

**WEST BENGAL ELECTRICITY REGULATORY COMMISSION**

**WEST BENGAL**

**Petition No. OA-268/17-18**

**Date of hearing: 9<sup>th</sup> November, 2020**

**Time of hearing: 14.30 hours**

**Coram:**

**Shri Sutirtha Bhattacharya, Chairperson**

**Shri Durgadas Goswami, Member**

**Shri Pulak Kumar Tewari, Member**

In the matter of

Application under section 86(1)(f) of the Electricity Act, 2003 for direction upon WBSEDCL (Respondent) to pay Rs. 253.18 lakh along with the interest @ 1.25% to Nippon Power Limited (Petitioner).

And

In the matter of  
M/s Nippon Power Limited,  
4A & 4B, 240B A.J.C. Bose Road  
Kolkata 700 020.

..... Petitioner

And

In the matter of  
West Bengal State Electricity Distribution Company Limited  
Vidyut Bhavan  
Block DJ, Sector – II  
Salt Lake City  
Kolkata 700 091.

..... Respondent

Representatives attended:

M/s Nippon Power Limited (NPL) [Petitioner]

1. Sri Sambuddha Dutta, Advocate,
2. Sri Prakash Chandra Saraogi, Managing Director, NPL



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**West Bengal State Electricity Distribution Company Limited (WBSEDCL)**

**[Respondent]**

1. Sri Vishrov Mukherjee, Advocate
2. Sri Subrata Chowdhury, AGM (HR&A),

**CASE IN BRIEF**

The petition submitted by M/s Nippon Power Limited (NPL) is in regard to supply of power to WBSEDCL from its 3 MW hydro generating plant at Darjeeling to the point of inter-connection as per the present Power Purchase Agreement entered between NPL and WBSEDCL on 16.11.2010 effective from 30.03.2007 for a period of 35 years. NPL contends, the power supply line being used for transmission of power to the inter-connection point is a transmission line and not a distribution line as is being claimed by WBSEDCL. As a result, WBSEDCL is not making the payments to NPL for deemed generation loss as per the scale applicable for transmission line outages. Accordingly, they have prayed before the Commission to pass an order directing WBSEDCL to pay NPL a sum of Rs. 253.18 lakh along with interest @ 1.25% and amend the PPA by replacing the words "distribution line" with the words "transmission line" and by replacing the words "90%" with the words "95%" in paragraphs 3.2, 3.3 and 3.4 of the PPA.

On perusal of the petition along with the documents submitted by NPL, the Commission admitted the matter and decided to hear it. Accordingly, several hearings took place, the last one being held on 24.09.2019. Since no representative from NPL attended the hearing on 24.09.2019, the hearing was adjourned and the next date of hearing was fixed on 16<sup>th</sup> December, 2019 at 14.30 hours. Since then no hearing could be held due to requests for adjournment of hearing received from both the applicant and the respondent as well as COVID pandemic situation prevailing in India. However, a hearing was convened on 9<sup>th</sup> November, 2020 and accordingly notices were issued to NPL and WBSEDCL vide letter no. WBERC/OA-268/17-18/6046-6047 dated 24<sup>th</sup> September, 2020. Although the notice of hearing was issued on 24<sup>th</sup> September, 2020, NPL, just before a few days of the hearing date, requested the Commission vide their letter dated 3<sup>rd</sup> November, 2020 to adjourn the hearing for a further period of 4 weeks. The Commission considered the reason for which the adjournment was sought for, and found no valid reason to adjourn the date of hearing and therefore NPL's request for adjournment of the hearing was not accepted by the Commission. The decision of the Commission was conveyed to NPL vide letter dated 6<sup>th</sup> November, 2020.



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However, during the hearing held on 20.02.2019, the Commission partly heard both the parties and directed vide order dated 22.10.2019 as follows:

Quote:

- a) WBSEDCL will file notarized statement supported by documents on outage and other written arguments / papers as they wish, with this Commission within two weeks and with a copy to NPL.
- b) NPL will submit rejoinder, if any, on the documents / written arguments / papers as would be received from the WBSEDCL within another three weeks.

Unquote

In view of above, WBSEDCL submitted their notarized statement supported by documents vide their letter No. REG/SERC/RC/Nippon/02 dated 03.04.2019. However, no rejoinder has been received from NPL.

All on a sudden, after expiry of more than one and a half years, NPL has prayed for amendment of their original application under Petition No. OA-268/17-18 vide their petition dated 4<sup>th</sup> November, 2020 submitted on 05<sup>th</sup> November, 2020, just a few days before the date of instant hearing.

### **SUBMISSION DURING THE HEARING**

Sri Sambuddha Dutta, Advocate, on behalf of NPL, submitted that they have already submitted a petition before the Commission for amendment of pleadings, prayer and cause title of the original petition. Sri Dutta also confirmed that NPL has received the statement supported with written arguments / papers / documents as has been submitted by WBSEDCL to the Commission based on the direction given by the Commission vide order dated 22.10.2019. However, the rejoinder as to be submitted by NPL on the said submission of WBSEDCL is under preparation and will be submitted to the Commission shortly. Sri Dutta also submitted that the hearing may be adjourned because Sri Pradip Kumar Tarafdar, Ld. Senior Advocate of NPL, who has been dealing the case since its beginning is presently out of station on leave. It is likely that Sri Tarafdar will resume his profession by 16<sup>th</sup> or 17<sup>th</sup> November, 2020 and the hearing may be fixed any day after 17<sup>th</sup>



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November, 2020.

Sri Pulak Kumar Tewari, Member of the Commission enquired from Sri Dutta as to whether the copy of the amendment application has been served on WBSEDCL. Sri Saraogi, Managing Director of NPL confirmed that they had not served the copy of the said amendment application on WBSEDCL, as it was not known to them that the copy of the amendment petition is required to be served upon WBSEDCL. Sri Saraogi admitted their mistake and confirmed to send the copy of the said amendment petition to WBSEDCL forthwith and prayed before the Commission to condone their mistake.

Sri Vishrov Mukherjee, Ld. Advocate, submitted on behalf of WBSEDCL that they have not received any copy of the amendment petition filed by NPL. Sri Mukherjee also submitted that the matter has been heard by the Commission on several occasions and WBSEDCL has submitted the reply along with all relevant data / documents as per the direction of the Commission based on which the issue is under process of finalization. At this point of time, how such an amendment petition can be accepted. If at all NPL wants to make any amendment petition, they may do so as a fresh petition after disposal of this petition.

Sri Pulak Kumar Tewari, Member of the Commission commented that this amendment petition is a new device to drag the resolution of the case following the denial of the Commission as to the adjournment of the instant hearing. According to the practice and Code of Civil Procedure the amendment petition is to be filed at the earliest opportunity.

Sri Durgadas Goswami, Member of the Commission commented that it is not understood as to why the copy of the amendment petition was not served upon WBSEDCL which is mandatory as per CPC.

Sri Sutirtha Bhattacharya, Chairperson of the Commission asked Sri Sambuddha Dutta, Ld. Advocate to take a note on behalf of NPL that when the matter has been heard by the Commission and the Commission is in the process of almost finalization of the case, why this amendment petition has been filed at the end of the year 2020 after a lapse of 3 years as the instant case is admitted in the year 2017.

While NPL has been asked to give their reply to the above mentioned comments of the Commission, Sri Sambuddha Dutta submitted that they have relied upon the following



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reasons for preferring the amendment petition.

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

Sri Sutirtha Bhattacharya, Chairperson of the Commission asked to quote the section of law under which the notification issued by the Ministry of Power, Government of India is binding upon the Commission.

In reply to the observation of the Chairperson of the Commission, Sri Saraogi of NPL submitted that since their senior counsel Sri Tarafdar is not present and that he has been pleading all along on behalf of NPL, it will be convenient for them to explain all the observations of the Commission, if the hearing is adjourned to another date when Sri Tarafdar will be present on behalf of NPL.

Sri Pulak Kumar Tewari, Member of the Commission pointed out that it is a misinterpretation on the part of NPL that amendment petition *may* be filed during the pendency of the judgement. Amendment petition can be entertained till the final judgment is passed subject to condition that the same was not filed at the earliest due the reason which was beyond control of the petitioner. The amendment petition is admissible on the following grounds as per the law of CPC:

- a) The facts or evidences prayed to be incorporated were unknown to the petitioner in spite of exercised of due diligence;
- b) The facts or evidences discovered after filing the principal petition.
- c) The amendment petition cannot be filed at any stage when the facts or evidences were known to the petitioner at the time of filing the principal petition. Moreover, the prayer for amendment to the principal petition should have been made at the



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earliest opportunity whereas the same has been filed long after 3 years. The member of the Commission also pointed out that delayed submission of amendment petition is liable to payment of cost on the ground of harassment to the Commission as well as the respondent.

Sri Dutta of NPL has submitted that they will submit their reply explaining the reasons for submission of amendment petition along with relevant documents / paper and supreme court's judgement in this regard.

Sri Vishrov Mukherjee submitted the following:

- a) A copy of the amendment petition may be served upon WBSEDCL;
- b) WBSEDCL shall submit their reply to the amendment petition;
- c) The maintainability of the amendment petition and the finalization of the merit may be disposed off altogether by the Commission.

#### ORDER

Upon hearing the parties and in view of the above observations of the Commission, the Commission directs that –

- a) NPL shall serve a copy of their amendment petition on WBSEDCL within 7 days from the date of receipt of this order;
- b) WBSEDCL shall submit their reply to the amendment petition before the Commission within 10 days from the date of receipt of amendment petition from NPL;
- c) The next date of hearing shall be intimated in due course.

Sd/-  
(PULAK KUMAR TEWARI)  
MEMBER

Sd/-  
(DURGADAS GOSWAMI)  
MEMBER

Sd/-  
(SUTIRTHA BHATTACHARYA)  
CHAIRPERSON

DATE: 03.12.2020



(T. K. MUKHERJEE)  
SECRETARY



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