

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

Appeal No. 131 of 2021 & IA No. 2609 of 2023

Dated: 14th May, 2024

**Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member**

In the matter of:

Adhunik Power and Natural Resources Limited
Through its Authorised Representative
9B, 9th Floor,
Hansalaya Building,
15, Barakhamba Road,
Connaught Place,
New Delhi- 110001.

...Appellant

Versus

1. Jharkhand State Electricity Regulatory Commission
New Police Line Road, opposite to C.M. House
Kanke Road, Ranchi-834008.
2. Jharkhand Bijli Vitran Nigam Limited
Through its Managing Director
HEC Building, Dhurwa,
Ranchi- 834004.
3. Jharkhand Urja Sancharan Nigam Limited
Through its Managing Director
JUSNL Building,
Kusai Colony,
Doranda Ranchi – 834002.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.

Mr. Deepak Khurana
Mr. Vineet Tayal
Mr. Abhishek Bansal
Mr. Tejasv Anand
Mr. Ashwini Tak
Ms. Nishtha Wadhwa

Counsel for the Respondent(s) : Mr. Farrukh Rasheed for R-1

Mr. Kumar Anurag Singh
Ms. Ekta Bharti
Mr. Shwetank Singh for R-2

Mr. Anup Kumar
Mr. Saurabh Jain
Ms. Shruti Singh for R-3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned Appeal has been filed by M/s. Adhunik Power and Natural Resources Limited (in short "Appellant") challenging the legality and validity of the Order dated 09.01.2021 (hereinafter referred to as "Impugned Order") passed by the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as "JSERC" or "State Commission") in Petition No. 03 of 2018, filed by the Jharkhand Bijli Vitran Nigam Limited (in short "JBVNL").

Parties

2. The Appellant is a generating company under Section 2(28) of the Electricity Act, 2003, *inter-alia*, has set up a 540 MW (2x270 MW) thermal power project

located at Saraikela-Kharsawn, District in Jharkhand (hereinafter referred to as “Project”).

3. The Respondent No. 1, Jharkhand State Electricity Regulatory Commission has been vested with the powers to adjudicate the matter under dispute, *inter-alia*, has passed the Impugned Order in Case No. 03 of 2018 under Section 86(1)(b) of the Electricity Act, 2003.

4. The Respondent No. 2, Jharkhand Bijli Vitran Nigam Limited is a distribution licensee engaged in the business of distribution and retail sale of electricity in the State of Jharkhand.

5. The Respondent No. 3, Jharkhand Urja Sancharan Nigam Limited is the State Transmission Utility in the State of Jharkhand.

Facts of the Appeal

6. On 31.10.2005, a Memorandum of Understanding (in short “MoU”) was entered into between the Government of Jharkhand (in short “GoJ”) and the Appellant for establishment of 1000 MW in phases of 2 X 250 MW (first phase) and 2 X 250 MW (second phase), whereby, the State Government agreed to facilitate connecting the proposed power station to the Grid of Powergrid Corporation of India Ltd. (in short “PGCIL”), at a convenient point, for evacuation of power from the proposed power station of the Appellant and also agreed that the Government of Jharkhand/Distribution Licensee shall have the first right of claim on purchase upto 25% of the power delivered to the system by the proposed

power station of the Appellant, under the Power Purchase Agreement (in short “PPA”) to be mutually agreed to, and at the tariff to be determined by the Appropriate Regulatory Commission, further, it was also agreed that Appellant shall have the right to sell the balance power outside the State of Jharkhand.

7. Subsequently, on 18.01.2007, another MoU was entered into between the Government of Jharkhand and the Appellant for extending the validity of the MoU dated 31.10.2005 for a period of 12 months i.e. 31.10.2006, thereafter, the said MoU was further extended till 31.10.2007, which was further extended for a period of 3 years i.e. till 31.10.2010 through another MoU dated 01.02.2008.

8. The period under the MoU was further extended vide MoU dated 16.05.2011, for a further period of 3 years i.e. till 31.10.2013.

9. Thereafter, on 28.09.2012, a PPA was signed between the Appellant and Jharkhand State Electricity Board (predecessor of the Respondent No. 2), the relevant provisions of the PPA are as under:

- i. Recital C refers to the MoU executed between the State Government and the Appellant. The same reads as under:

“C. The State Government of Jharkhand has entered into a Memorandum of Understanding (“MOU”) with the Seller on October 31, 2005 and amendments thereof (copy of all MoU with amendments, etc are enclosed at Annexure -I) for facilitation of the 1000 MW coal based thermal power project.

The Seller is setting up 540 MW coal based thermal power plant Stage-I and the Seller is further planning to develop additional 540 MW approximately coal based power plant in Stage-2.”

- ii. Article 1 of the PPA defines the Delivery Point, Dedicated Transmission System, Interconnection Facilities, and Interconnection Point as under:-

“Delivery Point”:

‘shall mean the Interconnection Point of the Power Station which is at 400 KV “PGCIL Sub-station at Ramchandrapur, Jharkhand in Eastern Region from the CoD for supply of power from Seller to Procurer for the interim period of 2 years or till the Dedicated Transmission System for supply of power to JSEB is developed, whichever is earlier and thereafter, the Delivery Point shall mean the Interconnection Point of Power Station at JSEB Ramchandrapur 220 kV sub-Station;’

“Dedicated Transmission System”:

‘shall mean the transmission system to be developed by Seller within two years from the CoD including 400 kV transmission line from Power Station Bus-Bar upto the JSEB’s Ramchandrapur 220 kV sub Station. For development of Dedicated Transmission System, the Capital Cost to be incurred at Seller’s sub-station (including cost of additional bay,

transformer, etc) and 400 kV transmission line till the JSEB's Ramchandrapur 220 kV sub-Station shall be borne by the Seller and the Capital Costs to be incurred at Procurer's sub-station (including cost of additional bay, transformer, etc) shall be borne by the Procurer.'

"Interconnection Facilities":

'shall mean the facilities on the Procurers' side of the Delivery Point for receiving and metering the electrical output in accordance with this Agreement and which shall include, without limitation, all other transmission lines and protective devices, safety equipment and, subject to Article 6, the Metering System required for supply of power as per terms of this Agreement.'

"Interconnection Point"

'Shall mean the point where the power from the power station switchyard bus of the seller is injected into the 400 KV "PGCIL sub-station at Ramchandrapur, Jharkhand" in Eastern Region.'

iii. Article 4.3.1 contains the 'Procurer's Obligations' and reads as under:-

"4. ARTICLE 4: SUPPLY OF POWER

.....

4.3 Procurer's Obligations

4.3.1 Subject to the terms and conditions of this Agreement, the procurer shall:

- a) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be;*
- b) Be responsible for payment of Transmission Charges (from the Power Station Bus-Bar onwards) and applicable RLDC/SLDC charges , limited to the charges applicable to the Contracted Capacity of Procurer. The Procurer shall reimburse any of the above charges, if paid by the Seller for the interim period of 2 years till the dedicated transmission system from the Power Station Bus-Bar to the JSEB Ramchandrapur 200 kV sub-Station Is developed for the supply of power to the Procurer whichever is earlier;*
- c) be responsible for making arrangements for evacuation of their Contracted Capacity from the Interconnection Point; and fulfill all obligations undertaken by the Procurer under this Agreement;*

Submissions of the Appellant

10. The Appellant submitted that the decision of the State Commission that the amount, if any, is levied as POC Charges (i.e. injection and withdrawal),

concerning the supply of power by the Appellant to Respondent No. 2 at any point of time then the same shall be shared in the ratio of 60:40 between the Appellant and Respondent No. 2, respectively, after observing that the same is due to non-construction of the Dedicated Transmission System (in short “DTS”)

11. Relying upon the provisions of the MoU, the Appellant argued that the GoJ or the Distribution Licensees authorised by it would have the first right of claim of purchase upto 25% of Power delivered to the system by the Appellant’s Project of 2x270 MW (Stage-I) Coal based Power Plant at Saraikela-Kharswan, the validity of the said MoU was thereafter extended by way of the subsequent MoUs dated 18.01.2007, 01.02.2008 and 16.05.2011.

12. Consequently, a PPA dated 28.09.2012 was signed between the Appellant and Respondent No. 2 for purchase of 122.85 MW of power on ‘Round the Clock’ basis, of which Respondent No. 2 was to procure 63.882 MW (i.e. 13% of the Total Net Capacity) at Tariff approved by the State Commission, with the balance 58.968 MW (i.e. 12% of the Total Net Capacity) at variable cost i.e. Energy Charge as approved by the State Commission as per the applicable Tariff Regulations for the controlled period plus Fuel Price adjustment, further, on similar lines, a supplementary PPA dated 06.11.2017, for procurement of additional 66 MW of power was signed between the Parties.

13. The contracted power, in terms of the PPA, was to be supplied through a DTS, which in terms of Article 1.1 of the PPA was to be developed within 2 years from the Commercial Operation Date (in short “COD”), the DTS was to include a 400 kV Transmission Line from Appellant’s Power Station Bus-Bar upto

Respondent No. 2's Ramchandrapur 220 kV sub-station and the capital cost to be incurred at the Seller/ Appellant's sub-station (including cost of additional Bay, Transformer etc.) and 400 kV Transmission Line till Respondent No. 2's Ramchandrapur 220 kV Sub-station was to be borne by the Appellant, however, the capital cost to be incurred at the Respondent No. 2's sub-station (including cost of additional Bay, Transformer etc.) was to be borne by the Respondent No. 2.

14. The Appellant submitted that with reference to the above, the Respondent No. 2 was also responsible for setting up the 'Inter-connection Facilities', and, in terms of Article 1.1 of the PPA, the 'Inter-connection Facilities' have been defined to mean the facilities on the Procurer i.e. Respondent No. 2's side of the Delivery Point for receiving and metering the electrical output in accordance with the PPA, inter-alia, include, without limitation, all other Transmission Line and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and, the metering system required for supply of power.

15. Further, the construction of the aforementioned proposed DTS was insisted upon by Respondent No. 2 itself, the same was also noted of by the State Commission in Para 4.40 of its Order dated 26.05.2014, which finds reference in the subsequent Order dated 21.12.2016 of the State Commission in Case No. 13 of 2014, specifically in Para 7 thereof, the para 4.40 is extracted as under:

“4.40 With regard to construction of the Dedicated Transmission System (DTS), the Commission notes that the proposed dedicated transmission line is to be constructed because JUVNL has insisted

upon this. The cost of this line will, necessarily, have to be passed on to the consumer. The Commission, therefore, believes that the rationale for construction of the DTS from the power station to JSEB's Ramchandrapur 220 KV substation should be a net reduction in the cost of power purchase to the consumers. The Commission directs JUVNL to carry out a cost benefit analysis of routing the power from the power station through the Dedicated Transmission System vis-a-vis routing the power through the CTU as is being done currently and submit a report regarding the same to the Commission within two months of issuance of this Order. The Commission considers this exercise necessary in interest of minimizing the cost of the consumer."

16. As a provisional arrangement, till the DTS constructed, the power was to be delivered by the Appellant at PGCIL's 400 kV sub-station at Ramchandrapur, Jharkhand, the said sub-station was to be the delivery and interconnection point, accordingly, pending the construction of the DTS, power is being supplied by the Appellant to Respondent No. 2 through the PGCIL network and the Transmission Charges payable on the said supply of power was borne by Respondent No. 2, as part of its obligations under the PPA, in this respect, it would be relevant to mention that the Procurer's obligation under the PPA, *inter-alia*, included its obligation to pay Transmission Charges and applicable RLDC/ SLDC Charges corresponding to the contracted capacity.

17. The State Commission, vide its Order dated 26.05.2014 (Para 4.42) and as also reproduced in Para 7 of Order dated 21.12.2016, directed constitution of a

Joint Committee of the Appellant and Respondent No. 2 so as to look into the need of the proposed DTS, further, directed Respondent No. 2 to submit a report on the “**Cost Benefit Analysis**” of routing the power through the DTS *vis-à-vis* routing the power through the PGCIL system, within two months of the issuance of Order dated 26.05.2014, para 4.42 is quoted as under:

4.42 The Commission directs the petitioner and JUVNL to constitute a joint committee to resolve all the issues regarding the transmission of power from the power station to JUVNL. The committee should look into the need for the proposed Dedicated Transmission System, the technical configuration of the proposed line and the sharing of costs of the transmission line. The petitioner and JUVNL should, after mutual discussions and agreement, arrive at a way forward vis-a-vis the issue of the Dedicated Transmission System and should submit a status report regarding the same to the Commission within two months of issuance of this Order.

18. However, the Respondent No. 2 failed to comply with the said direction, which was so taken note of by the State Commission in its Order dated 21.12.2016 (Para 19), *inter-alia*, granted further time till 31.01.2017 to Respondent No. 2 for submitting its report on the cost benefit analysis, the relevant extracts of the Order are quoted as under:

“19. It has been admitted by the parties that the Dedicated Transmission System has not been developed till date. As has been stated above, the Commission had also expressed its concern, in the provisional Tariff

Order dated 26.5.2014, for the delay in constructing Transmission system. The petitioner had taken the plea that the construction of the Dedicated Transmission System could not be started as JUVNL/JBVNL has not given clearance of certain technical parameters. The Commission had considered the facts and circumstances and had directed the JUVNL to submit a report on the cost benefit analysis of routing the power through Dedicated Transmission System vis-a-vis routing the power through PGCIL system, within two months of issuance of the order dated 26.5.2014. **It is admitted position that JUVNL/JBVNL has not complied with the direction of the Commission and has not submitted the cost benefit analysis report to the Commission till date.**”

View of the Commission

“Since the PPA clearly provided for construction of Dedicated Transmission system within two years of CoD, and the same has not been fulfilled by the petitioner-APNRL till date, one more opportunity is being given to the parties to fulfil the obligations/directions of the Commission dated 26.5.2014. **The JUVNL/JBVNL are allowed further time till 31.1.2017 for submitting a report on cost benefit analysis to the Commission.**”

19. Further, argued that the Respondent No. 2 once again failed to comply with the aforesaid direction, which came to be duly noted by the State Commission in its Order dated 21.01.2019 in Case No. 12 of 2017, as also in Orders dated 28.05.2019 and 05.03.2020 passed in Case No. 03 of 2018.

20. Further, in the proceedings dated 21.01.2019 of Case No. 12 of 2017, it came out before the State Commission that the Respondents did not have the requisite space for constructing 220 kV bays at their end, for purposes of implementing the DTS under the subject PPA, the relevant submission made before the State Commission is quoted as under:

*“ Learned Counsel for the respondent submitted that as regards the second direction in the order dated 21.12.2016 in Case no. 13 of 2014 for submitting a report on cost benefit analysis to the Commission for the construction of Dedicated Transmission System, the respondent had submitted it to JUSNL for technical scrutiny and further process. **The JUSNL has submitted its report vide its letter dated 05.01.2019. JUSNL has reported that they don’t have any extra space for constructing 220 kV bays except using two number of 220 kV unutilized bays of M/s Tata Power. However, most of the equipments installed in those bays are not worth to use. JBVNL has contacted its consultant to examine the technical possibilities and would be submitting the cost benefit analysis once the technical feasibility is established.**”*

21. The aforesaid position was reiterated by the Respondents in the discussions held on 20.10.2020 between the contesting parties before us, in the said discussion, apart from re-affirming the position of there being a space constraint at Respondents’ end, it was stated by the Respondents that their sub-station cannot intake power at 400 kV voltage level and can only intake power at 220 kV

voltage level, and for which suitable land/ space was required for installation of a step down voltage transformer from 440 kV to 220 kV, as such, the Respondents stated that a system study and load-flow analysis was also required before installation of the proposed DTS.

22. In the light of the above submissions of the Respondents, the Appellant submitted that the Respondents, who had themselves insisted for construction of the proposed DTS, were not in a position to implement and construct the said DTS at their end and such being the position, there was no basis for the Respondents to find fault with the Appellant for non-construction of the proposed DTS.

23. Further, the proposed step-down voltage transformer at the Respondents' sub-station, was part of the Respondents' end of the DTS as also its 'Inter-connection Facilities.'

24. Accordingly, and also in the light of the definition of DTS as provided for in Article 1.1 of the PPA, the capital cost for the proposed step-down transformer, if at all, is to be incurred by the Respondents and not by the Appellant, as sought to be erroneously contended by the said Respondent in its Reply filed in the present Appeal, in fact, the Minutes of Meeting dated 13.10.2020, also record the observation of the Committee (comprising of the parties herein) that the capital cost of the proposed DTS is to be borne by the Parties in terms of the PPA.

25. Further, informed that the Appellant, in the meeting dated 13.10.2020 held between the parties, convened as per the directions of the State Commission, submitted that there are two circuits' quad moose conductors currently being used

to evacuate power from the Appellant's Power Plant to PGCIL's sub-station and the Appellant proposed to tap one of these circuits and provide power to the Respondents' sub-station, as fulfilment of its obligations under the PPA and beyond the transmission line of 400 kV at the Respondents' sub-station, the obligation for connecting the existing system lines with the said sub-station, including cost of installing additional bays, transformers, ROW etc. was with Respondent No. 2 itself, further, aforementioned position came to be reiterated by the Appellant in the meeting held on 20.10.2020, as also in its communication dated 27.10.2020.

26. Further, argued that despite the aforementioned factual position, the State Commission in its Impugned Order dated 09.01.2021, passed in Case No. 03 of 2018, sought to find ambiguity in the definition of DTS under the PPA by having to state that the liability regarding cost of transformer, whether being of the Seller or of the Buyer, was not clear in the PPA, however, while having to so observe, the State Commission failed to furnish any reason whatsoever for the said purported ambiguity.

27. However, Article 1.1 of the PPA defines the DTS, which was proposed to be constructed for purposes of supply of power from the Appellant's Power Plant to Respondent No. 2, a plain reading of the said clause makes it more than clear that:

- The capital cost to be incurred at the Seller/ Appellant's sub-station (including cost of additional Bay, Transformer etc.) and 400 kV Transmission

Line till Respondent No. 2's Ramchandrapur 220 kV Sub-station was to be borne by the Seller/ Appellant; and

- The capital cost to be incurred at the Procurer/ Respondent No. 2's sub-station (including cost of additional Bay, Transformer etc.) was to be borne by the Procurer/ Respondent No. 2.

28. In fact, as also aforementioned, the 'Inter-connection Facilities' at Respondent No. 2's end which, *inter-alia*, includes bays, transformers etc. also fall within the scope of obligations of Respondent No. 2, as defined under Article 1.1 as the 'Inter-connection Facilities' read with Article 4.3.1(a) of the PPA, accordingly, the aforementioned clauses of the PPA, leave no room of doubt that transformer (including a step-down voltage transformer), at Respondent No. 2's end i.e. its own sub-station, falls within the scope and obligation of the said Respondent itself, which alone is to bear the capital cost thereof.

29. Further, without having to arrive at a finding *inter-alia* holding the Appellant responsible for the delay in the construction of the proposed DTS, the State Commission without any basis whatsoever, held that henceforth, if any amount is levied as POC Charges due to non-construction of DTS, the same would be shared amongst the Appellant and Respondent No. 2 herein in the ratio of 60:40 respectively.

30. It is also the submission of the Appellant that the said direction came to be passed by the State Commission with prospective effect, in other words, the State Commission did not find fault with the Appellant for non-construction of DTS

beyond the stipulated time of two years from the date of COD (which COD was admittedly achieved in the year 2013), and till the date of passing of the Impugned Order, thus, having not so found any fault with the Appellant for such period, coupled with the fact that Respondent Nos. 2 and 3 itself were not in a position to implement and construct the DTS at their end, there was no justification whatsoever for the State Commission to have directed the Appellant to also bear the Transmission Charges, concerning the power supplied by it to Respondent No. 3 under the PPA, due to non-construction of the DTS, also for the reason that, as aforementioned, the PPA itself obligates Respondent No. 2 to bear the Transmission Charges.

31. In the light of above, vehemently contested the oral arguments of Respondent No. 2 during the hearing of the present Appeal, that its liability to bear Transmission Charges was only for a period of two years from the COD, is wholly untenable and erroneous, a bare perusal of Article 4.3.1(b) of the PPA, would show that Respondent No. 2 was to bear the Transmission Charges till the DTS was constructed, the period for which under the PPA was envisaged as two years.

32. However, as aforementioned, the said DTS could not be constructed due to Respondent Nos. 2 and 3's own doing i.e. of firstly, not submitting the "Cost Benefit Analysis" report in the requisite timeline on the routing of the power through the DTS *vis-à-vis* routing the power through the PGCIL system despite repeated directions of the State Commission, and *secondly*, and most pertinently for not being in a position itself to implement & construct the DTS at its own end.

33. It is his argument, that having itself defaulted, Respondent No. 2 cannot seek to contend that its liability to bear Transmission Charges was only up till two years and not thereafter, further, owing to its own default, Respondent No. 2 in terms of the PPA, is bound to bear the Transmission Charges till construction of the proposed DTS, if at all, the same, in the most respectful & humble submission of the Appellant herein, is the only reasonable and plausible interpretation of the terms of the PPA, more so in light of the admitted factual conspectus of the present case.

34. Also countering the contention of the Respondent No. 2 that the Appellant had accorded its consent to share the Transmission Charges with Respondent No. 2, inasmuch as, the Appellant had participated in the meetings and discussions held between the parties so as to amicably resolve the issue, the Appellant submitted that at the outset, the aforesaid contention of Respondent No. 2 is wholly erroneous and untenable, inasmuch as, *inter-alia*, mere participation in meetings and discussions so as to work out an amicable resolution of the issue, cannot by any stretch of imagination be treated and taken to mean that as the Appellant having consented to share the Transmission Charges, the obligation of which is otherwise of Respondent No. 2, under the PPA.

35. Without prejudice to the above, and in furtherance thereof, it is also otherwise submitted that a perusal of the Orders of the State Commission as also the Minutes of the Meetings & notes of discussion between the Parties, would reveal that no such consent was ever accorded by the Appellant for sharing the Transmission Charges, the Record of Proceedings dated 14.10.2020 in Case No. 03 of 2018, as referred to by Respondent No. 2 during its oral arguments, would

show that the Meeting of the parties was being convened so as to submit “a mutually agreed draft proposal of amicable settlement”, in fact, the further Record of Proceedings dated 04.11.2020 expressly record that “any consensus could not be reached with regard to apportionment of POC charges”, also, referring to the Notes of discussion held on 20.10.2020 by Respondent No. 2, also does not advance its case, inasmuch as, *inter-alia*, the said notes of discussion duly record that the Appellant’s stand of not agreeing to share the POC Charges.

36. As such being the case, it is most respectfully & humbly submitted that there is no merit whatsoever in Respondent No. 2’s aforesaid contention, further, prayed that the Impugned Order dated 09.01.2021 be set aside, including all consequential steps taken by Respondent No. 2 pursuant thereto, including but not limited to its letter dated 13.11.2023 intimating eminent adjustment of 60% of the purported POC Charges, in name of T-GNA (Temporary GNA), from the month of November, 2023 onwards, from the Appellant’s Energy Bills.

Submissions of the Respondent No. 2. JBVNL

37. The Respondent No. 2, JBVNL submitted that as per the terms of the Power Purchase Agreement dated 28.09.2012, the sole responsibility of construction of Dedicated Transmission Line was of the Appellant, which was to be developed within two years from the date of CoD i.e., 21.01.2013 for 1st Unit, and for such interim period of two years or till the Dedicated Transmission Line was constructed by the Appellant, which ever was earlier, the transmission charges were to be paid by Respondent No.2, it is emphasised that as per the term of the PPA the liability of Respondent No. 2 to pay transmission charges was only for two years, however,

due to non-construction of DTS the Respondent has been paying transmission charge since 2013.

38. Accordingly, the State Commission, seeing the checkered history pertaining to DTS construction though passed the Impugned Order in anticipation (since Clause 11 of CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020 (effective from 1.11.2020) exempted distribution licensee having long term access from paying transmission charges for short term access), as on today Respondent No. 2 is paying POC charges and has been paying the same since October, 2023 again.

39. Further, argued that the adjudication upon the issue of DTS goes back and the said issue was seized within the regulatory power of the State Commission even before the petition for approval of PPA, that is Case No. 03 of 2018, was filed, further, in Case No. 13 of 2014 filed by the Appellant wherein the State Commission has noted that the interconnection point with PGCIL was temporary in nature and the issue of DTS was kept open, thereafter again in case no. 12 of 2017 filed under section 142 of the Electricity Act, 2003 by the Appellant, the State Commission observing the effort of Respondent no. 2, rejected the prayer for invoking section 142 and no penalty was issued and there, also the issue of DTS was kept open.

40. The answering Respondent filed Case No. 03 of 2018 before the State Commission seeking its approval to the Power Purchase Agreement dated 28.09.2012 and Power Purchase Agreement dated 06.11.2017 signed between

him and the Appellant, in line with the direction issued by the State Commission in its order dated 21.05.2017.

41. Further, submitted that the Electricity Act, 2003 (in short "Act") does not contemplate exclusion from the purview of the State Commission's jurisdiction all the matters relating to generation and covers several aspects including wide power under section 86 of Act, also the PPA was entered between the Appellant and the answering Respondent wherein the interim arrangement which was to continue for two years and was to end upon the fulfilling of the responsibility by the Appellant, however, the same continued for almost a decade burdening the answering Respondent with cost of transmission charges which ultimately passed to the customer, various efforts were taken to reconcile the matter and apportioning of charges was suggested by the State Commission which was never objected by the Appellant.

42. It is emphasised that the State commission was seized of the matter and since there was ambiguity in the definition of DTS as defined in the PPA dated 28.09.2012 the issue was to be dealt by the State Commission after submission of the cost benefit analysis, the same is also clear from order dated 14.10.2020 passed in Case No. 03 of 2018, wherein it was the Appellant which participated in mediation and submitted report of meeting of the committee constituted by order dated 16.09.2020 for mediation and submission of draft proposal of amicable settlement regarding construction of DTS and apportionment of POC charges till construction of DTS and the same is also reflected in order dated 16.09.2020 passed in Case No. 3 of 2018 wherein a committee was constituted to sit together for mediation process and submit a draft proposal of amicable settlement to bring

the issue(s) to a logical end with reference to MoU, PPA entered into regarding DTS (Dedicated Transmission System) for power evacuation, respective expenditure for the work envisaged leading to apportionment of POC charges till the construction of DTS, if feasible.

43. A meeting was convened on 20.10.2020 between JUSNL, JBVNL and APNRL wherein in light of the direction of the State Commission on apportionment of POC charges, it was proposed by JBVNL that since no consensus on apportionment of POC charges could be arrived in the meeting, a formula for the apportionment of the POC charges based on the expected cost that is to be incurred for the Dedicated Transmission system should be shared with Appellant herein.

44. It is most respectfully submitted that the Appellant herein never objected to apportionment of charges between the Appellant and Respondent before the State Commission and had even participated in the mediation and meetings held for resolving the matter, the same is also clear from order dated 04.11.2020 wherein Appellant has no objection to the prayer of the Respondent No. 2 for grant of time to file calculation and methodology for apportionment of POC charges.

45. The Respondent No. 2 emphasised that as per the terms of the agreement, the Appellant had the sole responsibility to construct the DTS, within two years which has not been fulfilled even today, which led to the answering Respondent bear financial burden which ultimately passed to the consumer, hence taking into account such fact that the Appellant was required to construct the DTS within two years and was to install a transformer which will be part of fixed cost recovered

through Tariff of the net generated power of APNRL, and looking at the liability of each parties the State Commission has directed the Appellant to share 60% of the POC charges.

46. Also, submitted that the proceeding before the State Commission was initiated for approval of PPA and the approval of PPA is imperative as the objective thereof is to remove any uncertainty that may be faced by the consumers of a distribution licensee who does not have any written terms and conditions, accordingly, the State Commission passed the impugned order wherein the issue was pending for long time and financial liabilities was being borne by the Respondent which passed on to the consumers, the issue as to the construction of DTS and liabilities of the parties on failure to fulfil its obligation was never settled between the parties and was categorically kept open by the State Commission, it is settled law that a court is empowered to grant consequential reliefs in order to meet the ends of equity and justice in a matter.

47. Further, argued that the Impugned Order has been passed in a petition under section 86(1)(b) of Electricity Act, 2003, which includes the power of the State Commission to reject, modify, alter or vary the terms of the agreement for purchase of power and further direct the distribution licensee to re-write the terms found reasonable by the State Commission. The word “regulate” has wide import, it carries with it the powers to reject, modify, alter or vary the terms of the Agreement and the scope and ambit of the word “regulate” has found conclusive interpretation by the Supreme Court in Cellular Operators Association Vs. Union of India – AIR 2003 SC 899, wherein it has been held as under:

“The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsicly, they act like an internal audit. They may fix the price; they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.”

48. Hence in view of the above, the powers of the State Commission under the Act to take measures conducive to the development of the electricity industry, promoting competition, protecting the interest of the consumers and the supply of electricity to all areas cannot be questioned, as such, in light of such wide power of the State Commission and the factual matrix of the case where the interest of the consumer was to be protected, fixing of liability of parties to the power purchase agreement was indispensable since even after multiple opportunities and constitution of committee the blame game of the Appellant continued which needed to be settled.

Submissions of the Respondent No. 3. JUSNL

49. The Respondent No. 3, Jharkhand Urja Sancharan Nigam Ltd. adopted the submissions of the Respondent No. 2 and preferred not to file any written submission as no oral arguments were made by the Respondent No. 3.

Observations and Conclusion

50. The State Commission while determining the liability of transmission charges i.e. POC (Point of Connection) charges observed as under:

“2. This Commission by its order dated 28th May, 2019 has approved the procurement of 188.85 MW of power from APNRL vide PPA dated 28.09.2012 and PPA dated 06.11.2017 and observed in Para 24 as follow:-

“There is ambiguity in the above definition of the Dedicated Transmission System defined in the Principal PPA dated 28.09.2012 as to whether APNRL or JBVNL/JUSNL will bear the cost of power transformer. The issue will be dealt separately by this Commission after submission of the cost benefit analysis report by the petitioner as mentioned above.”

3. The Commission was to take a final view on the Dedicated Transmission System (DTS) based on the submission of cost benefit analysis and feasibility report by JBVNL as such, to bring the issue of DTS to a logical end with regard to the necessity of the DTS and sharing cost for power transmission between APNRL and JBVNL, the Commission fixed a date on 31.03.2020 at 2.30 PM for hearing and submitting report by the parties.”

6. The petitioner-JBVNL in the notes of discussion as held on 20.10.2020 expressed that JBVNL would communicate/propose the calculation and methodology for apportionment of POC charges to APNRL/JUSNL by 27.10.2020. **However, the petitioner-JBVNL has**

not submitted yet, the above said proposal with regard to calculations and methodology for apportionment of POC charges.

7. For construction of DTS, this Commission by order dated 21.12.2016 in Case No. 13 of 2014 directed the JBVNL and APNRL to submit a report on cost benefit analysis to the Commission regarding construction of DTS. The relevant extract of the order is reproduced below: -

“28. Since the PPA clearly provided for construction of Dedicated Transmission system within two years of COD, and the same has not been fulfilled by the petitioner-APNRL till date, one more opportunity is being given to the parties to fulfill the obligations/directions of the Commission dated 26.05.2014. The JUVNL and JBVNL are allowed further time till 31.01.2017 for submitting a report on cost benefit analysis to the Commission.”

51. From the above, it is clear that the State Commission has noted ambiguity in the Power Purchase Agreement signed between the Appellant and the Respondent No. 2, with respect to DTS, however, failed to get it corrected, further, decided to take up the issue separately even to the fact that the issue involved i.e. the transmission charges are directly dependent upon the DTS, and get the issue linked to submission of the cost benefit analysis report.

52. The State Commission has also failed in ensuring compliance of its orders as the direction for submission of the cost benefit analysis report has not been submitted by the Respondents till the date of conclusion of arguments before this Tribunal as on enquiry, submitted by the Respondents.

53. The State Commission while concluding failure of the Appellant to commission the DTS system and accordingly, fixed the liability on the Appellant contrary to the terms of the PPA, by which the transmission charges have to be borne by the Respondent No. 2, we find it absolutely unjust as the State Commission has not considered the reasons for non-commissioning of DTS.

54. We find no reason to agree with the State Commission to deal the issue of DTS separately, in case the cost of transmission through the existing arrangement is lower for the consumers of the State as compare to transmission through the DTS, the State Commission is bound to decide the commissioning of DTS first on the basis of the "Cost Benefit Analysis Report", instead of ruling sharing of transmission charges arbitrarily.

55. It cannot be disputed that the facts/ reasons for the non-commissioning of the DTS, were placed by the Respondents before the State Commission, as noted in its Order dated 21.01.2019 in Case No. 12 of 2017, as aforementioned i.e.

*“ Learned Counsel for the respondent submitted that ----- **JUSNL has reported that they don't have any extra space for constructing 220 kV bays except using two number of 220 kV unutilized bays of***

M/s Tata Power. However, most of the equipments installed in those bays are not worth to use. JBVNL has contacted its consultant to examine the technical possibilities and would be submitting the cost benefit analysis once the technical feasibility is established.”

56. As submitted by the Appellant and also noted by the State Commission in foregoing paragraphs that the DTS was proposed and insisted by the Respondents, however, the State Commission has not sought any technical feasibility report, certainly as noted above, the proposed DTS is not technical feasible, which clearly indicates default on the part of the Respondents.

57. Also, the cost of such DTS has to be passed on to the consumers as observed by the State Commission, therefore, the charges for the DTS has to be borne by the consumers and there is no liability on the part of the Appellant, the State Commission vide order dated 26.05.2015, reiterated vide order dated 21.12.2016 has noted as under:

“4.40 With regard to construction of the Dedicated Transmission System (DTS), the Commission notes that the proposed dedicated transmission line is to be constructed because JUVNL has insisted upon this. The cost of this line will, necessarily, have to be passed on to the consumer. The Commission, therefore, believes that the rationale for construction of the DTS from the power station to JSEB's Ramchandrapur 220 KV substation should be a net reduction in the cost of power purchase to the consumers.”

58. Accordingly, the State Commission directed the Respondents to submit a report which results in lower cost for the consumers as the cost of DTS would have been higher as compare to the existing system provisionally allowed.

“4.40 ----The Commission directs JUVNL to carry out a cost benefit analysis of routing the power from the power station through the Dedicated Transmission System vis-a-vis routing the power through the CTU as is being done currently and submit a report regarding the same to the Commission within two months of issuance of this Order. The Commission considers this exercise necessary in interest of minimizing the cost of the consumer.”

59. Further, the Commission in Para 20 in order dated 21.12.2016 in Case No. 13 of 2014 has observed as follow:-

“20. Both the parties are engaged in playing blame game finding fault in one another, but neither of them has performed their respective part. The arrangement which was envisaged only for two years in the PPA is still continuing. The parties are thereby mutually carrying on the same arrangement which was meant for a maximum period of two years.

29. The respondents who are paying Transmission losses from the Delivery point which is 400 KV PGCIL Sub-Station at Ramchandrapur, Jharkhand in Easter Region, under short term arrangement, shall go

on paying the same including the Transmission losses i.e. Drawal losses and the Injection losses till any order is passed by the Commission, after submission of report of the respondents on cost benefit analysis.”

60. It is seen from the above that after noticing that the parties are engaged finding fault in one another, but neither has performed their respective part, mutually carrying on the same arrangement which was meant for a maximum period of two years, the State Commission directed the respondents shall continue to pay the same including the Transmission losses i.e. Drawal losses and the Injection losses till any order is passed by the Commission, after submission of report of the respondents on cost benefit analysis, thus clearly observing that the liability of paying the transmission charges is upon the Respondent No. 2.

61. As already stated in the previous paragraphs, the State Commission observed that the cost of transformer at seller's end is to be incurred by the seller and cost of transformer at buyer's end is to be incurred by the procurer, as such, the liability regarding cost of transformer is not clear in the PPA, as such there is an ambiguity in the PPA.

62. We find it appropriate to reproduced the definition of DTS as per PPA, as under:

“Dedicated Transmission System”:

‘shall mean the transmission system to be developed by Seller within two years from the CoD including 400 kV transmission line from Power Station Bus-Bar upto the JSEB's Ramchandrapur 220 kV sub

Station. For development of Dedicated Transmission System, the Capital Cost to be incurred at Seller's sub-station (including cost of additional bay, transformer, etc) and 400 kV transmission line till the JSEB's Ramchandrapur 220 kV sub-Station shall be borne by the Seller and the Capital Costs to be incurred at Procurer's sub-station (including cost of additional bay, transformer, etc) shall be borne by the Procurer'."

63. From the aforesaid definition, it is clear that the cost of Transformer, Bay etc. at the Procurer's end including the Interconnection Facility have to be borne by the Procurer and there is no ambiguity in either the definition or in the PPA, the observation of the State Commission is erroneous and merits rejection.

64. The State Commission while passing the Impugned Order has failed to give any reason on which basis the sharing of POC charges have been decided, the decision is arbitrary and unreasonable, as per the PPA, it is the responsibility of the Procurer to pay Transmission Charges (from the Power Station Bus-Bar onwards) and applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurer, accordingly, the cost incurred on the DTS by the Appellant has to be made pass through, as the obligation of the Procurer is to pay transmission charges for the transmission system from the Power Station Bus-Bar, the Procurer's Obligation is mentioned under Article 4.3 of the PPA, as aforequoted.

65. Undisputedly, as submitted by the Respondent No. 2, the sole responsibility of construction of Dedicated Transmission Line was of the Appellant, which was

to be developed within two years from the date of CoD i.e., 21.01.2013 for 1st Unit, and for such interim period of two years or till the Dedicated Transmission Line was constructed by the Appellant, which ever was earlier, however, failure on the part of the Respondents, by either not providing the interconnection facilities at their sub-station or providing space for termination of the DTS at their 220 kV sub-station alongwith necessary transformation and connection system, which is the mandatory requirement for commissioning the DTS, cannot impose liability on the Appellant.

66. The State Commission noting the conduct of the Respondents vide various Commission's Orders *inter-alia* continuous non-compliance of its directions by the Respondents, has preferred not to take any action against the State Utilities despite having enough powers to deal such a situation, instead, went ahead by penalizing the Generating Station through the Impugned Order by directing the sharing of the liabilities of the Respondent No. 2.

67. It is important to note here that the DTS to be commissioned by the Appellant include 400 kV transmission line which is supposed to be terminated at the Procurer's sub-station, however, the said sub-station neither has enough space for extending the facilities at their sub-station nor have spare capacity/ equipment therein for interconnection of 400kV line as submitted by them and noted in the previous paragraphs.

68. We decline to accept the submission of the Respondent No. 2 that the State Commission while disposing of the petition under section 142, rejected the prayer made under section 142 for imposition of penalty citing efforts made by the

Respondents, and also, keeping the issue of DTS open, we find no efforts being made by the Respondents either in submitting the “**Cost Benefit Analysis Report**” in time nor providing interconnection facilities at their end, instead stating that there is no space available for interconnecting the DTS at their end, thus indicating that the DTS cannot be commissioned as required.

69. Further, the State Commission by keeping the issue of DTS open has created uncertainty which need to settled.

70. Also, we find no merit in the submission of the Respondents that the interim arrangement continued for almost a decade burdening the answering Respondent with cost of transmission charges which ultimately passed to the customer, various efforts were taken to reconcile the matter and apportioning of charges was suggested by the State Commission which was never objected by the Appellant.

71. It is the failure on the part of the Respondents that after insisting for the DTS, they failed to provide the interconnection facility/ space for the termination of the DTS at their sub-station, further, continuing non-compliance of the directions of the State Commission regarding the “**Cost Benefit Analysis Report**”.

72. The Respondents have statutory duty to carry out detailed studies whether such a system can be connected at their sub-station, further, the State Commission also require to examine such details before approving and making observations in regard to commissioning of such system.

73. The Respondent No. 2 also argued that the State Commission has very wide powers to deal with the issues filed under section 86(1)(b) of the Act, which includes powers to reject, modify, alter or vary the terms of the agreement for purchase of power and further direct the distribution licensee to re-write the terms found reasonable by the State Commission, further, adding that the word “regulate” has wide import, it carries with it the powers to reject, modify, alter or vary the terms of the Agreement and the scope and ambit of the word “regulate”, reliance was placed on the judgment of the **Supreme Court in Cellular Operators Association Vs. Union of India – AIR 2003 SC 899**.

74. However, the aforesaid judgment of the Supreme Court is not applicable in the present context, as the dispute in hand is whether the Appellant can be penalized for not commissioning the DTS due to continuing default by the Respondents, further, it the tariff is to be fixed by the express provisions of the relevant Regulations and the PPA.

75. It is a settled principle of law, that the State Commission cannot interfere with the PPA signed between the parties, the Supreme Court in **PTC India Ltd. v. CERC, (2010) 4 SCC 603** has held that even a Regulator (appropriate Commission) can only interfere in an existing agreement by specifying Regulations.

76. Further, Supreme Court in **Haryana Power Purchase Centre v. Sasan Power Ltd., (2024) 1 SCC 247 : 2023 SCC OnLine SC 577 at page 310**, while referring to the above said PTC vs CERC judgment, has ruled that in a case where the matter is governed by the express terms of the contract, the Central Electricity

Regulatory Commission cannot, even donning the garb of a regulatory body, go beyond the express terms of the contract, the relevant extract of the judgment is reproduced as under:

*“109. We are unable to see how the said judgment can advance the case of the first respondent. The question which fell for consideration and the opinion which has been rendered do not in any way detract from the view which we have taken. Substantially, it was held that the making of regulation was not a precondition for levying a regulatory fee under Section 79(1)(g). It is no doubt true that the Commission has an adjudicatory function. It is also empowered to give opinions. Power to frame regulations indicates that it also has legislative powers. **The point is that since in this case we are concerned with the adjudicatory function of the Commission, we are concerned with the trammels to which it is subject in the form of the express terms of the contract. All that we are holding is that in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract.***

110. It is *apposite* that we notice para 58 which reads as follows : (PTC case [PTC India Ltd. v. CERC, (2010) 4 SCC 603] , SCC p. 639, para 58)

“58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section

178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. **Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j)."**

77. Therefore, the State Commission by an order, cannot interfere with the signed agreement i.e. PPA even under its "Regulatory Powers", hence, the contention of the Respondent No. 2 is misconceived and merits rejection.

78. The Seller and the Procurer are bound by the terms and conditions of the PPA, wherein, the Procurer has obligation to (i) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point, (ii) liable for payment of Transmission Charges (from the Power Station Bus-Bar

onwards) and applicable RLDC/SLDC charges, and (iii) making arrangements for evacuation of their Contracted Capacity from the Interconnection Point.

79. Undisputedly, the DTS can be commissioned only once an interconnection facility is provided by the Respondents at their sub-station, however, the Respondents, even on being asked, failed to provide any satisfactory answer whether such a requirement can be met by them, accordingly, we find no default on the part of the Appellants in not commissioning the said DTS.

80. Further, the State Commission passed the Order without going into the merits for the non-commissioning of the DTS by the Appellant and also not taking appropriate action under the law against the Respondents due to non-compliance of its orders.

81. Once it is the cost which has to be borne by the Procurer for the Transmission of electricity from the bus-bar of the switchyard of the generation project, the cost of the DTS shall become part of the generation tariff, accordingly, State Commission prudently sought the “**Cost Benefit Analysis Report**” from the Respondents so as to ensure lower transmission cost, thus, lower tariff for the consumers.

82. During the course of the hearing, the Respondents failed to place any evidence in support of their contention that the Appellants have consented for sharing of the Transmission Charges, as such we find merit in the submission of the Appellants denying such an allegation by the Respondents.

83. In the light of above, we find the Impugned Order unjust and arbitrary, and deserves setting aside including all consequential steps taken by Respondent No. 2 pursuant thereto, including but not limited to its letter dated 13.11.2023 intimating imminent adjustment of 60% of the purported POC Charges, with regard to T-GNA (Temporary GNA), from the month of November, 2023 onwards, from the Appellant's Energy Bills.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 131 of 2021 filed by M/s Adhunik Power and Natural Resources Limited has merit and is allowed, the Impugned Order dated 09.01.2021 passed by the Jharkhand State Electricity Regulatory Commission in Petition No. 03 of 2018 is set aside to the above extent.

PRONOUNCED IN THE OPEN COURT ON THIS 14th DAY OF MAY, 2024.

**(Virender Bhat)
Judicial Member**

**(Sandesh Kumar Sharma)
Technical Member**

pr/mkj