Respondent, which is the intermediate agency, to facilitate cross-border transactions to perform obligations under the PPA.

(f) The Respondent is an intermediary agency in the purchase of power from the Petitioner for the resale of power to NEA. Procurement of power from the Petitioner by the Respondent is entirely for resale of power to NEA on a back-to-back basis.

(g) The power purchased from the Petitioner is sold by the Respondent to NEA with a trading margin as provided under the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (the Trading Licence Regulations). Therefore, the purchase of power is for back-to-back sale to another user/Discom being NEA.

(h) The Respondent is a trading company and does not consume or utilise any electricity for self-use. The electricity, which was purchased under the NVVN-DBPL PPA was to be further sold to NEA with a trading margin.

(i) The inability to schedule electricity on account of the Covid-19 pandemic is a *Force Majeure* event under Article 10 of the PPA dated 12.2.2019 between NVVN and NEA and, therefore, equally a *force majeure* event within the provision of Article 3.9 of the PPA dated 7.3.2019 between the Petitioner and NVVN.

(j) The Government of India has itself recognized Covid-19 as an event of force majeure in terms of Para 9.7.7 (Force Majeure) of the Manual for Procurement of Goods 2017, the Ministry of Finance (MoF) Notification dated 13.5.2020 and 19.2.2020, Office Memorandum issued by the Ministry of New and Renewable Energy (MNRE) dated 20.3.2020 (MNRE OM dated 20.3.2020), Circular dated 18.5.2020 issued by Ministry of Roads Transport and Highways, and MHA Guidelines.

(k) There is no requirement under Article 3.9 of the NVVN-DBPL PPA to issue a notice regarding force majeure. Even otherwise, the Petitioner was duly informed within 24 hours of receiving communication from NEA invoking force majeure.

(l) Clause 3.9 of the NVVN-DBPL PPA does not provide for a specific format of issuing notice, and forwarding of NEA's letter within 24 hrs is substantial compliance with clause 3.9 of the said PPA.

(m) Clause 3.7 of the NVVN – DBPL PPA relating to compensation for short supply is not an automatic compensation for default in scheduling. At best, Clause 3.7 of the NVVN-DBPL PPA is a liquidated damages clause which can only be invoked once actual damage is established.

(n) The Ministry of Power had come forward to treat the Covid-19 pandemic- as a force majeure event and had deferred all payments for more

than 3 months, and had also granted a waiver of 20-25% on fixed charges of contracts rather than penalizing the discoms for under-drawal.

(o) The order of this Commission dated 20.01.2022 in Petition no. 594/MP/2020 relied on by the Petitioner is not applicable vis-à-vis the situation in the present case. The said order does not state that Covid-19 is not a force majeure event.

(p) The Petitioner has not disclosed any information regarding the damage suffered by them which would justify the applicability of the liquidated damages clause.

(q) In support of the above, the Respondent has placed reliance on certain judgments of the Hon`ble Supreme Court, APTEL, and this Commission, namely (i) Judgment dated 15.5.2020 titled Halliburton offshore Services Vs Vedanta Limited and another [2020 SCC Online Del 2068 (Para 69 and 70)], (ii) Judgement dated 14.9.22020 in titled Tuticorin Stevedores' Association V. Government of India, [2020 SCC Online Mad 20495 (Para 7)], (iii) Judgement dated 17.2.2021 in the case of Confederation for Concessionaire Welfare V. Airports Authority of India, [W.P(c) 2204/2021 & CM APPL.6421-22/2021 (Para 6)], (iv) Judgement dated 1.2.2021 in the case of R. Narayan V. The Government of Tamil Nadu, [n W.P(MD) No. 19596 of 2020 & W.M.P(MD) Nos. 16318 & 16320 of 2020 (Para 15)], (v) Order dated 15.4.20222 passed by Commission in Petition No. 3/GT/2021 titled NTPC Limited V. Uttar Pradesh Power Corporation Limited (Unchahar Stage IV (500 MW) (Paras 13,14 and 15) and Order dated 20.1.2022 passed by Commission in Petition No. 594/MP/2020 titled GMR Warora Energy Limited (GWEL) v. DNH Power Distribution Company Limited.

Rejoinder by the Petitioner

7. The Petitioner, in its rejoinder dated 30.11.2022, has mainly submitted as under:

(a) The Respondent, in its reply has not even dealt with, much less countered the Petitioner's contention that pandemic is not a force majeure

event as per Clause 3.7 of the NVVN PPA and thus, it has conceded to this extent.

(b) The Government of India Notification dated 19.2.2020 ('19.2.2020 Notification') is not a blanket declaration that all supply chain disruptions shall be considered as a force majeure. The subsequent order of the 'High Level Coordination Committee' of the Government of Nepal dated 24.3.2020 does not even talk about the suspension of services or declaration of the pandemic as a force majeure event for the purposes of commercial contracts.

(c) On the contrary, the Ministry of Home Affairs dated 24.3.2020 and Ministry of Power letter dated 25.3.2020 exempted the activities relating to '*Power Generation, transmission, and distribution units and services*' from the measures taken to control the outspread of the Pandemic.

(d) MoP issued clarification dated 6.4.2020 to its letters dated 27.3.2020 and 28.3.2020 regarding the requirement of a Letter of Credit (LoC) and imposition of LPS. It was categorically stated that no exemption had been given to the distribution licensees from making the payment of bills within 45 days (or the period given in the PPA) of its presentation, and the obligation to pay for capacity charges under the NVVN-SEIL PPA was to continue.

(e) MHA issued guidelines dated 15.4.2020 extending the nationwide lockdown till 3.5.2020. In terms of Clause 11(iii) of said MHA Guidelines, power generating companies and distribution licensees continued to be exempted from the restrictions imposed due to the lockdown on account of providing essential services. Similar guidelines were issued by MHA on 1.5.2020 further extending the lockdown till 17.5.2020.

(f) The Petitioner had declared and reserved contracted capacity for supply in terms of NVVN-DBPL PPA. The Petitioner has claimed compensation for the minimum offtake of 85% contracted power out of 100% capacity reserved for the Respondent. The loss caused to the Petitioner is over and above the quantum of Rs.1/kWh stipulated in the PPA.

(g) The contention of the Respondent that forwarding of NEA's letter within 24 hrs is substantial compliance with clause 3.9 of the said PPA is wholly erroneous and misconceived. The emails referred to by the Respondent do not even provide a passing reference to the occurrence of a force majeure event, much less provide information as to which event under Clause 3.9 (a) to (d) of the NVVN PPA got triggered. It is a trite law that *force majeure* Clauses are to be interpreted narrowly and not broadly.

(h) The letter of MoP dated 25.3.2020 clarified that power generation and supply were essential services and were exempted from the restrictions imposed by the lockdown. MoP further clarified that since power generation utilities, including Independent Power Plants (IPPs), supply inter-State electricity to the grid, their operations were critical for maintaining power supply across the country. Accordingly, MoP requested all the State Secretaries to ensure that the restrictions of lockdown did not hamper the movement of staff and raw materials for these power plants.

(i) A transaction cannot be termed as a back-to-back arrangement if the generating company is not a party to the NVVN – NEA PPA. This is more so when the Petitioner was never even provided with a copy of the NVVN - NEA PPA prior to or upon its execution. Even otherwise, the NVVN-NEA PPA is a cumulative PPA for the supply of power to NEA by the Respondent, from not only the Petitioner but also all other PPAs it has entered into with the other generators. The reliance, therefore, placed by Respondent on the Cross-Border Regulations is misplaced.

(j) The Manual for Procurement of Goods 2017 and Ministry of Finance Office Memorandum dated 19.2.2020 are applicable to cases of supply chain disruption while importing goods from China or any other Covid-19 affected nation, which is not the issue in the present Petition. Para 9.7.7 of the Manual for Procurement of Goods 2017 makes it clear that a party is excused from the performance of the contract and/or any punitive action so long as the delay/failure in fulfilling obligations under the contract is a result of an event covered under the force majeure clause of the respective contract.

(k) The limited issue which has already been decided by this Commission in Order dated 20.01.2022 in Petition No. 594/MP/2020 is that reduction in demand for power on account of Covid-19 and consequent lockdown does not qualify as a force majeure event. Therefore, a reduction in demand for power by NEA does not qualify as a force majeure event under Clause 3.9 of the DBPL-NVVN PPA and has no bearing on the independent contractual obligations under the PPA.

(l) It is settled law that the requirement of notice is *sin qua non* for claiming relief for force majeure. A conjoint reading of Clause 3.7 and Clause 3.9 of the NVVN – DBPL PPA clearly shows that a notice is to be provided in the event of force majeure.

(m) The Respondent's reliance on emails dated 23.3.2020 and 24.3.2020 as having given force majeure notices to the Petitioner is misplaced. The said communications state that NEA had revised open access scheduling which cannot be interpreted or construed to be a force majeure notice. Similarly, an email received by the Respondent from NEA on 25.3.2023 was never forwarded to the Petitioner.

(n) In the absence of any force majeure event in terms of the PPA, the Respondent's obligation to pay the energy compensation bills continues to persist. Since the Respondent has inordinately delayed payment of the energy compensation bills, the Petitioner is entitled to claim LPS under Clause 3.6 of the PPA.

Hearing dated 11.10.2023

8. During the course of the hearing, the learned counsel for the Petitioner and the learned counsel for the Respondent, NVVNL made detailed submissions in the matter. Based on their request, the parties were permitted to file their respective written submissions.

9. The Petitioner and the Respondent, in their written submissions dated 6.11.2023, have reiterated their submissions and the same are not repeated here for the sake of brevity. The Petitioner, in its written submissions dated 6.11.2023, has additionally relied on an order dated 27.10.2023 passed by this Commission allowing similar Petition No. 188/MP/2022 concerning the very same NEA PPA 12.02.2019.

Analysis and Decision

10. After considering the submissions of the parties and perusal of the documents placed on record, the following issues arise for consideration:

Issue No. 1: Whether a force majeure event has occurred in terms of the DB Power Limited-NVVN PPA that impacted the Respondent's obligations to pay energy compensation bills?

Issue No. 2: Whether the arrangement between the Petitioner, Respondent and NEA can be categorised as a back-to-back arrangement?

Issue No. 3: Whether the Petitioner is entitled to compensation under the DB Power Limited-NVVN PPA?

The above issues have been dealt with in the subsequent paragraphs.

Issue No.1: Whether a force majeure event has occurred in terms of the DB Power Limited-NVVN that impacted the Respondent's obligations to pay energy compensation bills?

11. The claim of the Petitioner is based on the premise that entitlement to Energy Compensation Bills is based on Clause 3.7 of the NVVN-DBPL PPA for the failure of the Respondent to offtake power. The Petitioner has submitted that there is no provision under the NVVN-DBPL PPA which makes the scheduling of power contingent upon NEA's ability to offtake power.

12. With regard to the Force Majeure, the Petitioner has submitted that Covid-19 lockdowns and reduction in demand / supply of power by the NEA is not a force majeure event under Clause 3.9 of the NVVN-DBPL PPA. The Petitioner has contended that the imposition of lockdown in India due to Covid-19 pandemic cannot be considered as a Force Majeure Event since power generation and transmission were categorized as essential services in terms of the Ministry of Home Affairs lockdown order and were exempted from the purview of the lockdown. Further, the letter dated 25.3.2020 issued by the Ministry of Power also stated that power generation and supply were essential services and were exempted from the restrictions imposed by the lockdown. The Petitioner also relied on the letter dated 6.4.2020 issued by the Ministry of Power which clarified that no exemption had been given to the Procurers from making payment of bills within 45 days (or the period given in the PPA) of its presentation, and the obligation to pay for capacity charges under the PPA were to continue.

13. The Petitioner has relied on the decisions of this Commission in its order dated 20.01.2022 in Petition No. 594/MP/2020 (GMRWEL v. DNHCL) and order dated 27.10.2023 in Petition No. 188/MP/2022 wherein it has been held that lockdown due to outbreak of Covid-19 cannot be considered as a force majeure event hindering performance of obligations under the PPA since outbreak of Covid-19 did not dislodge the obligations of DNH.

14. *Per contra*, the Respondent has contended that it was impossible for the Respondent to perform the minimum scheduling of electricity under the NVVN-DBPL PPA since the same was hindered by orders of the Sovereign Governments (both India and Nepal) which were circumstances beyond its control. The Respondent has

further submitted that the inability to schedule electricity on account of the Covid-19 pandemic during the above-mentioned period is a force majeure event under Article 10 of the PPA dated 12.2.2019 between NVVN-NEA PPA and therefore, equally a force majeure event within the provision of Clause 3.9 of the NVVN-DBPL PPA. The Respondent's case is premised on the fact that power demand for NEA otherwise was stable. However, the power demand was drastically reduced when the economy of Nepal was badly hit by the lockdown. The reduction in demand was only on account of the spreading of the Covid-19 pandemic, which resulted in the lockdown barring certain essential services.

15. The Respondent has further contended that the inability of the Respondent to make payment to the Petitioner is a consequence of a force majeure event, and the ability of the Respondent to make payment necessarily has to be seen in the context of whether the Respondent is in a position to procure power or not. The Respondent has sought to draw parity with the instances mentioned as force majeure under Clause 3.9 of the NVVN-DBPL PPA, for instance, in case of an earthquake, cyclone, act of war, and industry-wide labour strike, etc. which are specific events expressly provided as force majeure events under the NVVN-DBPL PPA, it is not necessary that there may be an impact on the performance obligation of Respondent to make payment. However, the force majeure clause recognizes that in case there is a drastic reduction in the power demand, the same would certainly impact the ability of the Respondent to procure the power. It is the Respondent's case that the Petitioner has sought to interpret the NVVN-DBPL PPA as if relief can only be claimed for such a force majeure event which impacts the obligations of both parties and so long as the Petitioner is in a position to make power available; the Respondent has to pay

the tariff irrespective of any force majeure event which impacts the ability of the Respondent to procure power.

16. The Respondent has further argued that the entire process of generation till consumption is an instantaneous process, and electricity cannot be stored. Therefore, to contend that since power generation and distribution were exempted under the MHA Guidelines, the same is outside the purview of force majeure is incorrect. The impact on the consumption of power has a direct correlation with the procurement of power, especially in the case of the Respondent, a trading licensee. The contention of the Petitioner that the ability to make payments has not been affected is also misconceived as the inability to make payment is only a consequence of a force majeure event and is not a force majeure event itself. The ability to make payment necessarily has to be seen in the context of whether the Respondent is in a position to procure power or not. If the contention of the Petitioner is to be accepted, there would be no force majeure clause at all applicable to the Respondent. The force majeure clause in PPA applies to the benefit of both parties by its plain language.

17. We have considered the submissions of the parties. As the issue involved requires examination of the occurrence of a force majeure event, if any, it would be pertinent to refer to the relevant provisions of the NVVN-DBPL PPA. Clause 3.9 of the NVVN-DBPL PPA deals with 'force majeure' provides as under:

“3.9 Force Majeure:

Force Majeure events shall include but not limited to:

a) Any restriction imposed by RLDC / SLDC in scheduling of power due to Transmission / Grid constraint.

b) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site),

earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions.

c) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo; revolution, riot, insurrection, terrorist or military action;

d) Change in Law/ Change in Regulations of India/Nepal debarring to perform the activities under this offer the above shall be treated as Force Majeure without any liability on either side.

Note: -Occurrence of Force Majeure conditions must be intimated immediately on their occurrence and in no case later than 24 Hrs from the time of occurrence.”

18. RE- Notice: The note at the end of Clause 3.9 provides that the occurrence of the force majeure conditions must be intimated on their occurrence and in no case later than 24 hours from the time of occurrence. Thus, it requires the party claiming to be affected by the force majeure event to put the other party on notice about the occurrence of the force majeure event on an immediate basis and in no case later than 24 hours from the time of occurrence. The Petitioner has submitted that even if it was to be assumed that the Covid-19 pandemic and associated lockdown qualified as force majeure event, the Respondent has failed to give notice of such event as per the NVVN-DBPL PPA above, which clearly shows that the alleged claim of force majeure is merely an afterthought. Whereas, the Respondent has referred to the Notification of Govt. of India dated 19.2.2020 and Govt. of Nepal dated 24.3.2020 and submitted that the perusal of these notifications with regard to the various restrictions due to Covid-19 itself is sufficient to establish the force majeure event. The Respondent has further stated that the Hon'ble Delhi High Court in its judgment dated 12.6.2020 in W.P (C) No. 2241 of 2020, titled MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation and Ors. has held that the acknowledgement in view of public declaration of Covid-19 pandemic is a valid

intimation/notice for invoking force majeure clause. The Respondent has also submitted that even assuming that a separate notice was required to be given under the PPA for a force majeure event, the Respondent had duly notified the Petitioner within 24 hours of receiving a likewise communication from the ultimate beneficiary of power-NEA vide its emails dated 23.3.2020 and 24.3.2020.

19. We have considered the rival submissions. As noted above, the NVVN-DBPL PPA requires a party claiming to be affected by a force majeure event to give notice about the occurrence of such event not later than 24 hours of such occurrence. The Respondent has submitted that it had notified the Petitioner within 24 hours of receiving a similar communication from NEA by emails dated 23.3.2020 and 24.3.2020. We have perused the said e-mails, both of which request the Respondent to effect a downward revision of the open access schedules/curtail the power from the generators proportionately on account of the drop in the power demand of NEA on account of the halt of economic activities/ lockdown in the country due to Covid-19 pandemic. However, none of these e-mails refers to the above events as force majeure events or seeks to invoke such clause on the agreement between the parties. Hence, we are unable to agree with the contention of Respondent that it having forwarded such e-mails of NEA within 24 hours of receipt would amount to substantial compliance with the notice requirement under Clause 3.9 above. While Respondent has also placed on record an e-mail dated 25.3.2020 received from NEA, wherein NEA had adverted to Clause 10 (force majeure) of its agreement with Respondent, the Petitioner has submitted that no such e-mail was forwarded to it by Respondent and the Respondent may be put to strict proof with regard to the same. It is noticed that Respondent has indeed failed to produce any corroborating

document indicating that the e-mail received from NEA, which adverted to and invoked the force majeure clause, was forwarded to the Petitioner. The Respondent has also argued that in terms of the judgment of the Hon'ble High Court of Delhi dated 12.6.2020 in WP (c) No. 2241 of 2020 in MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation and Ors., the acknowledgement in view of the public declaration of the Covid-19 pandemic is a valid intimation/notice for invoking the force majeure clause. However, we observe that the APTEL in its Judgment dated 30.4.2015, in Appeal No. 54 of 2014 in the case of Himachal Sorang Power Ltd. v. Central Electricity Regulatory Commission and Ors. has observed that where there are specific provisions to be complied with for the applicability of force majeure events, the said requirement cannot be ignored. Nevertheless, since the parties have extensively argued on the merits of the case, we also find it appropriate to examine the claims/submissions of the Respondent on the alleged force majeure on merits as well.

20. As per the definition of force majeure under Clause 3.9 of the NVVN-DBPL PPA, any event will qualify as force majeure, including but not limited to, cases of: a) Any restriction imposed by RLDC / SLDC in scheduling of power due to the transmission/grid constraint; b) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions; c) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo; revolution, riot, insurrection, terrorist or military action; d) Change in Law/ Change in Regulations of India/Nepal debarring to perform the activities under this offer the above shall be treated as Force Majeure without any liability on either side. The said

clause is non-exhaustive and provides that the above events would be treated as force majeure events without any liability to the other side.

21. Keeping in mind the aforesaid contractual provision of the NVVN-DBPL PPA, we now proceed to examine the claims of Respondent as to whether the Covid-19 lockdown and consequential reduction in demand of power by the NEA from Respondent constitutes a force majeure event under the NVVN-DBPL PPA so as to absolve Respondent from making the payment towards energy compensation bills raised by the Petitioner pursuant to the NVVN-DBPL PPA.

22. It is pertinent to mention that the order of the Ministry of Home Affairs dated 24.3.2020, whereby the Guidelines providing for the measures to be taken for containment of Covid-19 were issued, clearly exempted the units and services relating to the generation, transmission, and distribution from the lockdown. The relevant extract of the above guidelines reads as under:

“1. Office of the Government of India, its Autonomous/ Subordinate Offices and Public Corporations shall remain close.

Exceptions:

Defence, central armed police forces, treasury, public utilities (including petroleum, CNG, LPG, PNG) (disaster management, power generation and transmission units, post offices, National Informatics Centre, Early Warning Agencies

4. Commercial and private establishment shall be closed down.

Exceptions:

....

g. Power generation, transmission and distribution units and services...”

23. Further, the Ministry of Power vide its letter dated 25.3.2020 had also recognized that power generation is an essential service for securing smooth and

uninterrupted power flow across and within the States, and operations of inter-State generating stations are critical for maintaining the power supply. Accordingly, in order to provide the uninterrupted operation of such generators, the Ministry of Power had also asked the concerned authorities to provide various permissions to such generating stations. The relevant extract of the said letter reads as under:

“Subject: Essential operation of power generation utilities and permission for material movement needed by them during the nation-wide lockdown for Covid-19 outbreak.

...2. Power Generation is an essential service for securing smooth and uninterrupted power flow across and within the states. In the current scenario of Covid-19 outbreak and nationwide lockdown announced by Hon’ble Prime Minister, there will be need to ensure uninterrupted power generation.

3. The power generation utilities under Ministry of Power, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), hereafter referred to as “interstate power generating stations”, supply inter-state electricity to the grid. Hence, their operation are critical for maintaining power supply across the country.

4. In order to provide uninterrupted operation of “interstate power generating stations”, the following support is requested from your office.

....c. Waiver from section 144, Nationwide Lockdown, Curfew or any other limitation on number of people to gather in locations like ash pond, raw water intake, Power Generating Stations and other related locations where it may be required for operation and maintenance activities of generation and associated equipment....”

24. Thus, in terms of the above, the activities relating to the generation, transmission and distribution were exempted from the nationwide lockdown imposed for restricting spreading of Covid-19. As such, since there is a categorical exemption from the Covid-19 induced nationwide lockdown on all activities and services relating to generation, transmission, and distribution in terms of the Ministry of Home Affairs Order dated 24.3.2020, in our view, lockdown in India cannot be considered a

force majeure event that prevents, hinders, or delays the Respondent from performing its obligations under the NVVN-DBPL PPA.

25. The Commission, in its order dated 27.10.2023 in Petition No. 188/MP/2022, has already held that the Covid-19 pandemic and consequential reduction in demand for power during the period of the lockdown does not constitute a force majeure event. The relevant extracts of the said order dated 27.10.2023 are as under:

“25. The Commission in its order dated 20.01.2022 in Petition No. 594/MP/2020 has already held that the Covid-19 pandemic and consequential reduction in demand of power during the period of the lockdown does not constitute a force majeure event. The relevant extracts of the said order are as under:

“36. The Respondent has sought to argue that the reliance on above notification providing for exemption from lockdown is misconceived as the exemption was for the purpose that power supply should not be disconnected. However, the said argument, in our view, is misconceived. On one hand, the Respondent has sought to rely upon the Notifications issued by Ministry of Finance, MNRE and MoP in contending that Covid-19 and nationwide lockdown have been considered as force majeure therein, whereas on the other hand, it has sought to contest the applicability of the Ministry of Home Affairs Order dated 24.3.2020 clearly exempting services relating to generation, transmission and distribution from the lockdown. Such approbation and reprobation on the part of the Respondent cannot be permitted. In view of the categorical exemption from the Covid-19 led nationwide lockdown to all the activities and services relating to generation, transmission and distribution in terms of MoHA Order dated 24.3.2021, in our view, such lockdown cannot be considered as force majeure event that prevents, hinders or delays the Respondent/ distribution licensee in performing its obligations as specified in the DNH PPA.”

...

“58. In view of the above discussions, the submission of the Respondent that Covid-19 pandemic led lockdown and consequent reduction in demand constitute force majeure event absolving the Respondent from making payment of capacity charges under the PPA deserves to be rejected and accordingly, the Respondent is directed to make payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 within 60 days from the date of this order.”

...

“62. The Summary of our decision is as under:

(a) The outbreak of the COVID-19 pandemic did not dislodge the obligation of DNH. Since GWEL has declared its capacity on day ahead basis, DNH is under obligation to pay the capacity charges, along with late payment surcharge.

(b) The delayed payment of the bills which falls between 24.03.2020 to 30.06.2020, shall be payable at the reduced rate of 12% per annum that translates into 1% per month.

(c) DNH is liable to pay capacity charges to GWEL for the period from April 2020 to June 2020 along with late payment surcharge shall be payable within 60 days from the date of the Order.”

26. In the light of the decisions taken by the Commission in its order dated 20.01.2022 in Petition No. 594/MP/2020 and Order dated 27.06.2022 in Petition No. 187/MP/202, the prayer of the Respondent that Covid-19 pandemic and lockdown leading to reduction in demand of power is a force majeure event, as prayed for, is not sustainable.”

26. In light of the decisions taken by the Commission in its orders dated 20.1.2022 in Petition No. 594/MP/2020, Order dated 27.6.2022 in Petition No. 187/MP/2021 and Order 27.10.2023 in Petition No. 188/MP/2022, the prayer of Respondents that Covid-19 pandemic and lockdown leading to reduction in demand of power is a force majeure event, as prayed for, cannot be considered.

27. The Respondent has relied upon the decision of the Hon`ble Delhi High Court in the case of MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation & Ors. – WP (C) No. 2241/2020 (Judgment dated 12.6.2020) and has contended that once the force majeure clause is acknowledged by other parties in view of the public declaration of the Covid-19 pandemic, the force majeure event comes into effect from 19.2.2020, the date of notification of force majeure by the Ministry of Finance. We have gone through the judgments as relied upon by the Respondent and find that none of them will come to the aid of the Respondent as they are distinguishable on the facts since in none of the cases the parties were exempted from the lockdown in terms of Clause 4(g) of MHA Order dated 24.3.2020. We are inclined to agree with the submissions of the Petitioner that the Notification dated 19.2.2020 issued by the Ministry of Finance will not come to the aid of the Respondent since it is applicable for invoking force majeure in cases of disruption in the supply chain while importing goods from China or any other Covid-19 affected

nation. The Notification dated 19.2.2020 was applicable to under-construction Projects that were impacted by delays in the supply of raw materials due to supply chain disruption. In the facts and circumstances of the present Project, the Notification dated 19.2.2020 was not applicable in this case since the Petitioner was an operational Project engaged in the generation and supply of power to the Respondent.

28. We also hasten to add that, for similar reasons detailed above, reliance by Respondent on the Ministry of New and Renewable Energy's Office Memorandums dated 20.3.2020 and 13.5.2020 would not take the Respondents far since these were notifications/office memorandums issued to address supply chain disruptions and would not extend to generating companies such as the Petitioner since the physical infrastructure for generation and distribution of power from the Project was not impacted by Covid-19 and the consequent lockdown. Selective reliance by Respondent on certain notifications to claim Covid-19 as a force majeure event while ignoring the other notifications issued by the Central Government, which clearly exempted generation and supply of power from the purview of lockdown, cannot be permitted. This will be tantamount to Respondent approbating and reprobating at the same time.

29. Another fact put forward by Respondent was relying on the Ministry of Power's letter dated 15.5.2020 in support of its contention that the Government of India had come forward to treat Covid-19 as a force majeure event and had granted a waiver of 20-25% on fixed charges of contracts rather than penalising the Discoms for under-drawls. NEA, Nepal, being a small, hilly country, was facing a much more difficult situation, and upon its request, the Respondent did not charge any

compensation for under drawl/schedule revisions of power on them for all transactions starting from March 2020 to June 2020. Having considered the Respondent's submissions, we note that the Respondent's submission does not hold water for two reasons: firstly, this Commission, in its Order dated 27.6.2022 in Petition No. 187/MP/2021, has already held that the Ministry of Power has limited applicability to the Central Public Sector Generation Companies under the Ministry of Power including their Joint Ventures/Subsidiaries and the Central Public Sector Transmission Companies. This was not intended to be applicable to IPPs such as the Petitioner. The relevant extracts of the Order dated 27.6.2022 are as under:

“10. Further, the concessions to the distribution companies through MOP, GOI advisory dated 15.5.2020/16.5.2020 for deferment of capacity charges for power not scheduled, to be payable without interest after the end of lockdown period in three equal instalments and a rebate of about 20-25% on power supply billed (fixed cost) to Discoms and inter State Transmission charges levied by PGCIL, are applicable only to the Power Generation and Transmission CPSEs and all Subsidiaries/Joint Ventures of Power Generation and Transmission CPSEs under the MOP, GOI and not to the independent power projects of the Respondents herein. Hence, the question of extending the said advisory dated 15.5.2020/16.5.2020 to the power projects of the Respondents, to provide rebate and interest free deferment of capacity charges to the Petitioner, does not arise. The prayer of the Petitioner is not maintainable on this count also.”

30. Secondly, it was the Respondent's prerogative to give a special dispensation to the NEA by waiving the recovery of tariff for under drawl/schedule revisions of power from March 2020 to June 2020 on account of Nepal being a small, hilly country adversely impacted by the Covid-19 pandemic and ensuing restrictions. Since the Respondent made a commercial decision to grant a waiver of compensation for under-drawl without any prior intimation or discussion with the Petitioner, the Petitioner cannot be penalized. Therefore, we are not in agreement with the defence put forward by Respondent.

31. The Respondent has also sought to distinguish the order dated 20.01.2022 passed by the Commission in Petition No. 594/MP/2020 (GMR Case) from the present case primarily on the grounds that, (a) there is no finding in the order dated 20.1.2022 that the Covid-19 pandemic is not a force majeure event, (b) the issue in the GMR case was a domestic transaction between a generating company and distribution licensee whereas the present case deals with sale of power to a foreign country through a trading licensee, (c) the claim in the GMR case was qua payment of fixed charges whereas the present case deals with payment of energy compensation bills for deviation in drawl/schedule of power from March 2020 till June 2020, and (d) The present case deals with a back-to-back arrangement. While the issue of back-to-back arrangements and the Respondent's supply of power being a foreign transaction has been dealt with in the subsequent paragraphs of this Order, at the moment, we are limiting our findings on the aspect of whether the reduction in power demand owing to the Covid-19 pandemic qualifies as a force majeure event. We are of the considered opinion that irrespective of whether the claim in the present case is for energy compensation bills, as separate from the claim for capacity charges in the GMR case, the genesis of the liability of the Procurer in the GMR case (DNHPCL) was that generation and supply of power were neither impacted by any force majeure event nor was the obligation to pay for such power dislodged due to the outbreak of the Covid-19 pandemic and imposition of lockdown and other allied restrictions. Similarly, in the present case also, a reduction in demand for power by the NEA does not qualify as a force majeure event under Clause 3.9 of the NVVN-DBPL PPA.

32. In view of the above discussions, the submission of Respondent that the Covid-19 pandemic lockdown and consequent reduction in demand constitute a force majeure event absolving Respondent from scheduling power from the Petitioner and not paying the energy compensation bills raised by the Petitioner deserves to be rejected. We agree with the submissions of the Petitioner that the reduction in demand for power from March – June 2020, due to the imposition of Covid-19 related lockdown, does not qualify as a force majeure event as per Clause 3.9 of the NVVN-DBPL PPA since there is no provision under the NVVN-DBPL PPA that makes the scheduling of power contingent upon NEA's ability to offtake power. Also, it is reiterated that fluctuation in load demand is an operational reality for every procurer. Therefore, a reduction in demand/supply of power by the Respondent / NEA does not qualify as a Force Majeure event absolving the Respondent of its obligations under the NVNN-DBPL PPA.

33. The issue is answered accordingly.

Issue No. 2: Whether the arrangement between the Petitioner, Respondent and NEA can be categorised as a back-to-back arrangement?

34. The Respondent has submitted that NVVN-DBPL PPA and NVVN-NEA PPA have the same provisions and are directly linked so as to constitute a back-to-back arrangement between the Petitioner and NEA. According to the Respondent, it is only acting as a trader of electricity and does not consume any electricity it merely resells the electricity, that too, to a foreign procurer, NEA. The Respondent has submitted that the NVVN-DBPL PPA was entered into on 7.3.2019, i.e., after the NVVN-NEA PPA dated 12.2.2019 and the NVVN-NEA PPA is incorporated by reference under the NVVN-DBPL PPA. Accordingly, Respondent has submitted that since it is merely acting as an intermediary in the entire back-to-back transaction, i.e.

the PSA between Respondent and NEA and the PPA between Respondent and Petitioner, the Petitioner cannot raise any dispute or make a claim for payment of the energy compensation bills against the Respondent and therefore, the claim made by the Petitioner is baseless.

35. *Per contra*, the Petitioner has submitted that NVVN-DBPL PPA does not incorporate the terms and conditions of NVVN-NEA PPA as a back-to-back arrangement for the Petitioner's ultimate obligation was to supply power to the Respondent at the delivery point at Muzaffarpur sub-station end of the Muzaffarpur (Bihar), India- Dhalkebar (Nepal) transmission line and not to the NEA. To constitute a back-to-back arrangement, the parties should specifically agree to the same, and such an understanding should find mention in both the PPAs. A transaction cannot be termed a back-to-back arrangement if the generating company is not a party to the PPA between the trading licensee and the subsequent procurer. This is more so since the transaction between the Petitioner and Respondent is domestic, whereas the transaction between Respondent and NEA is a cross-border transaction. According to the Petitioner, the Respondent in effect, is seeking to evade its obligations on the alleged ground that the NEA is the ultimate procurer/beneficiary and the arrangement between the Petitioner and Respondent does not envisage any liability on Respondent, which as per the Petitioner is totally impermissible.

36. We have considered the rival submissions and perused the provisions of the NVVN-DBPL PPA and the NVVN-NEA PPA. The moot issue to be decided is whether the transaction between NVVN-DBPL PPA and NVV-NEA PPA are back-to-back arrangements? If yes, whether Respondent may be held liable to compensate

the Petitioner for the energy compensation bills for the period from March 2020 to June 2020.

37. In order to decide the issue, we have examined various provisions of both the NVVN-DBPL PPA and the NVVN-NEA PPA. Some of the relevant provisions are reproduced below:

(a) The NVVN-DBPL PPA provides as under:

“(i) M/s NVVN is an inter-State trading licensee, who has been granted category - I electricity trading license number 3/Trading/CERC by CERC under the Indian Electricity Act, 2003, carrying out its trading activities through its trading division, located at New Delhi.

(ii) M/s DBPL is agreeable to supply and NWN is agreeable to purchase the offered power sourced from DBPL as per NWN Offer no. NVVN/BD-7/G-17/02/21, dated 26.02.2019.

...

Other terms and conditions for the purchase of power shall be as follows:-

3.1. Delivery Point:

The Delivery Point for supply of Power shall be 400/220 KV bus (as applicable) at Muzaffarpur Substation end of Muzaffarpur (Bihar) Dhalkebar transmission line.

3.2 Transmission Charges and Losses:

...

NVVN shall book the Transmission corridor after making advance payment to the nodal RLOC towards PoC Charges as per CERC regulations for STOA. NWN shall make payment towards open access charges in the first instance and the same, as may be applicable shall be reimbursed by OSPL in full to NWN. The first bill shall be raised by NWN immediately after receipt of open access bill from the concerned RLOC. DBPL shall make the payment within 7 days on receipt of open access charges bill (excluding the day of receipt of bill). A surcharge of 15% per annum shall be applied on all Open Access payments outstanding after the 7th day of receiving NVVN's Open Access Bill (excluding the day of receipt of bill). This surcharge would be calculated on a day-to-day basis for each day for the delay.

3.4 Payment Terms:

The due date for payment would be 8th day from the date of receipt of bill by NVVN through Fax/email (excluding the date of receipt). The payment of bills raised by DBPL would be deposited through RTGS in "Seller's Bank Account" by NVVN within the "Due Date" of payment.

3.7. Compensation for default in Scheduling:

Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on 'monthly basis. In case deviation from Buyer side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Buyer shall pay compensation at RS.1.00 per kWh for the quantum of shortfall in excess of permitted deviation of 15%. In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Seller shall pay compensation to Buyer at RS.1.00 per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied. Above compensation shall be calculated on monthly basis. For any compensation payable by NVVN IOBPL as above, invoice shall be raised by DBPL/NWN as the case may be and payment shall be made within 15 days from the date of receipt of the invoice (excluding the date of receipt of invoice). For any delays in payment, surcharge shall be payable for the period of delay, at the rate of 15% per annum. No compensation shall be payable' by either party if the offered/requisitioned quantum of power is between 85% and 100%."

38. While Respondent has made bald averments that no liability can fall upon Respondent since it was merely acting as an intermediary/trading licensee in the entire transaction and the NVVN-DBPL PPA and the NVVN-NEA PPA were back-to-back arrangements, the Respondent has failed to make out a case either by relying on PPA provisions or showing Orders of Courts to substantiate its submission that the present arrangement was, in fact, a back-to-back arrangement. After having perused the above provisions, we note that to constitute a back-to-back arrangement, the parties should specifically agree to the same, and such an understanding should find mention in both the NVVN-DBPL PPA and the NVVN-NEA PPA. We agree with the contention of the Petitioner that a transaction cannot be *ipso facto* termed as a back-to-back arrangement if the generating company (Petitioner herein) is not a party to the PPA between the trading licensee (Respondent) and the subsequent procurer (NEA). In the absence of any reference by incorporation or explicit written agreement between the parties that the NVVN-DBPL PPA and NVVN-NEA PPA are back-to-back arrangements, it is difficult to accept Respondent's

submissions that the present scheme constitutes a back-to-back arrangement. Further, we note that the term and quantum of power for both sets of PPAs are different, the NVVN-DBPL PPA and the NVVN-NEA PPA are separate and distinct agreements and, therefore, cannot be categorised as a back-to-back arrangement.

39. Thus, it is evident from the above that both the PPAs are not linked to each other, and the rights and obligations arising out of any one PPA are not reflected in the other PPA. In the absence of any provisions of the PPAs that unambiguously indicate that both NVVN-DBPL PPA and NVVN-NEA PPA are back-to-back agreement, we hold that Respondent has failed to substantiate its argument that the present scheme is a back-to-back arrangement.

40. In this regard, while testing whether an arrangement is a back-to-back arrangement or not or where the intermediary/trading licensee is merely acting as a conduit, it would be relevant to refer to the decisions of APTEL dated 9.8.2012 in Appeal No. 188 of 2011 in the case of Lanco Budhil Hydro Power Limited v Haryana Electricity Regulatory Commission and Ors., wherein the APTEL has, *inter-alia*, held as under:

*“112. Haryana Power, during the course of hearing before this Tribunal in the present proceedings adverted to the purported distinction between the Merchant Trader and Intermediary Trader and contended that the PTC in this case acted only as intermediary. We are unable to distinguish between a merchant trader and intermediary trader as these terms are not defined and used in the Act or Rules/Regulations or National Electricity Policy/Tariff Policy. However, the Haryana Powers’ contention is that PTC was merely a conduit. This contention is misconceived. The PTC cannot be certainly construed to be an intermediary or conduit in any manner whatsoever. **PTC has undertaken to off-take the entire saleable power and energy from the Appellant’s Power Station for a period of 35 years and pay monthly and supplementary bills in terms of the PPA. PTC has taken the responsibility to enter into or cause the purchaser to enter into a bulk power transmission agreement with CTU for wheeling of power from the delivery point. Accordingly, PTC had applied to CTU to obtain long term***

open access and has further executed Bulk Power Transmission Agreement dated 18.10.2007 with the Appellant and PGCIL. Through the PPA, the PTC has undertaken upon itself substantial financial and commercial risk such as providing a Payment Security Mechanism by way of undertaking to furnish an irrevocable Letter of Credit. Thus, the PTC has undertaken substantial commercial obligations which distinguishes it from mere intermediary or conduit.”

41. The reasoning in the above order was also adopted by the APTEL in its decision dated 6.8.2009 in Appeal No. 7 of 2009 in the case of Lanco Amarkantak Power Limited v. Madhya Pradesh Electricity Regulatory Commission, wherein the APTEL held as under:

“21. It was argued vehemently by both Learned Counsel for the R-2 and R-3 that the Madhya Pradesh State Commission has got jurisdiction over the present dispute by virtue of the fact that the PPA and PSA constitute back to back arrangements. This contention cannot be countenanced as these two agreements are separate and distinct. Further between the two different parties these two agreements had been entered into. The close reading of the PPA clearly establishes that the obligation of the Appellant to supply the power energy output under the PPA is solely to R-2 which is independently entitled to sell the said power to one or more purchasers and accordingly the R-2 is independently responsible and liable for the supply of power to such purchasers.”

...
“23. The resale of power procured under PPA takes place under the Power Sale Agreement (PSA) between the R-2 and R-3. The Appellant is not a party to this transaction. As such the purchase of power under the PPA cannot be construed to be within the jurisdiction of the Madhya Pradesh State Commission since there is no certainty whatsoever that the power would be resold by R-2 to Madhya Pradesh. Therefore, the argument based on treatment of both agreements as one is not sustainable.”

42. It would emerge that Respondent fails to fulfil the test laid down by the APTEL in the above-mentioned decisions since it cannot be said that NVVN has not taken upon itself substantial commercial obligations. The Respondent's obligations to make payment to the Petitioner are independent and distinct from the Respondent's obligation to make payment. The Respondent has taken upon itself substantial commercial obligations and risks, including ensuring timely payment to the Petitioner as evident from Clause 3.4 of the NVVN-DBPL PPA, which provides that the

Respondent is liable to make payment to the Petitioner on the 8th day from the date of receipt of the bill by the Respondent. Further, it would appear that the Respondent has also undertaken commercial obligations and risks qua payment under the NVVN-NEA PPA. Clause 3.2 of the NVVN-NEA PPA states that transmission charges and losses up to the delivery point were to be borne by the Respondent. Therefore, given that Respondent has undertaken upon itself substantial financial and commercial risks such as payment of monthly dues, payment of transmission charges, and opening of an irrevocable letter of credit, it cannot be said that Respondent is acting as a mere intermediary, and the present transaction *ipso facto* becomes a back-to-back arrangement.

43. Another aspect raised by the Petitioner to demonstrate that it was not a back-to-back arrangement being that the Respondent had taken upon substantial commercial risk and obligation and that the Petitioner was not consulted by the Respondent, when it decided to give a special dispensation to the NEA by waiving of recovery of tariff for under draw/schedule revisions of power from March 2020 to June 2020. Based on the material placed on record and no averment to the contrary by Respondent, it appears that Respondent unilaterally decided to grant a waiver of compensation for under-drawl while supplying power to Nepal. This may have been done by Respondent in its capacity as the Nodal Agency for cross-border transactions. However, without getting into the aspect of cross-border supply of power and limiting the dispute to the NVVN-DBPL PPA, we are of the view that had there been back-to-back arrangement, the Respondent ought to have consulted the Petitioner before granting any such waiver to NEA. It was known to Respondent that such waiver could adversely impact the Petitioner`s contractual rights and obligations, despite this Respondent, in its wisdom, decided not to engage with the

Petitioner. Since the Respondent made a commercial decision to grant a waiver of compensation for under drawl without consulting the Petitioner, the Petitioner cannot be put to prejudice for not being paid the energy compensation bills that have been raised in accordance with Clause 3.7 of the NVVN-DBPL PPA. Therefore, we agree with the submissions of the Petitioner that the conduct of the Respondent would show that it did not act merely as a conduit/ in the transaction.

44. Therefore, we are not inclined to accept the plea of Respondent that no claims can be raised against it and that Respondent is not liable for any payment against the claim made by the Petitioner. The obligation of payment towards the energy compensation bills solely rests on the Respondent since the Petitioner's claims have been made under the NVVN-DBPL PPA. The Respondent is required to fulfil its obligations, including payment of energy compensation bills raised by the Petitioner. Therefore, in our view, the present scheme of supply between the Petitioner, the Respondent and NEA cannot be categorised as a back-to-back arrangement and failure on the part of Respondent to discharge its obligations under the NVVN-DBPL PPA entitles the Petitioner to bring a claim against Respondent and the Respondent is contractually obligated to honour the same.

45. The issue is answered accordingly.

Issue No. 3 Whether the Petitioner is entitled to compensation under the DBPL-NVVN PPA?

46. The Petitioner has, *inter alia*, contended that it has raised energy compensation Bills in accordance with Clause 3.7 of the NVVN-DBPL PPA and is entitled to compensation if the deviation from the Respondent's side is more than 15% of the contracted energy on a monthly basis, and that compensation is payable at Rs. 1.00 per kwh for the quantum of the shortfall in excess of the permitted 15%

deviation. The Petitioner has claimed the principal amount of Rs. 7,82,71,830/- from the Respondent towards the Energy Compensations Bills for the months of March 2020, April 2020, May 2020 and June 2020. The Petitioner has also claimed an amount of Rs. 1,87,66,459/- (as on 31/01/2022) towards LPS as per Clause 3.6 of the NVVN-DBPL PPA. As per the Petitioner, the amount towards LPS is a recurring amount and will be levied till the final payment is made by the Respondent.

47. *Per contra*, the Respondent has contended that compensation under Clause 3.7 of the NVVN-DBPL PPA is not triggered automatically and the compensation under Clause 3.7 has to be seen as liquidated damages. Since the Petitioner has failed to prove the actual loss suffered, it is not entitled to the compensation claimed by way of the Energy Compensation Bills. Without discharging proof of suffering a legal injury or loss or damage due to non-scheduling of power from March 2020 to June 2020, the Petitioner has not fulfilled the principles of proving injury enabling the Petitioner to claim compensation from the Respondent. The Respondent also placed reliance on the decision of the Hon'ble Supreme Court in the cases of Construction & Design Services Vs. Delhi Development Authority (2015)14 SCC 236, Kailash Nath Associates v. DDA [(2015) 4 SCC 136] and the decision of Hon'ble Delhi High Court in the judgment dated 07.01.2016 in Engineers India Limited Vs. Tema India Limited FAO(OS)487/2015 to substantiate that the Petitioner is not entitled to claim any compensation. This apart, the Respondent has reiterated its stance that no liability can be imposed by the Respondent since it was acting merely as an intermediary in a back-to-back arrangement.

48. We have considered the submissions of the parties and are of the view that the grant of compensation to the Petitioner under Clause 3.7 of the NVVN-DBPL

PPA is a corollary and logical extension of the issue decided above. Since we have already held that the Respondent's obligations under the NVVN-DBPL PPA were not dislodged on account of any force majeure event, therefore, the obligation of the Respondent to schedule energy from the Petitioner was never dislodged. Having failed to schedule power from the Petitioner for the months of March 2020 – June 2020, the Respondent was in breach of its obligations. Being in breach, the Petitioner had no other option but to raise Energy Compensation Bills in accordance with Clause 3.7 of the NVVN-DBPL PPA. We find no fault in the Petitioner raising the energy compensation bills in accordance with Clause 3.7 of the NVVN-DBPL PPA and claiming the said amounts from the Respondent. The Respondent cannot take shelter in the fact that it was merely acting as an intermediary in a back-to-back transaction. We have already held in the foregoing paragraphs that the Respondent was not acting as a mere intermediary, having taken upon itself substantial commercial risk and obligations. Since the amounts have been claimed in accordance with the formula prescribed under Clause 3.7 of the NVVN-DBPL PPA, which was agreed upon by both parties at the time of execution of the PPA, we see no reason as to why compensation should not be paid to the Petitioner. The Respondent cannot now contend that the Petitioner has to prove actual loss/damage, when the Respondent agreed to this formulation. In any case, the Petitioner has indicated that the non-offtake of power has resulted in a substantial loss to the Petitioner inasmuch as the said reserved capacity remained unutilised. The Petitioner has indicated that only the part of the contracted capacity that was reserved for the Respondent was sold to third parties (Power Exchange), and the revenue earned therefrom was Rs. 1.70 crore whereas the actual loss caused to the Petitioner on account of the non-offtake of power by the Respondent is Rs. 53.37

crore. We are of the view that Clause 3.7 of the NVVN-DBPL PPA is a genuine pre-estimate of damages agreed by the parties at the time of execution since the compensation has been agreed to by the parties at Rs. 1.00 per kWh. Also, Clause 3.7 of the NVVN-DBPL PPA adequately protects the rights of both the Petitioner and Respondent since the Respondent would also be entitled to claim compensation in cases of deviation from the seller (Petitioner) being more than 15% of contracted energy for which open access has been allocated on a monthly basis. Therefore, having agreed to this dispensation in the NVVN-DBPL PPA, the Respondent cannot claim that it is not liable to pay compensation to the Petitioner.

49. It is also observed that initially, the Respondent also claimed compensation from NEA for the supply of power in March, April, and May 2020. It was only after NEA's rejection to pay compensation by way of NEA's letter dated 24.6.2020 that Respondent refused to make payment to the Petitioner. It is clear that Respondent claimed compensation from NEA, and only after NEA's refusal did it seek to claim exemption from compensating the Petitioner. While the Respondent has sought to deny this and contended that no compensation bills were raised on NEA, the same is not in consonance with the record. Be that as it may, for the purposes of the present Petition, we are concerned with the transaction between the Petitioner and Respondent under the NVVN-DBPL PPA, wherein we have no hesitation in holding that the Respondent is liable to compensate the Petitioner in terms of the energy compensation bills raised by the Petitioner.

50. In view of the above discussions, the submission of the Respondent that the COVID-19 pandemic led to a lockdown and a consequent reduction in demand constitutes a force majeure event absolving the Respondent from making payment

under the NVVN-DBPL PPA deserves to be rejected. Accordingly, the Respondent is directed to make payment to the Petitioner in accordance with the formula prescribed under Clause 3.7 of the NVVN-DBPL PPA towards the energy compensation bills for the period from March 2020 to June 2020 together with LPS within two months from the date of this order after reconciliation of the amount.

51. The issue is answered accordingly.

Late Payment Surcharge

52. The Petitioner has sought a late payment surcharge on the delayed payment of the Energy Compensation Bills. The relevant provisions of the NVVN-DBPL PPA pertaining to late payment surcharge are as under:

“3.5. Rebate for Prompt Payment:

DBPL shall allow a rebate of 2.0 % on the billed amount to NVVN if the payment is made as per the due dates above. The rebate shall be adjusted at the time of payment by NVVN. In case the due date of payment is a bank/NWN holiday, the next working day shall be the due date of payment.

3.6. Surcharge:

For the delayed payment surcharge of 1.25% per month shall be leviable on all dues remaining unpaid for more than 30 (Thirty) days from the due date of bill. However, in case of Open Access charges, the surcharge shall be applicable for each day of the delay from date of bill.”

53. The Commission in its order dated 27.10.2023 in Petition No. 188/MP/2022 has dealt with the LPS as under:

“53. The Petitioner has sought late payment surcharge on the delayed payment of the Energy Compensation Bills. The relevant provisions of the NVVN-SEIL PPA pertaining to late payment surcharge is as under:

“10. Rebate and Surcharge

Seller shall allow a rebate of 2.0% on the billed amount to NVVN if the payments are made as per the due dates above. The rebate shall be adjusted at the time of payment by NVVN. In case the due date of payment is a bank/NVVN holiday, the next working day shall be the due date of payment.

For delayed payment, surcharge of 1.25% per month shall be leviable on all dues remaining unpaid for more than 30 days from the date of the bill.

However, in case of Open Access charges, the surcharge shall be applicable for each day of delay from date of bill.”

54. The NVVN-SEIL PPA provides for payment of LPS at 1.25% on the dues unpaid for more than 30 days. The parties have entered into the contract with open eyes and we see no reason to deviate from the terms agreed by the parties. Therefore, the Respondent is liable to make payment of all pending dues at the contractually stipulated LPS of 1.25% per month till the date of the filing of the present Petition.”

In light of the above decision of the Commission, the Respondent is liable to make payment of all pending dues at the contractually stipulated LPS of 1.25% per month till the date of the filing of the present Petition.

54. The summary of our decision is as under:

(a) The outbreak of the COVID-19 pandemic did not dislodge the obligation of the Respondent. Since the Petitioner was available and has raised Energy Compensation Bills in accordance with Clause 3.7 of the NVVN-DBPL PPA, the Respondent is under obligation to pay the same along with a late payment surcharge.

(b) The delayed payment of the bills shall be payable at the LPS rate agreed by the parties at 1.25% per month till the date of the filing of the present Petition.

(c) All payments to be made by the Respondent to the Petitioner along with LPS within two months of this Order.

55. Petition No. 73/MP/2022 is disposed of in terms of the above discussions and findings.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(Jishnu Barua)
Chairperson