

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 188/MP/2022

Coram:

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 27th October, 2023

In the matter of:

Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 read with Power Purchase Agreement dated 31.5.2019 between Sembcorp Energy India Ltd. and NTPC Vidyut Vyapar Nigam Ltd. for recovery of pending Energy Compensation Bills for the months of April – June 2020 along with Late Payment Surcharge on the pending amounts.

And

In the matter of:

Sembcorp Energy India Limited,
5th Floor, Tower C, Building No.8
DLF Cybercity, Gurgaon
Haryana-122002

...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 Vishrov Mukerjee, Advocate, SEIL

Shri Girik Bhalla, Advocate, SEIL

Ms. Juhi Senguttuvan, Advocate, SEIL

Shri Anand Ganesan, Advocate, NVVNL

Ms. Swapna Seshadri, Advocate, NVVNL

Ms. Ritu Apurva, Advocate, NVVNL

Ms. Archita Kashyap, Advocate, NVVNL

ORDER

The Petitioner, Sembcorp Energy India Limited (SEIL/ Petitioner) has filed the present Petition under Section 79 (1) (b) and (f) of the Electricity Act (hereinafter referred to as 'the Act'), read with the Power Purchase Agreement dated 31.5.2019 (NVTN-SEIL PPA) between SEIL and NTPC Vidyut Vyapar Nigam Ltd. (NVTN / Respondent). The Petitioner has made the following prayers:

“(a) Direct NVTN to pay Rs. 18,38,82,730/- towards outstanding Energy Compensation Bills for the period of April, May and June 2020;

(b) Direct NVTN to pay Rs. 5,29,47,963/- towards Surcharge / LPS (as on 31.05.2022) on outstanding Energy Compensation Bills;

(c) Direct NVTN to pay surcharge / LPS on the total outstanding amount due till date of actual payment;

(d) As an interim measure, direct NVTN to release 75% of the aforesaid amount payable to SEIL; and

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

Background

2. The Petitioner is a generating company in terms of Section 2 (28) of the Act and owns and operates SEIL (Project 1) (P1 Project) and SEIL (Project 2) (P2 Project) comprising of 1320 MW (2x660 MW), respectively located in the State of Andhra Pradesh. In the present case, the Petitioner supplied power to the Respondent for onward supply to Nepal from the P2 Project (Project).

3. On 13.2.2019, the Respondent offered to purchase power from the Petitioner for onward sale at a fixed tariff of Rs. 4.28/unit. Thereafter, the Petitioner and the Respondent executed the NVTN-SEIL PPA for supply of up to 120 MW power by the Petitioner to the Respondent for the period from 1.7.2019 to 30.6.2020. The

Respondent was procuring power for onward supply to Nepal Electricity Authority (NEA).

4. The Petitioner has filed the present Petition seeking payment of Rs. 18,38,82,730/- towards Energy Compensation Bills for the supply period of April – June 2020 along with Late Payment Surcharge (LPS) amounting to Rs. 7,59,33,303/- (as on 27.03.2023). The Respondent has refused to make payment of the Petitioner's dues on the grounds that the reduction in demand for power by NEA due to the outbreak of Covid-19 Pandemic, constitutes a Force Majeure Event under the PPA.

Submissions by the Petitioner

5. The Petitioner, has mainly submitted as under:

(a) On 23.3.2020 and 24.3.2020, the Respondent informed the Petitioner that due to lockdown in Nepal, NEA had revised the open access scheduling from the Respondent to 70MW and subsequently to 50MW.

(b) On 24.3.2020, Ministry of Home Affairs (MHA), Government of India, in exercise of powers under Section 10 (2) (I) of the Disaster Management Act, 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.

(c) 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 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.

(d) This Commission passed order dated 3.4.2020 in Suo Moto Petition No. 6/SM/2020 in terms of which it clarified that the obligation to pay LPS would continue and only the rate of LPS was reduced to 12% per annum or 1% per month.

(e) MoP issued clarification dated 6.4.2020 to its letters dated 27.3.2020 and 28.3.2020 regarding the requirement of 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 were to continue.

(f) 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 company and distribution licensees continued to be exempted from the restrictions imposed due to 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.

(g) On 7.5.2020, the Petitioner raised energy compensation bill for the month of April 2020 amounting to Rs. 52,327,230/- in accordance with Clause 6 of the PPA. The due date for the same was 14.5.2020.

(h) On 8.6.2020, the Petitioner raised energy compensation bill for the month of May 2020 amounting to Rs. 67,893,000/- in accordance with Clause 6 of the NVVN-SEIL PPA. The due date for the same was 15.06.2020.

(i) NEA vide its letter dated 24.6.2020 informed the Respondent, denying payment of compensation bills raised by the Respondent since outbreak of

Covid-19 was a Force Majeure event and neither party was liable for losses/damages incurred on account of non-performance due to Force Majeure.

(j) In terms of NEA's letter dated 24.6.2020, the Respondent itself had raised energy compensation bills on NEA for the months of April 2020 to June 2020. This clarifies the Respondent's stance that it did not consider the reduction in demand as a Force Majeure event and continued to raise bills in accordance with the PPA. It was only after NEA refused to make payment, the Respondent changed its stance and denied payment of energy compensation bills to the Petitioner. Moreover, NEA's letter dated 24.6.2020 was sent to the Petitioner by the Respondent belatedly on 14.9.2020 i.e., after a delay of almost 3 months.

(k) The Respondent by way of letter dated 1.7.2020 wrote to the Petitioner stating that (i) Covid-19 qualifies as an Act of God. Even the MoP has treated Covid-19 as a force majeure event and has deferred all payments for more than 3 months in addition to waving 20% to 25% on fixed charges of contracts rather than penalizing Discoms for under drawls, (ii) NEA has requested NVVN to not charge any compensation for under drawl for the period from April 2020 to June 2020.

(l) The Petitioner vide letter dated 06.07.2020 responded to the Respondent's letter dated 1.7.2020 stating that (i) the electricity is an essential service in terms of the lockdown orders issued by the Government of India. Also, the Petitioner incurred additional costs to ensure continued supply to the Respondent, (ii) NEA had continued to avail power throughout the term of the NVVN-SEIL PPA dated 12.2.2019 (NVVN-NEA PPA) and the Respondent had not represented occurrence of Force Majeure to the Petitioner, and (iii) Despite the Petitioner maintaining the contracted availability under the contract, and in the absence of offtake, the Petitioner was constrained to sell additional quantum of power merely to ensure safe operations of the Plant. Therefore, the Petitioner stated that it would not be in a position to withdraw/waive its energy compensation bills.

(m) On 7.7.2020, the Petitioner raised Energy Compensation Bill for the month of June 2020 amounting to Rs. 63,662,500/-, in accordance with Clause 6 of the NVVN-SEIL PPA.

(n) The Respondent vide letter dated 11.7.2020 reiterated its request that the Energy Compensation Bills could not be accepted since (i) Covid-19 pandemic, was a force majeure event under the NVVN-SEIL PPA, (ii) NEA had also invoked force majeure on account of the reduced offtake of power and reduction in demand of power as a force majeure (iii) The Respondent being a trader had no option but to invoke Force Majeure under the NVVN-SEIL PPA.

(o) The Petitioner vide its letter dated 24.7.2020 stated that unilateral denial and non-payment of Energy Compensation Bills would constitute as a dispute/difference under Clause 14 of the PPA. The Petitioner gave a Notice under Clause 14 of the NVVN-SEIL PPA calling upon the Respondent for resolution of the differences through mutual discussions.

(p) The Respondent vide its letter dated 12.8.2020 responded to the Petitioner's Notice under Clause 14 of the NVVN-SEIL PPA and stated that (i) NEA had invoked Force Majeure under the NVVN-NEA PPA and the same had already been informed to the Petitioner, (ii) The Petitioner had been informed of revision of schedule by NEA (iii) The Petitioner's dispute was misconceived due to the existence of a Force Majeure event that prevented NEA from scheduling power from the Respondent (iv) Inability to schedule electricity on account of Covid-19 and reduction in demand qualified as a force majeure event under Article 10 of the NVVN-NEA PPA. It also qualified as a force majeure event under Article 15 of the PPA, (v) The outbreak of Covid-19 and reduction of demand by NEA is an event beyond the reasonable control of the Respondent. The same has made performance of the Respondent's obligations under the NVVN-SEIL PPA impossible.

(q) The Petitioner vide its letter dated 28.8.2020 informed the Respondent that (i) NVVN had not exclusively claimed force majeure during

the term of the NVVN-SEIL PPA nor was any information related to force majeure event received by the Petitioner, (ii) As per standard practice, all contracts executed through Energy Traders are such that the obligations of the end buyer are deemed to be performed by the intermediary party (energy trader) for all purposes. By the nature of energy trading business and such contracts entered, the liability/obligation of commercial and other settlements remain the obligation of the intermediary (Respondent in this case), and (iii) The Respondent had continued scheduling power during the period the from 1.4.2020 to 30.6.2020 as per NEA's requirement and the Petitioner had maintained 'Full Availability' of the capacity on Day Ahead/Contingency basis.

(r) The Respondent vide its letter dated 14.9.2020 informed the Petitioner that (i) SEIL's claims regarding payment of compensation on account of quantum of power not taken are misplaced since the same occurred during the subsistence of a Force Majeure event, (ii) The Respondent is the intermediary agency in the purchase of power from the Petitioner for resale of the power to NEA. The procurement of power by from the Petitioner is entirely for resale to NEA. The Petitioner executed the NVVN-SEIL PPA being aware that fundamental premise of the NVVN-SEIL PPA was for resale of power to NEA by the Respondent, (iii) Inability to schedule electricity on account of Covid-19 is a Force Majeure event in terms of the NVVN-NEA PPA and the PPA. Force Majeure clauses in both PPAs are inclusive and not exhaustive in nature, (iv) The Respondent being the nodal agency for the cross-border transaction, can compensate the Petitioner only to the extent the Respondent is paid by NEA. Accordingly, SEIL's claim of LPS on Energy Compensation Bills was denied.

(s) The Petitioner vide its letter dated 5.10.2020 informed the Respondent that (i) The Respondent continued scheduling of power during the period from 1.4.2020 to 30.6.2020 as per NEA's requirement and the Petitioner had maintained 'Full Availability' of the capacity under the contract. The same is evidenced by the additional FCFS/Day Ahead/Contingency applications for the varying quantum in different Time of Day received in the months of April and June 2020 which were invariably serviced by the Petitioner. The Petitioner even

provided the details and quantum of power scheduling for April 2020 – June 2020, (ii) The compensation Bills raised by the Petitioner were in accordance with the NVVN-SEIL PPA (iii) Revision request dated 24.3.2020 whereby owing to imposition of lockdown in Nepal and reduction in demand, NEA had revised open access scheduling from the Respondent to 50 MW (from 250 MW) has been misinterpreted as a Force Majeure Event. Revision was pertaining to a specific period of March 2020 only and could not be construed as an exclusive Force Majeure Event, and (iv) Since the Respondent unilaterally denied payment of pending Energy Compensation Bills, the Petitioner sought an appointment with the CEO of NVVN to mutually discuss the issue and arrive at an amicable settlement.

(t) Clause 15 of the NVVN-SEIL PPA is an exhaustive provision and provides for specific instances viz. restrictions imposed by RLDC/SLDC, act of God, act of war, invasion, etc., and Change in Law / regulation debarring to performing activities under the NVVN-SEIL PPA which shall qualify as force majeure. Reduction of demand of power has not been recognised as a force majeure event.

(u) For an event to qualify as force majeure, it is essential that the performance of obligations by the Respondent have been prevented, hindered, or impeded. However, in the present case, the Respondent's obligations remain unaffected.

(v) There is no provision under the NVVN-SEIL PPA which makes scheduling of power contingent upon NEA's ability to off-take power. Fluctuation in load demand is an operational reality for every procurer. Therefore, reduction in demand / supply of power by the Respondent cannot be considered as a force majeure under Clause 15.

(w) The Petitioner raised Energy Compensation Bills for the months from April to June 2020 in accordance with the PPA. The Respondent did not consider reduction in demand as a force majeure event and continued to raise bills in accordance with the PPA. If the Respondent was of the view that

reduction in demand and low offtake was indeed a Force Majeure event, it should have returned the Petitioner's Energy Compensation Bills in April 2020 itself (when they were raised for the first time). Notwithstanding the outbreak of Covid-19 and imposition of lockdown, the Respondent went ahead and raised the Energy Compensation Bills on NEA, thereby accepting that there was no Force Majeure. It was only after NEA rejected to make payment, as an afterthought, the Respondent claimed Force Majeure qua the Petitioner.

(x) This Commission has specifically rejected the contention that reduction in demand for power due to Covid-19 constitutes as a force majeure event in Order dated 20.1.2022 in Petition No. 594/MP/2020 (594 MP Order) titled GMR Warora Energy Limited (GWEL) v. DNH Power Distribution Company Limited (DNH) (Paras 36, 58, 62).

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

(z) The PPA was executed between parties being 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 terms of the contracts ought to be honored and that parties in a contract agree to risks which are expressed through the terms thereof.

(aa) Clause 15 of the NVVN-SEIL PPA envisages force majeure events in India. Since the delivery point in terms of Clause 1 is the Muzaffarpur Substation, Bihar, the transaction between the Petitioner and Respondent and obligations of parties is limited to performance within India. Any force majeure event faced by procurers from NVVN outside India is not covered by the PPA. Fall in demand of power by NEA, being an alleged force majeure event outside

India can neither be governed by the provisions of PPA nor can it be considered as a force majeure event under the PPA.

(bb) Even otherwise, imposition of lockdown in India due to Covid-19 cannot be considered as a force majeure event since power generation and transmission were categorized as essential services and were exempted from the purview of lockdown.

(cc) The Hon'ble Bombay High Court in the case of Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp Ltd., Commercial Arbitration Petition (L) No. 404 of 2020 [Para 4 (d)] refused to grant relief under the force majeure clause for imposition of lockdown to entities engaged in 'essential services.'

(dd) Without prejudice, the Respondent is not entitled to claim benefit of Force Majeure under Clause 15 of the NVVN-SEIL PPA since no notice invoking the force majeure provision was served upon the Petitioner.

(ee) The Commission in various cases has interpreted the requirement of the affected party to give a notice of Force Majeure strictly. [Himachal Sorang Power Ltd. v. Central Electricity Regulatory Commission & Ors., Appeal No. 54 of 2014 (Judgment dated 30.04.2015) (Para 26, 33); and Maruti Clean Coal and Power Ltd. v. Power Grid Corporation of India Ltd., Appeal No. 212 of 2016 (Judgment dated 07.11.2017)].

(ff) In addition to the principal amount of Rs. 18,38,82,730/- payable by the Respondent, the Petitioner is also entitled to LPS on the outstanding amounts in terms of Clause 10 of the PPA.

(gg) The Respondent has failed to make payments towards Energy Compensation Bills for supply of power by the Petitioner during the months of April, May, and June 2020 by the due dates. Accordingly, SEIL is entitled to claim LPS on the pending Energy Compensation Bills.

(hh) This Commission is the Appropriate Commission under Section 79 (1) (b) of the Act. This Commission has the jurisdiction to adjudicate on the present Petition because 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 11.10.2022

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

Submissions by the Respondent

7. The Respondent, in its reply dated 14.1.2023, 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 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 PPA.
 - (c) Power demand for NEA remains stable for each normal month. The power demand drastically decreased during the period from April 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.
 - (d) The Respondent is an intermediary agency in the purchase of power from the Petitioner for resale of power to NEA. Procurement of power from the Petitioner by the Respondent is entirely for resale of power to NEA on back-to-back basis.
 - (e) 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 (hereinafter referred to as 'the Trading

Regulations. Therefore, purchase of power is for back-to-back sale to another user/Discom being NEA.

(f) 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-SEIL PPA was to be further sold to NEA with a trading margin.

(g) 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 13.05.2020 and 19.02.2020, Office Memorandum issued by the Ministry of New and Renewable Energy (MNRE) dated 20.03.2020 (MNRE OM dated 20.03.2020), Circular dated 18.05.2020 issued by Ministry of Roads Transport and Highways, and MHA Guidelines.

(h) The intensity and scope of Covid-19 does not need a separate intimation/notice of force majeure. Governments of Nepal and India notifications are sufficient to establish force majeure.

(i) The adverse impact of the Covid-19 pandemic and its impact on commercial and economic environment of the country, different courts have granted relief to contracting parties that were impacted by the Covid-19 pandemic. Reliance was placed on decisions of Hon`ble High Court of Delhi in the cases of MEP Infrastructure Developers Ltd. v. SDMC in WP (C) Mo. 2241 of 2020; Halliburton Offshore Services Inc. v. Vedanta Ltd., OMP (I)(Comm) No. 88 of 2020, and Tuticorin Stevedores' Association v. The Government of India, [WP(MD) No. 6818 of 2020].

(j) There is no requirement under Clause 15 of the NVVN-SEIL PPA to issue a notice regarding force majeure. Even otherwise, SEIL was duly informed within 24 hours of receiving communication from NEA invoking force majeure.

(k) Clause 6 of the NVVN-SEIL PPA relating to compensation for short supply is not an automatic compensation for default in scheduling. At best,

Clause 6 of the NVVN-SEIL PPA is a liquidated damages clause which can only be invoked once actual damage is established.

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

(m) Since Energy Compensation Bills are not payable, there is no question of seeking LPS.

Rejoinder by the Petitioner

8. The Petitioner in its rejoinder dated 11.2.2023, has mainly submitted as under:

(a) Force majeure under the NVVN-SEIL PPA contemplates 4 distinct circumstances, upon the occurrence of which, an event would qualify as an event of force majeure. Pertinently, reduction in demand of power in Nepal does not qualify as a force majeure event under the PPA.

(b) It is essential that the force majeure event has hindered, prevented, or impeded the performance of obligations by the Respondent. In the present case, the Respondent's obligations remain unaffected.

(c) Reduction in demand for power in Nepal has no bearing on supply of power by the Petitioner under the NVVN-SEIL PPA and the Respondent's obligation to pay Energy Compensation Bills for the same. This Commission in the Order dated 22.01.2022 in Petition No. 594/MP/2020 has held that Covid-19 pandemic led lockdown and consequent reduction in demand does not qualify as a force majeure event. Therefore, there is no basis for the Respondent to re-agitate a settled issue.

(d) 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, 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.

(e) Mere reference in the NVVN-SEIL PPA that power would be for onward sale to Nepal / NEA does not make the transaction between the Petitioner and the Respondent and NVVN-NEA a back-to-back arrangement. These are two separate and distinct transactions, one a domestic transaction between two Indian parties and the other a cross-border transaction between the Respondent and NEA. This cannot be considered as one composite transaction since the sale by NVVN to NEA falls within a separate legal regime.

(f) In terms of Recital (iv) and (v) read with Clause 2 of the NVVN-NEA PPA, the term of the NVVN-NEA PPA was from February 2016 to 30.6.2019 which was further extended up to 30.6.2020. The NVVN-NEA PPA has been valid for a period of 4 years and the contracted capacity was up to 350 MW RTC Power. However, in the present case, the NVVN-SEIL PPA was only for a period of 1 year for supply of 120 MW. Since the term and quantum of power for both set of PPAs is different, the NVVN-SEIL PPA and the NVVN-NEA PPA are separate agreements and not back-to-back arrangements.

(g) When the trading licensee takes upon itself substantial obligations then it does not function as a mere intermediary or a conduit. In the present case, the Respondent's obligation to make payment to the Petitioner are independent and distinct of NEA's obligation to make payment. The Respondent has taken upon itself to ensure timely payment to the Petitioner (as per Clause 9 of the PPA) including opening of Letter of Credit in favor of the Petitioner (as per Clause 11 of the PPA).

(h) A transaction cannot be termed as a back-to-back arrangement if the generating company is not a party to the NVVN-SEIL PPA / PSA between the trading licensee and the subsequent procurer. This is more so since the transaction between the Petitioner and the Respondent is a domestic transaction whereas the transaction between the Respondent and NEA is a cross-border transaction.

(i) The Petitioner has also placed reliance on the certain judgments to support its case (i) Md. Serajuddin vs State of Orissa [reported as (1975) 2 SCC 47 (Para 25, 27)], (ii) Judgement dated 9.8.2012 in Appeal No. 188 of 2011 titled M/s. Lanco Budhil Hydro Power Private Ltd. Power Ltd vs HERC & Ors., (Para 112), and (iii) Judgement dated 6.8.2009 passed by the APTEL in Appeal No. 7 of 2009 titled Lanco Amarkantak Power Ltd vs MPERC & Ors., (Pars 21, 23)

(j) Transaction between the Respondent and the Petitioner is not a 'Cross-Border' transaction as defined under the Central Electricity Regulatory Commission (Cross Border Trade of Electricity) Regulations, 2019 (in short 'the Cross-Border Regulations) Regulation 3 of the Cross Border Regulations provides that these are applicable to Participating Entities in India. Regulation 2(II) defines a Participating Entity to be an entity approved by the Designated Authority for the purposes of cross border trade. The Petitioner has not been granted any approval by the Designated Authority.

(k) 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 performance of the contract and/or any punitive action so long as the delay/failure in fulfilling obligations under the contract are a result of an event covered under the force majeure clause of the respective contract.

(l) The Respondent is selectively relying on certain notifications to claim Covid-19 as a force majeure event while ignoring the notifications which exempted generation and supply of power from the purview of lockdown. The Respondent cannot be allowed to approbate and reprobate by seeking to take benefit under the Notifications which sought to declare Covid-19 as a force majeure event while refusing to accept that power generation and supply of power were exempted from Covid-19 related restrictions.

(m) The Respondent's contention that MoP has treated Covid-19 as a force majeure event and has deferred all payments for more than 3 months along with waiver of 20%-25% on fixed charges rather than penalizing the Discoms for underdrawl is misleading. Dispensation under MoP letter dated 15.5.2020 was limited to the Central Public Sector Generation Companies under MoP including their Joint Ventures/Subsidiaries and Central Public Sector Transmission Companies and not to private generating stations. The relief did not extend to exemption from payment of capacity charges. There was only deferment of payment of capacity charges. Additionally, MoP vide letter dated 6.4.2020 clarified that no exemption was granted to Discoms from making payment of bills and the obligation to pay capacity charges as per the respective PPAs would continue. As regards waiver, the only relaxation granted to the procurers was vide Order dated 3.4.2020 in Petition No. 6/SM/2020 wherein LPS payable for bills between 24.3.2020 to 30.6.2020 were reduced to 12% per annum i.e., 1% per month.

(n) The Respondent's contention that upon NEA's request, NVVN did not charge any compensation for under drawl/schedule revisions for April 2020 to June 2020 is incorrect. Such a dispensation has been provided by the Respondent to NEA unilaterally, as a commercial decision of the Respondent under the NVVN-NEA PPA. No such dispensation was either sought from or agreed to by the Petitioner under the PPA. Therefore, the Respondent's decision to waive compensation for underdrawl by NEA (under the NVVN-NEA PPA) cannot be binding on the Petitioner (who is not a party to the NVVN-NEA PPA).

(o) The limited issue which has already been decided in the negative 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 qualifies as a force majeure event. Therefore, reduction in demand of power by NEA does not qualify as a force majeure event under Clause 15 of the NVVN-SEIL PPA and has no bearing on the independent contractual obligations under the PPA.

(p) It is settled law that the requirement of notice is *sin qua non* for claiming relief for force majeure. Therefore, notice of force majeure is to be given strictly. A conjoint reading of Clause 15 and Clause 18 of the NVVN-SEIL PPA clearly stipulates that a notice is to be provided in the event of force majeure. Clause 18 places an obligation on parties to provide a notice for matters related to operations, scheduling, and open access. Since Covid-19 would have a direct impact on operations and scheduling of the Petitioner's Project, the Respondent ought to have issued a notice under Clause 18.

(q) 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 only for the month of March 2020, which cannot be interpreted or construed to be a force majeure notice.

(r) In the absence of any force majeure event in terms of the PPA, the Respondent's obligation to pay Energy Compensation Bills continues to persist. Since the Respondent has inordinately delayed payment of Energy Compensation Bills, the Petitioner is entitled to claim LPS under Clause 5 of the PPA. The mandatory nature of LPS has been recognized by the Hon'ble Supreme Court in the case of Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission & Ors: [(2022) 4 SCC 657] and Adoni Ginning Factory vs. Secretary, Andhra Pradesh Electricity Board & Ors., [AIR 1979 SC 1511].

Hearing dated 7.3.2023

9. During the course of the hearing 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.

Written Submissions by the Petitioner

10. The Petitioner in its written submissions dated 29.03.2023 has mainly reiterated its submissions and has additionally submitted as under:

(a) Reduction in demand for power from April – June 2020, due to imposition of Covid-19 related lockdown does not qualify as a Force Majeure event as per Clause 15 of the NVVN-SEIL PPA as (i) there is no provision under the NVVN-SEIL PPA which makes scheduling of power contingent upon NEA's ability to offtake power, (ii) fluctuation in load demand is an operational reality for every procurer. Therefore, reduction in demand / supply of power by the Respondent is not a Force Majeure event under Clause 15, (iii) The Respondent continued to schedule power from 1.4.2020 to 30.6.2020 as per NEA's requirements while SEIL maintained 'full availability', and (iv) The Respondent raised Energy Bills for April to June 2020 on NEA and the Respondent did not consider reduction in demand in Nepal as a force majeure event. It was only after NEA rejected to make payment, as an afterthought, the Respondent claimed Force Majeure.

(b) The Respondent's reliance on APTEL's Judgment dated 7.10.2022 passed in Appeal No. 333 of 2022 in Tamil Nadu Generation and Distribution Co. Ltd. v. CERC & Ors. is erroneous. The present dispute does not pertain to a physical impossibility of performance of obligations.

(c) It is settled law that mere onerousness of performance cannot be considered as a Force Majeure event as held by the Hon'ble Supreme Court in the cases of Energy Watchdog vs Central Electricity Regulatory Commission & Ors. reported as (2017) 14 SCC 80 (Paras 38-42, 46) and Naihati Jute Mills Limited v. Khyaliram Jagannath [reported as AIR 1968 SC 522 (Para 10)]. The force majeure clause in the NVVN-SEIL PPA (Clause 15) and in the Judgment dated 7.10.2022 are different. In the present case, Clause 15 of the NVVN-SEIL PPA is exhaustive and all claims for force majeure will have to be examined in the context of Clause 15 of the PPA.

(d) The Respondent's reliance on MoP's letter dated 15.05.2020 is misplaced. MoP's letter dated 15.05.2020 has limited applicability to Central

Public Sector Generation Companies under Ministry of Power including their Joint Ventures/Subsidiaries and Central Public Sector Transmission Companies. This was not intended to be applicable to IPPs such as the Petitioner. This Commission in Order dated 27.06.2022 in Petition No. 187/MP/2021 titled MSEDCL v. GWEL & Anr. (Para 10) has also recognised that letter dated 15.5.2020 is not applicable to IPPs. Further, letter dated 15.5.2020 was a recommendatory dispensation and cannot be considered as a binding direction. The discretion whether to waive of fixed charges was left to Central Public Sector Generation Companies, Joint Ventures/Subsidiaries and Central Public Sector Transmission Companies.

(e) Respondent's reliance on Regulation 2 (1) (d) of the Trading Licence Regulations 2020 (definition of back-to-back agreements) is misplaced. The Trading Regulations 2020 were notified on 2.1.2020 which is after the execution of the NVVN-SEIL PPA executed on 31.5.2019. It is a trite that a Rule or Law cannot be construed to have retrospective effect unless it expresses a clear or manifest intention to the contrary [Assistant Excise Commissioner, Kottayam & Ors. v. Esthappan Cherian & Anr. [(2021) 10 SCC 210 (Para 16-18)]. Without prejudice, even as per the definition under Regulation 2 (1) (d) of the Trading Regulations 2020, contracts can only be considered as back-to-back arrangements if both parties agree to the same which is not the case in the present dispute.

(f) Without prejudice, even if the NVVN-SEIL PPA is a back-to-back arrangement with NVVN-NEA PPA, the Respondent would still be liable to pay energy charges to the Petitioner. The Commission vide Order dated 15.8.2020 in Petition No. 158/MP/2019 titled Adhunik Power and Natural Resources Ltd. v. TANGEDCO & Anr. (Paras 29 & 31) while upholding that sale of power by the generating company (APNRL) to the Distribution Licensee (TANGEDCO) through the trading licensee (PTC) constitutes a back-to-back arrangement, held that payment to APNRL by PTC is not conditional upon payment made by TANGEDCO to PTC.

(g) Under Clause 6 of the PPA, the Petitioner is entitled to compensation if 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 unit for the quantum of shortfall in excess of permitted 15% deviation.

(h) The Respondent's contention that no compensation is payable to the Petitioner since Clause 6 contemplates liquidated damages and the Petitioner is only entitled to such damages after proving the actual loss caused or injury incurred is misplaced. The Hon'ble Supreme Court and ATEL have recognized difficulties in quantifying actual damages in regulated regimes such as the electricity sector where the actual loss caused in monetary terms cannot be assessed. Therefore, the party claiming breach should be entitled to liquidated damages specified in the contract as an upper limit.

(i) Despite being aware of Clause 6 and agreeing to the consequences thereof, the Respondent is attempting to renege from its obligations by disputing the applicability of Clause 6 on the ground that the Petitioner has not proved actual loss incurred. The Hon'ble Supreme Court in the case of Construction and Design Services v. DDA: [(2015) 14 SCC 263 (Paras 14-15)], held that if the amount stipulated under the agreement is a genuine pre-estimate of the loss, the actual loss need not be proved. On the contrary, the burden to prove that no loss was likely to be suffered is on the party committing the breach.

(j) The conduct of the Respondent of non-payment of outstanding dues and consequent LPS on the delayed payments is a violation of the terms of the PPA. Accordingly, the Petitioner is entitled to Rs. 18,38,82,730/- towards outstanding Energy Compensation Bills for the period from April to June 2020 and Rs. 7,59,33,303/- (calculated till 5.3.2023) towards LPS.

Written submissions by the Respondent

11. The Respondent, in its written submissions dated 29.3.2023, has mainly reiterated its submissions in the reply and has additionally submitted as under:

(a) The entire premise of the Respondent's case is that it is a trader and does not consume any electricity and only resells electricity, and that too to a foreign distribution licensee. In view of the nationwide lockdown, all the industrial and commercial activities in Nepal were mandated to cease operations (except for miniscule essential services), resulting in drastic reduction in power demand in Nepal. The Respondent is purchasing power from the Petitioner entirely for resale to NEA on a back-to-back basis.

(b) Inability to schedule electricity on account of Covid-19 is a force majeure event under Article 10 of the NVVN-NEA PPA and therefore, equally a force majeure event within the provision of Clause 15 of the PPA.

(c) Power demand for NEA remains very stable for each normal month and varies between 350 MW to 300 MW. However, the power demand drastically reduced by 200 MW in the months of April 2020 to June 2020, due to Covid-19. It was impossible for the Respondent, which is the intermediate agency, to facilitate cross border transactions and perform the obligations under the PPA. In such a case, to hold the Respondent responsible for any liability to the Petitioner is in complete contradiction to the cross-border transaction for sale of power between the parties.

(d) On account of the devastating effects of the Covid-19, different Courts granted relief to mitigate the burden of lockdown-imposed restrictions.

(e) MoP vide its letter dated 15.5.2020 has deferred all payments for more than 3 months and had also granted waiver of 20-25% on fixed charges of contracts rather than penalizing the Discoms for under draws. NEA, Nepal, being a small hilly country, was facing a difficult situation and upon its request, the Respondent did not charge any compensation for under draw/schedule revisions of power on them for all transactions starting from April 2020 to June 2020.

(f) While power generation and distribution were exempted under the MHA Guidelines, the consumption of power certainly had an impact. 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 consumption of power has a direct correlation with the procurement of power, especially in the case of the Respondent, which is a trading company and purchases electricity for further retail sale.

(g) Inability to make payments is only a consequence of the force majeure event and is not the force majeure event itself. The ability to make payment necessarily has to be seen in context of whether the Respondent was in a position to procure power or not.

(h) The Commission in its order dated 20.1.2022 has not given any finding in terms of which Covid-19 can be considered as a Force Majeure event. Further, orders of this Commission on the interpretation in a different PPA cannot be a precedent in the present case.

(i) The Respondent has not charged any compensation from NEA for the period April 2020 to June 2020 and has accepted the plea of force majeure.

(j) In the Order dated 20.01.2022 in Petition No. 594/MP/2020, the Commission decided that outbreak of Covid-19 did not dislodge the obligation of the respondent as per the facts of the said case, whereas in the present matter it is crystal clear that the outbreak of Covid-19 did dislodge the obligation of the Respondent.

(k) The Hon`ble Supreme court in W.P.(C) 2241/2020 titled MEP Infrastructure Developers Ltd. vs South Delhi Municipal Corporation and Ors, held that the acknowledgment in view of the public declaration of Covid-19 is a valid intimation/notice for invoking force majeure clause.

(l) There is no notice requirement contemplated under the PPA. Even though the Respondent was not bound to send a notice in terms of Clause 15

of the PPA, it forwarded the NEA's letter dated 23.3.2020 within 24 hours to the Petitioner, intimating SEIL of invocation of force majeure by NEA.

(m) In terms of Clause 1 of the NVVN-SEIL PPA, the Respondent and NEA are in a back-to-back arrangement. In terms of Clause 6 of the NVVN-SEIL 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 monthly basis. In case, the deviation from the Respondent's side is more than 15% of contracted energy for which open access has been allocated on 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%. 34.

(n) Clause 6 of the NVVN-SEIL is not an automatic compensation for a default in scheduling. At the maximum, it can be read as a liquidated damages clause. The present petition does not disclose any damage which has been suffered by the Petitioner which would justify the applicability of a liquidated damages clause.

(o) Since Energy Compensation Charges is not an automatic levy, it cannot be described as a "dues remaining unpaid". Accordingly, the Petitioner is not entitled to any LPS.

Analysis and Decision

12. 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 NVVN-SEIL 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 NVVN-SEIL PPA?

The above issues have been dealt in the subsequent paragraphs.

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

13. The claim of the Petitioner is based on the premise that entitlement to Energy Compensation Bills is based on Clause 6 of the NVVN-SEIL PPA for failure of the Respondent to off-take power. The Petitioner has submitted that there is no provision under the NVVN-SEIL PPA which makes scheduling of power contingent upon NEA's ability to offtake power. Moreover, the Respondent continued to schedule power from 1.4.2020 to 30.6.2020 as per NEA's requirements, without scheduling any power from the Petitioner, when as a matter of fact the Petitioner maintained 'full availability'.

14. With regard to Force Majeure, the Petitioner has submitted that Covid-19 lockdowns and reduction in demand / supply of power by NEA is not a force majeure event under Clause 15 of the NVVN-SEIL PPA. The Petitioner has contended that 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 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. The Petitioner has also placed reliance on the decision of the Hon'ble Bombay High Court in the case

of Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp Ltd., wherein grant relief under the Force Majeure clause was refused for imposition of lockdown to entities engaged in essential services.

15. 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) 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. The Petitioner has also relied on this Commission's Order dated 27.06.2022 in Petition No. 187/MP/2021 (MSEDCL v. GMRWEL) wherein relying on the Order dated 20.01.2022, MSEDCL's prayer to acknowledge Covid-19 as a Force Majeure event was rejected.

16. *Per contra*, the Respondent has contended that it was impossible for the Respondent to perform the minimum scheduling of electricity under the NVVN-SEIL 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 12.02.2019 between NEA-NVVN PPA and therefore, equally a force majeure event within the provision of Clause 15 of the SEIL-NVVNL PPA. The Respondent's case is premised on the fact is that power demand for NEA otherwise was stable and normally varies between 350 MW to 300 MW per month. However, the power demand was drastically reduced by 200 MW in the period from April 2020 to June 2020, when the economy of Nepal was badly hit by the lockdown. The reduction

in demand was only on account of factor of spreading of Covid-19 pandemic, which resulted in the lockdown barring certain essential services.

17. The Respondent has further contended that 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 15 of the NVV-SEIL 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-SEIL PPA, it is not necessary that there may be an impact on the performance obligation of the Respondent to make payments. 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 power. It is the Respondent's case that the Petitioner has sought to interpret the NVVN-SEIL 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.

18. 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 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 force majeure event and is not force majeure event itself. The ability to make payment necessarily has to be seen in context of whether the Respondent is in 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 the parties by its plain language.

19. We have considered the submissions of the parties. As the issue involved requires examination of occurrence of a force majeure event, if any, it would be pertinent to refer to the relevant provisions of the NVVN-SEIL PPA. Clause 15 of the NVVN-SEIL PPA deals with 'force majeure' provides as under:

“15. Force Majeure

Force Majeure events shall include but not limited to;

- Any restriction imposed by RLDC/ SLDC in scheduling power due to Transmission/ Grid constraint*
- 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.*
- 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;*
- Change in Law/Change in Regulations debarring to perform the activities under this offer.*

The above shall be treated as Force Majeure without any liability on either side.”

20. As per the definition of force majeure under Clause 15 of the NVVN-SEIL 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 transmission / grid constraints, (b) Act of God, including but not limited lightening, drought, fire, explosion,

earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or adverse weather conditions, (c) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist, or military action, (d) Change in Law / change in Regulations debarring to perform the activities under the Agreement. The said clause is a non-exhaustive and provides that the above events would be treated as force majeure events without any liability to other side.

21. Keeping in mind the aforesaid contractual provision of the NVVN-SEIL PPA, we now proceed to examine the claims of the Respondent as to whether the Covid-19 led lockdown and consequential reduction in demand of power by NEA from the Respondent constitutes as a force majeure event under the NVVN-SEIL PPA so as to absolve the Respondent from making the payment towards Energy Compensation Bills raised by the Petitioners pursuant to the NVVN-SEIL 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 generation, transmission, and distribution from the lockdown. The relevant extract of 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 generator, 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 generation, transmission and distribution were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19. Therefore, it cannot be argued that such lockdown *per se* has in any way affected the Respondent in performing its functions and obligations under the agreement. 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 the Ministry of Home Affairs Order dated 24.03.2020, in our view, lockdown in India cannot be considered as force majeure event that prevents, hinders, or delays the Respondent in performing its obligations under the NVVN-SEIL PPA.

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.

27. The Respondent has relied upon the decisions of the Hon`ble Supreme Court in the cases of (a) Halliburton Offshore Services Inc. v. Vedanta Limited 2020 SCC On-Line Del 542, (b) 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 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 Respondent and find that none of them will come to the aid to the Respondent as they are distinguishable on the facts since in none of 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 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 delay in supply

of raw materials due to the 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's was an operational Project engaged in generation and supply of power to the Respondent.

28. We also hasten to add that, for similar reasons detailed above, reliance by the 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 is tantamount to the Respondent approbating and reprobating at the same time.

29. Another argument put forward by the learned counsel for Respondent during the course of hearing on 7.3.2023 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 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 their request, the Respondent did not charge any compensation for under drawl/schedule revisions of power on them for all transactions starting from April 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 in giving a special dispensation to NEA by waiving of recovery of tariff for under draw/schedule revisions of power from April 2020 to June 2020 on account of Nepal being a small hilly country adversely impacted by the Covid-19 pandemic and ensuing restrictions. Since Respondent made a commercial decision to grant waiver of compensation for under draw without any prior intimation or discussion with the Petitioner, the Petitioner cannot be penalized. Therefore, we are not in agreement with the defense put forward by the 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 Covid-19 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 draw/schedule of power from April 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 whether 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 claim in the present case is for energy compensation bills, as separate from 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 was neither impacted by any force majeure event nor was the obligation to pay for such power dislodged due to outbreak of Covid-19 pandemic and imposition of lockdown and other allied restrictions. Similarly, in the present case also, reduction in demand of power by NEA does not qualify as a force majeure event under Clause 15 of the NVVN-SEIL PPA.

32. 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 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 reduction in demand for

power from April – June 2020, due to imposition of Covid-19 related lockdown does not qualify as a Force Majeure event as per Clause 15 of the NVVN-SEIL PPA since there is no provision under the NVVN-SEIL PPA which makes 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, reduction in demand / supply of power by the Respondent / NEA does not qualify as a Force Majeure event absolving the Respondent from its obligations under the NVNN-SEIL 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-SEIL PPA and NVVN-NEA PPA have 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 procure, NEA. The Respondent has submitted that the NVVN-SEIL PPA was entered into on 31.5.2019 i.e., after NVVN-NEA PPA dated 12.2.2019 and the NVVN-NEA PPA is incorporated by reference under the NVVN-SEIL PPA. Accordingly, the Respondent has submitted that the genesis of the entire dispute, resulting in claim for payment of Energy Compensation Bills by the Petitioner is baseless since the Respondent is merely acting as an intermediary in the entire back-to-back transaction.

35. *Per contra*, the Petitioner has submitted that NVVN-SEIL 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 substation end of the Muzaffarpur (Bihar), India – Dhalkebar (Nepal) transmission line and not to NEA. The Petitioner has further submitted that mere reference in the NVVN-SEIL PPA that power would be for onward sale to Nepal / NEA does not make the transaction between NVVN-SEIL and NVVN-NEA a back-to-back arrangement. 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 as a back-to-back arrangement if the generating company is not a party to the PPA / PSA between the trading licensee and the subsequent procurer. This is more so since the transaction between the Petitioner and the Respondent is a domestic transaction whereas the transaction between the 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 NEA is the ultimate procurer / beneficiary and the arrangement between the Petitioner and the Respondent does not envisage any liability on the Respondent, which as per the Petitioner is totally impermissible.

36. We have considered the submissions of both parties and the provisions of the NVVN-SEIL PPA and the NVVN-NEA PPA. The moot issue that has to be decided is whether the transaction between NVVN-SEIL and NVV-NEA are back-to-back arrangements and whether the Respondent can be held liable to compensate the Petitioner for the Energy Compensation Bills for the period from April 2020 to June 2020.

37. To decide the issue, we refer to various provisions of the NVVN-SEIL PPA and the NVVN-NEA PPA. Some of the relevant provisions are reproduced below:

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

“(v) SEIL has offered to sell upto 120 MW of power sourced from its generating stations viz. Sembcorp Energy India Limited (SEIL) and/or Sembcorp Energy India Limited - Project II (SEIL-II) for sale to Nepal Electricity Authority (NEA) through NVVN.

(vi) NVVN shall purchase upto 120 MW RTC Power from SEIL as mentioned in Annexure -I from 1st July 2019 to 30th June 2020 for supply to NEA in line with terms and conditions between NVVN and NEA which can be extended further on mutually agreed terms & conditions. The power shall be supplied at the Delivery Point.

...

“NVVN shall purchase upto 120MW RTC Power as mentioned in Annexure-1 from 1st July 2019 to 30th June 2020 and SEIL is willing to supply upto 120 MW RTC power as mentioned in Annexure-I from 1st July 2019 to 30th June 2020 under commercial agreement between NVVN and SEIL that could be extended for further period(s) as may be agreed between the parties from time to time, for short term trading on the following terms and conditions:-

1. Delivery Point:

The Delivery Point for sale of this power shall be at Muzaffarpur substation end of Muzaffarpur (Bihar), India - Dhalkebar (Nepal) transmission line.

...

3. Tariff

The applicable tariff for sale of energy by SEIL to NVVN will be INR 4.28/kWh (INR Four and paise Twenty Eight only) at delivery point for the period 1st July 2019 to 30th June 2020.

6. Compensation for Short Supply:

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.

Without prejudice to the provisions of Force Majeure, the compensation will be computed every month and reconciled cumulatively at the end of each quarter for the deviation beyond 15% of the corridor approved. The Party claiming compensation shall raise separate compensation bill on other party and due date shall be 7 days from the date of receipt of Bill. Failure of payment by due

date shall automatically authorize to deduct the outstanding amount of other party from the immediate energy bill due for payment.

...

9. Due date of Payment:

The due date for payment would be 8th day from the date of receipt of bill by NVVN from Seller through Fax/email (excluding the date of receipt).

The payment of bills raised by Seller would be deposited through RTGS in "Seller Bank Account" by NVVN within the "Due Date" of payment."

(b) The NVVN-NEA PPA provides as under:

"(iv) Power Purchase Agreements / Supplementary Agreements have been signed between NVVN and NEA for supply of upto 240 MW Round the Clock (RTC) Power starting from February 2016 to 30th June 2019 from 400/ 220 KV (as applicable) bus at Muzaffarpur substation end of Muzaffarpur (Bihar), India-Dhalkebar (Nepal) transmission line."

(v) NVVN is in a position to offer upto 350 MW RTC Power as mentioned in Annexure -I from 1st April 2019 to 30th June 2020 to NEA under commercial agreement between NVVN and NEA which can be extended further on mutually agreed terms & conditions. The power shall be supplied at the delivery point."

...

2. Tariff:

The applicable tariff for sale of energy by NVVN to NEA will be INR 4.33/kWh (INR Four and Paise Thirty Three only) at the Delivery Point for the period 1st April 2019 to 30th June 2020. This applicable rate includes all transmission charges, losses, Reliability Support Charges, National / Regional Load Dispatch Centre (NLDC / RLDC) charges, Application fees upto Delivery Point and NVVN margin. The Tariff of INR 4.33/kWh shall have a rebatable portion of INR 3.66 (INR Three and Paise Sixty-Six only) per kWh and a nonrebatable portion of INR 0.67 (INR Zero and Paise sixty seven only) per kWh.

For the period April'2019 to June 2019, this tariff is for the additional quantum as per Annexure-I. The mentioned tariff is inclusive of applicable transmission and open access charges as on the date of the signing of the Agreement and any revision by CERC shall be to the account of NEA.

NVVN and NEA have in principle agreed to extend the agreement for supply of power upto 30th June 2021 with the same terms and conditions subject to confirmation by Generators which shall be confirmed by NVVN well in advance for supply beyond June 2020."

38. While the Respondent has made bald averments that no liability can fall upon the Respondent since it was merely acting as an intermediary / trading licensee in the entire transaction and the NVVN-SEIL 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 mere reference in the NVVN-SEIL PPA that power would be for onward sale to Nepal / NEA does not make the transaction between NVVN-SEIL and NVVN-NEA a back-to-back arrangement. 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-SEIL PPA and the NVVN-NEA PPA. We agree with the contention of the Petitioner that a transaction cannot be *ipso facto* be termed as a back-to-back arrangement if the generating company (Petitioner herein) is not a party to the PPA / PSA 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-SEIL PPA and NVVN-NEA PPA are back-to-back arrangements, it is difficult to accept the 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 set of PPAs is different, the NVVN-SEIL 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 is not reflected in the other PPA. In the absence of any provisions of the PPAs that unambiguously indicate that both NVVN-SEIL PPA and NVVN-NEA PPA are back-to-back agreement, we hold that the 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 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 APTEL in its decision dated 6.8.2009 in Appeal No. 7 of 2009 in the case of Lanco Amarkantak Power Ltd. 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 the Respondent fails to fulfil the test laid down by 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 of 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 9 of the NVVN-SEIL PPA which provides that the Respondent is liable to make payment to the Petitioner on the 8th day from the date of raising the bill by the Petitioner. Clause 11 of the NVVN-SEIL PPA makes it mandatory for the Respondent to open a payment security mechanism (in the form of a Letter of Credit) in favor of the Petitioner. Further, it would appear that the Respondent has also undertaken commercial obligations and risks qua payments under the NVVN-NEA PPA. Clause 3 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 the 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 the 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 this was not a back-to-back arrangement and that the Respondent had taken upon substantial commercial risk and obligation is that the Petitioner was not consulted by the Respondent when it decided to give a special dispensation to NEA by waiving of recovery of tariff for under draw/schedule revisions of power from April 2020 to June 2020. Based on the material placed on record and no averment to the contrary by the Respondent, it appears that the Respondent unilaterally decided to grant waiver of compensation for under draw while supplying power to Nepal. This may have been done by the Respondent in its capacity as the Nodal Agency for cross-border transactions. However, without getting in the aspect of cross-border supply of power and limiting the dispute to the NVVN-SEIL 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 the Respondent that such waiver could adversely impact the Petitioner`s contractual rights and obligations, despite this the Respondent in its wisdom decided to not engage with the Petitioner. Since the Respondent made a commercial decision to grant waiver of compensation for under draw 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 6 of the NVVN-NEA 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 the Respondent that no claims can be raised against it and that the 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-SEIL 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 the Respondent to discharge its obligations under the NVVN-SEIL PPA entitles the Petitioner to bring a claim against the 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 NVVN-SEIL PPA?

46. The Petitioner has *inter alia* contended that it has raised Energy Compensation Bills in accordance with Clause 6 of the NVVN-SEIL PPA and it is entitled to compensation if 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 unit for the quantum of shortfall in excess of permitted 15% deviation. The Petitioner has claimed the principal amount of Rs. 18,38,82,730/- from the Respondent towards the Energy Compensations Bills for the months of April 2020, May 2020 and June 2020. The Petitioner has also claimed an amount of Rs. 7,59,33,303/- (as on 27.3.2023) towards LPS as per Clause 10 of the NVVN-NEA PPA. As per the Petitioner, the amount towards LPS is a recurring amount and would be levied till the final payment is made by the Respondent.

47. *Per contra*, the Respondent has contended that compensation under Clause 6 of the NVVN-SEIL PPA is not triggered automatically and the compensation under Clause 6 has to be seen as liquidated damages. Since, the Petitioner has failed to

prove 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 April 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 case of Kailash Nath Associates v. DDA [(2015) 4 SCC 136] 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. In response, the Petitioner has submitted that the Hon'ble Supreme Court and APTEL, in various judgments, have already recognised difficulties in quantifying actual damages in regulated regimes such as the electricity sector where the actual loss caused in monetary terms cannot be assessed and therefore, the party claiming breach should be entitled to liquidated damages specified in the contract as an upper limit. The Petitioner has relied on judgment of the Hon'ble Supreme Court in the case of BSNL v. Reliance Communication Ltd. [(2011) 1 SCC 394] and APTEL's Judgment dated 12.02.2015 in Appeal No. 154 of 2013 in the case of Lanco Kondapalli Power Limited v. Andhra Pradesh Electricity Regulatory Commission & Ors. The Petitioner submitted that it has been decided by the Hon'ble Supreme Court that if the amount stipulated under the agreement is a genuine pre-estimate of the loss, the actual loss need not be proved [Construction and Design Services v. DDA: [(2015) 14 SCC 263].

49. We have considered the submissions of the parties and are of the view that grant of compensation to the Petitioner under Clause 6 of the NVVN-SEIL 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-SEIL 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 April 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 6 of the NVVN-SEIL PPA. We find no fault in the Petitioner raising the Energy Compensation Bills in accordance with Clause 6 of the NVVN-SEIL 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 6 of the NVVN-SEIL 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 itself the Respondent agreed to this formulation. We are of the view that the Clause 6 of the NVVN-SEIL 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 unit. Also, Clause 6 of the NVVN-SEIL PPA adequately protects the rights of both the Petitioner and the 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 monthly basis. Therefore, having agreed to this

dispensation in the NVVN-SEIL PPA, the Respondent cannot claim that it is not liable to pay compensation to the Petitioner.

50. 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 the Respondent refused to make payment to the Petitioner. It is clear that the Respondent claimed compensation from NEA and only after NEA's refusal it sought 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 the Respondent under the NVVN-SEIL 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.

51. In view of the above discussions, the submission of the Respondent that Covid19 pandemic led lockdown and consequent reduction in demand constitute force majeure event absolving the Respondent from making payment under the NVVN-SEIL PPA deserves to be rejected and accordingly, the Respondent is directed to make payment to the Petitioner in accordance with the formula prescribed under Clause 6 of the NVVN-SEIL PPA towards the Energy Compensation Bills for the period from April 2020 to June 2020 within two months from the date of this order after reconciliation of the amount.

52. The issue is answered accordingly.

Late Payment Surcharge

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.

55. 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 6 of the NVVN-SEIL PPA, the Respondent is under obligation to pay the same along with 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.

56. Petition No. 188/MP/2022 is disposed of in terms of above discussions and findings.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member