

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION  
BHOPAL**

**Sub: In the matter of Petition under Section 86 (1) (f) of the Electricity Act, 2003 seeking direction to Respondents to pay to the Petitioner Balance Capacity Charges / Fixed Charges for the supply period of April, 2020 along-with applicable Late Payment Surcharge.**

**ORDER**

**(Date of Order: 3<sup>rd</sup> November, 2023)**

**M/s Lanco Amarkantak Power Ltd.**  
Plot No. 334, Fourth Floor, Phase IV,  
Udyog Vihar, Gurgaon – 122015

- **Petitioner**

**V/s**

**1. M.P. Power Management Company Ltd.,**  
Shakti Bhawan, Rampur,  
Jabalpur – 482008

**2. PTC India Ltd.**  
2<sup>nd</sup> Floor, NBCC Tower, 15,  
Bhikaji Cama Place,  
New Delhi – 110066.

**Respondents**

Shri Deepak Khurana, Advocate, Shri Abhishek Bansal, Advocate and Shri Anil Sharma appeared on behalf of Petitioner.

Shri Ashish Barnard, Advocate and Shri Nitin Khatri appeared on behalf of Respondent No.1.

Shri Ravi Kishor, Advocate appeared on behalf of Respondent No. 2.

The subject Petition is filed by M/s Lanco Amarkantak Power Ltd. (hereinafter referred as the 'Petitioner') under Section 86 (1) (f) of the Electricity Act, 2003 seeking direction to the Respondents to pay to the Petitioner Balance Capacity Charges / Fixed Charges of Rs. 1,07,11,587/- for the supply period of April, 2020 along-with applicable Late Payment Surcharge (LPS). Aforesaid deduction in Capacity/Fixed Charges had been done by the Respondent No. 1, i.e. MP Power Management Company Limited (MPPMCL) considering the scheduled energy instead of the capacity declared by the

Petitioner by invoking 'force majeure' clause under PPA / PSA on account of reduction in demand due to country-wide lockdown imposed by Government of India due to Covid-19 pandemic.

2. The Petitioner is a generating company within the Section 2(28) of the Electricity Act, 2003 and established & operating a coal based thermal power station having two units of 300 MW each (2x300 MW) at Pathadi village, Korba district, Chhattisgarh.
3. The Respondent No.1. (MP Power Management Company Ltd. or MPPMCL) is a wholly owned company of the Government of Madhya Pradesh and is the holding company of three distribution companies in the State.
4. The Respondent No. 2 (PTC India Limited) is a company incorporated under the Companies Act, 1956. The Respondent No. 2 is an inter-state Trading Licensee under Section 14 of the Electricity Act, 2003 and is engaged in the business of trading of electricity.
5. The Petitioner executed a Power Purchase Agreement (PPA) on 11.05.2005 with Respondent No. 2 (M/s PTC India Ltd.) for sale of power of 300 MW (273 MW Net) from Unit No. 1 of the Power Station for a period of 25 years. Thereafter, the Respondent No. 2 entered into a Power Sale Agreement (PSA) dated 30.05.2005 with MP State Electricity Board for further sale of the aforesaid 300 MW power purchased from the Petitioner. The said PSA is now vested with MPPMCL. The PPA and PSA are read with the executed Implementation Mechanism (IM) for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012.
6. Date of Commercial Operation (CoD) of the Lanco Amarkantak Thermal Power Plant Unit No. 1 (300 MW) was 09.04.2010. The Petitioner is supplying power from its Unit No. 1 of Power Plant to the Respondent No. 1 (MPPMCL) through Respondent No. 2 on long term basis since 03.12.2012, after execution of Implementation Mechanism (IM) for PPA and PSA.

**Background:**

7. A brief background of the subject petition is as follows:
- i. Earlier, M.P. Power Management Co. Ltd. had filed petition No. 78 of 2012 under Section 86 (1) (b) of the Electricity Act, 2003 for approval of purchase of power from PTC India Limited towards the PSA dated 30<sup>th</sup> May, 2005 signed between the erstwhile MPSEB & PTC India Ltd., which was sourced from 300 MW Unit- I of Lanco Amarkantak Power Ltd. under the PPA dated 11<sup>th</sup> May, 2005 signed between M/s PTC India Ltd. & M/s Lanco Amarkantak Power Ltd. (Lanco) pursuant to the Settlement Agreement dated 16<sup>th</sup> October, 2012 signed amongst the Petitioner and Respondents. The aforesaid petition was filed by MPPMCL based on the CERC (Terms and Conditions for determination of Tariff) Regulations, 2009.
  - ii. Vide Order dated 1<sup>st</sup> December, 2012 in petition no. 78 of 2012, the Commission accorded approval to the process of power procurement under section 86(1)(b) of the Electricity Act, 2003 at the annual fixed cost and the energy charges as determined in aforesaid Order, in accordance to provisions of the CERC (Terms and Conditions for determination of Tariff) Regulations, 2009.
  - iii. Later on, M.P. Power Management Co. Ltd., had filed the petition No. 35 of 2016 under Section 61 read with Section 62 and 86(1)(b) of the Electricity Act, 2003 and based on the CERC (Terms and Conditions of Tariff) Regulations, 2014 seeking approval for determination of annual fixed charges and energy charges for the control period from FY 2014-15 to FY 2018-19 for electricity generated from Unit No. 1 of M/s Lanco Amarkantak power project.
  - iv. Vide order dated 23<sup>rd</sup> August, 2017, the Commission dismissed the aforesaid petition with the observation that the prayer made by the petitioner for determination of tariff on year- on- year basis was beyond the jurisdiction of this Commission under Section 86(1)(b) of the Electricity Act, 2003.
  - v. Subsequently, MPPMCL filed review petition no. 66 of 2017 under Section 94(1)(f) of the Electricity Act, 2003 for review of Commission's order dated 23<sup>rd</sup> August, 2017 in Petition No. 35 of 2016. Vide Commission's order dated 25<sup>th</sup> April, 2018, aforesaid review petition was not found maintainable and disposed of.

- vi. The aforesaid orders dated 23<sup>rd</sup> August, 2017 and 25<sup>th</sup> April, 2018 passed by the Commission were challenged by M.P. Power Management Company Limited, M/s Lanco Amarkantak Power Limited and M/s PTC India Limited in Appeal No. 327 of 2018, Appeal No. 338 of 2018 and Appeal No. 51 of 2019, respectively, before Hon'ble Appellate Tribunal for Electricity.
- vii. Vide Judgment dated 19<sup>th</sup> August, 2020, Hon'ble Appellate Tribunal for Electricity decided all the three Appeals setting aside the Commission's Order dated 23<sup>rd</sup> August, 2017 in petition No. 35 of 2016 and Order dated 25<sup>th</sup> April, 2018 in review petition No. 66 of 2017. In the aforesaid Judgment, Hon'ble Tribunal established jurisdiction of the Commission and directed it to determine the tariff under section 64(5) of the Electricity Act, 2003. In Para 12.15 of the aforesaid Judgment, Hon'ble Tribunal had observed the following:

*“12.15 It would thus appear that the Section 64 (5) is a special provision in the nature of exception and **deserves jurisdiction of the State Commission** over the distribution licensee of the state who are purchasing power from the generators who otherwise have composite scheme of which jurisdiction otherwise is vested with CERC under Section 79(1)(b). In other words, Section 64(5) is a special provision whereas Section 79(1)(b) is a general provision. A special provision prevails over a general one even within the same statute. We accordingly find that Section 64(5) is squarely attracted in the present case in as much as all three parties want the State Commission to determine the tariff for supply of power from LANCO to MPPMCL through PTC. -----”*

- viii. With the aforesaid observations, Hon'ble APTEL has directed the Commission to determine the tariff and pass consequential orders. In compliance to the aforesaid directions of Hon'ble Appellate Tribunals for Electricity, the Commission is determining generation tariff/true-up of M/s Lanco Amarkantak Power Ltd., Unit No. 1 (300 MW) on year-on-year basis, under Section 64(5) of the Electricity Act, 2003 based on the applicable MPERC (Terms and Conditions for determination of Generation Tariff) Regulations.

8. In the subject petition, the prayer of the petitioner is as follows:

*“Pass an Order directing the Respondents (Respondent No. 1 through Respondent No. 2) to pay to the Petitioner Capacity Charges/Fixed Charges deducted by it amounting to Rs. 1,07,11,587/- for the supply period April, 2020 forthwith along-with applicable Late Payment Surcharge with a further direction to pay the Late Payment Surcharge till the date of actual payment by the Respondents;”*

9. The subject petition was admitted at the motion hearing held on 18<sup>th</sup> July, 2023. Vide order 18<sup>th</sup> July, 2023, petitioner was directed to serve copy of petition to both Respondents within seven days. The Respondents were directed to file their responses to the petition within two weeks, thereafter. The petitioner was asked to file rejoinder within a week, thereafter. The case was fixed for hearing on the 5<sup>th</sup> September, 2023.
10. By affidavit dated 22.08.2023, Respondent No. 1 (MPPMCL) filed reply to the subject petition. By affidavit dated 31.08.2023, the petitioner filed rejoinder to the reply filed by Respondent No. 1.
11. At the next hearing in this matter held on 5<sup>th</sup> September, 2023, representative appearing on behalf of respondent no. 1 sought adjournment stating that his counsel was out of India. Counsel appeared on behalf of petitioner submitted that the issue involved in subject petition had already been decided by the Commission in three other matters. Therefore, there is no need for any argument and only written submissions may be allowed to be filed by the parties. Ld. Counsel appearing on behalf of respondent no. 2 (PTC India Ltd.) submitted that he also wants to file written submission in subject matter. Considering request, parties were allowed to file their respective written submissions within ten days. With the above directions, case was reserved for order.
12. Further, during the hearing of other matters held on 12<sup>th</sup> September, 2023, Ld. Counsel of Respondent No. 1 (MPPMCL) moved an application and prayed that the subject petition may be listed again for arguments on maintainability. After considering all the facts & circumstances, his prayer was considered and the case was again listed for hearing on maintainability on 20<sup>th</sup> September, 2023.

13. At the hearing held on 20<sup>th</sup> September, 2023, Ld. Counsel appearing on behalf of Respondent No. 1 (MPPMCL) put forth their arguments on maintainability of the petition. Ld. Counsels of the Petitioner and Respondent No. 2 were also put forth their counter arguments. Having heard the parties, the case was reserved for order on maintainability and parties were allowed to file their respective written submissions on the issue of maintainability of the petition within 10 days.
14. By affidavit dated 30.09.2023, petitioner submitted its reply on the issues raised by the Respondent No. 1 on maintainability of petition. Vide written submissions dated 05.10.2023 and 03.10.2023, Respondent No. 1 and Respondent No. 2 have also filed their respective contentions on maintainability of the petition.

**Submissions of Parties:**

15. Having heard the parties and on perusal of their respective written submissions on maintainability of the petition, the Commission has observed following issues raised by MPPMCL with regard to maintainability of the subject petition and the main submissions made by the parties on each issue are given below:

**Issue No. 1 - MPPMCL has contended that no proceedings can be held for adjudication U/s 86(1)(f) of Electricity Act as the petitioner has not executed any Power Purchase Agreement (PPA) with MPPMCL.**

**MPPMCL Submission:**

16. Vide written submission dated 05.10.2023, Respondent No. 1 has broadly advanced the following arguments:
- i. The instant petition is not maintainable before the Commission and no proceedings can be held for adjudication U/s 86(1)(f) of Electricity Act as the petitioner has not executed any PPA with the Respondent No. 1. It is the Respondent no.2 (PTC) which has executed the PPA dated 30.5.2005 (also termed as PSA) with the Respondent no.1 and therefore there is no privity of contract between the Petitioner and the Respondent no.1 for claiming such*

*demands/charges. In other words, there is no locus or privity of contract for the Petitioner to claim from the Respondent no.1 and it has to claim from the Respondent no.2.*

- ii. It is submitted that there is no claim raised by the Respondent no.2 (PTC) with the Respondent no.1 (MPPMCL) and therefore, it is not aggrieved by the non-payment of capacity charges. It is submitted that Petitioner cannot be granted the prayers of seeking payments from the Respondent no. 1.*
- iii. This position has been settled by the several judgements of the APTEL and Hon'ble Apex Court. It is submitted that the Hon'ble APTEL in Appeal no. 7 of 2009 dated 6.08.2009 has authoritatively decided this issue between the same parties and the same is therefore, squarely applicable and is res-judicata qua the parties and is also binding on the Commission. It is submitted that the Hon'ble APTEL in the case of Appeal no. 7 of 2009 dated 6.08.2009 is squarely applicable and therefore the Petition be dismissed on this ground alone.*

**Petitioner's Submission:**

17. By affidavit dated 30.09.2023, the petitioner has broadly submitted the following:

- i. The Petitioner submits that the contentions of MPPMCL is utterly frivolous, misconceived & untenable & is aimed solely at delaying the adjudication of the present Petition on merits. As MPPMCL does not have any defense on merits, it is raising the objection out of desperation, in utter disregard of the admitted factual position and Orders passed by this Commission from time to time.*
- ii. That all disputes between the parties under the aforesaid PPA & PSA, which led to the Order dated 21.10.2008 in Appeal No. 71 of 2008 and Order dated 06.08.2009 in Appeal No. 7 of 2009, having been passed by the Hon'ble APTEL, were comprehensively settled with the execution of a Tripartite Settlement Agreement dated 16.10.2012 between the Petitioner, PTC & MPPMCL. In terms of the Tripartite Settlement Agreement, Implementation Mechanism for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012, were also executed.*



- iii. *It is an admitted position that the tariff for supply of power from the Petitioner to the Respondents is being determined by this Commission. This Commission has passed Orders from time to time, for determination of year on year tariff as well as its true up based on applicable MPERC Generation Tariff Regulations.*
- iv. *The Petitioner vide its letter dated 18.04.2023 informed this Commission of its compliance of the earlier order dated 03.03.2023 by raising the differential bills for the energy supplied during the period from 01.04.2019 to 31.03.2022. However, MPPMCL has failed to pay the tariff (on the pretext of alleged force majeure event) for April 2020, thereby constraining the Petitioner to file the present Petition, therefore, in effect, the present proceeding call for implementation of the tariff orders passed by this Commission. It is further submitted that inasmuch as the tariff is being determined by this Commission & therefore any issue with regard to supply of power including non-payment thereof by MPPMCL shall have to be necessarily decided by this Commission.*
- v. *It is further submitted that this Commission, previously, has passed Orders in exercise of its powers under adjudication of disputes/issues under the PPA along with the PSA, in the Petitions no. 21 of 2021 and 26 of 2021 filed by the Petitioner in respect of the aforesaid supply between the very same parties. In all such proceedings, MPPMCL has been impleaded as party Respondent and it has contested matter on its merits, thereby leading to adjudication of issues on merits.*
- vi. *That all of the Orders passed by this Commission have attained finality. Thus, the Commission is exercising complete jurisdiction over the parties in respect of the present supply of power, including adjudication of issues/disputes that are arising between the parties including MPPMCL. The fact that PPA & PSA and subsequently signed Implementation Mechanism for PPA/PSA are admittedly back to back in nature clearly shows that the Petitioner can file and maintain the present Petition under the aforesaid contractual arrangement against both PTC & MPPMCL. MPPMCL, being the ultimate beneficiary of power, is a necessary & proper party to the present Petition. In the absence of MPPMCL, the present Petition cannot be adjudicated as MPPMCL has to pay the capacity charges*



*(which it has not paid on the alleged ground of force majeure) on the directions of this Commission to implement the orders related to determination of tariff for 2019-24 & its true up orders for FY 2019-22. The objection now being raised by MPPMCL that it need not be a party to the present Petition is clearly an afterthought, an attempt to delay adjudication of the present matter ought to be rejected out rightly.*

- vii. *The reliance placed by MPPMCL on the Order dated 21.10.2008 in Appeal No. 71 of 2008 and Order dated 06.08.2009 in Appeal No. 7 of 2009, passed by Hon'ble APTEL is also misconceived. The said Orders of the Hon'ble APTEL decided the issue of jurisdiction of the Commission, prior to the subsequent developments as narrated hereinabove. It is MPPMCL's own contention before this Commission in the present matter, that it is not raising objection to the jurisdiction of this Commission.*
- viii. *In any event of the matter, the said Orders passed by the Hon'ble APTEL are no longer relevant/applicable in view of the following: -*
- a) *Execution of Implementation Mechanism for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012;*
  - b) *Execution of Settlement Agreement dated 16.10.2012 between the three parties i.e. Petitioner, PTC & MPPMCL;*
  - c) *Order of this Commission dated 01.12.2012 approving the above;*
  - d) *Determination of Tariff for supply under the PPA & PSA by this Commission vide order dated 24.08.2021 (for the period FY 2014-15 to FY 2018-19), vide order dated 13.05.2022 (for the period FY 2019-20 to FY 2023-24); true up tariff order dated 03.03.2023 (for the period FY 2019-20 to FY 2021-22).*
- ix. *In view of the above, the objection raised by MPPMCL against it being impleaded as party to the present Petition is wholly untenable and is liable to be rejected.*

**Respondent No. 2 (PTC) Submission:**

18. Vide submission dated 03.10.2023, the Respondent No. 2 has broadly advanced the

following arguments:

- i. *It is well established that there is a clear nexus between the PPA and the PSA and both the Agreements are interconnected and are part of one chain. there exists a clear nexus between the PPA and the PSA. As per the terms of the PSA, the Petitioner was required to deliver the contracted power in accordance with the PPA for onward supply of power from the Project. The PSA was an intrinsic and material requirement for the operation of the PPA. Accordingly, it is submitted that PPA and PSA are inter-dependent and interconnected agreements.*
  
- ii. *It is reiterated that in terms of the aforesaid submissions, it is clear that:*
  - a. *The PPA and the PSA are back-to-back arrangements, forming part and parcel of the same transaction, wherein power generated by Petitioner is supplied to Respondent No.1 through Respondent No.2.*
  
  - b. *Role of the Petitioner in the entire transaction is that of a conduit/facilitator between the generating company and the distribution licensees.*
  
  - c. *Since the Respondent No.1 is purchasing the contracted quantum of power from the Project of the Petitioner, the ultimate beneficiary of the power is the Respondent No.1. Therefore, the Petitioner is entitled to recover dues from the Respondent No.1, through Respondent No.2 under the present petition.*
  
- iii. *In view of the above facts, provisions in the PPA & PSA, the scheme under Electricity Act, 2003, role of a Trader and the judicial pronouncement, it is well established that PPA & PSA being on back-to-back basis, there is clear nexus between PPA & PSA and accordingly, the petition including the relief sought under the petition is maintainable before the Commission and the contention of the Respondent No.1 in this regard is not tenable, both under facts and law.*

**Issue No. 2 - Petitioner has not challenged the letter dated 30.03.2020 & 31.03.2020 by virtue of which the Force Majeure clauses were invoked by Respondent no.1 during Covid-19 Pandemic.**

**MPPMCL Submission:**

19. Vide written submission dated 05.10.2023, Respondent No. 1 (MPPMCL) has broadly advanced the following arguments:

*“the Petitioner has not challenged the letter dated dt.30.03.2020 & 31.03.2020 by virtue of which the Force Majeure clauses were invoked by the Respondent no.1 during the Covid-19 Pandemic. It is submitted that the only prayer of the Petitioner is that payments should be released but there is no prayer or relief being sought for adjudication in the Petition that the letter dated dt.30.03.2020 & 31.03.2020 by virtue of which the Petitioner was informed that there is a force majeure event due to the Covid-19 pandemic, is illegal or not in accordance with law. It is submitted that in the absence of such a specific challenge and in view of the CPC, the instant petition is not maintainable as even if it is assumed that the Petitioner has a good case on merits the disbursement of payment is only a consequential relief and cannot be granted till the time the letter dated dt.30.03.2020 & 31.03.2020 invoking force majeure is valid, legal and not set-aside by a court of competent jurisdiction. It is therefore submitted that the instant petition be dismissed as being not maintainable on this ground alone.”*

**Petitioner’s Submission:**

20. By affidavit dated 31.08.2023, the petitioner has submitted the following:

*“The Respondent has stated that the Petitioner has not challenged letter dated 30.03.2020 and 31.03.2020 by virtue of which the Force Majeure clauses were purportedly invoked by Respondent No. 1. The Respondent has contended that in the absence of a specific challenge to the said letter, the instant petition is not maintainable. In this regard, it is pertinent to mention that admittedly, the Petitioner has opposed and objected to the said letters of Respondent No. 1, and therefore, it is wholly incorrect on the part of Respondent No. 1 to suggest that the Petitioner has not challenged the same.*

*It is further submitted that the Petitioner is not required to claim the relief of declaration that there is a force majeure event or any relief of declaration with regard to communications issued by Respondent No. 1 by which Respondent No. 1 has*

*purportedly and unilaterally sought to assert force majeure. There is no such requirement in law to seek a specific prayer with regard to communications issued by the opposite party.*

*The present petition is simplicitor for recovery of the Capacity Charges/Fixed Charges for the period April, 2020 along-with LPS as prayed. Force majeure has been raised as a defense by Respondent No. 1. The issue as to whether the defense of Respondent No. 1 with regard to force majeure is correct or not. If its defense fails, then the prayer for payment of unpaid capacity charges shall be granted. In any event, the Respondent is resorting to hyper-technical arguments in the present proceedings having no basis.”*

21. The respondent no. 2 (PTC) has not submitted any comments on this issue.

**Issue No. 3- Petition is barred by limitation as the cause of action arose on 30.3.2020 when the notice for force majeure was issued by the Respondent no.1 and the Petition has been filed in or around 3.6.2023.**

**MPPMCL Submission:**

22. Vide written submission dated 05.10.2023, Respondent No. 1 has broadly advanced the following arguments on the issue of limitation:

*“Petition is barred by limitation as the cause of action arose on 30.3.2020 when the notice for force majeure was issued by the Respondent no.1 and the Petition has been filed in or around 3.6.2023. It is submitted that the Petitioner is seeking a recovery of monies and the time limit for such actions is 3 years as per the Limitation Act. The time expired on 31.3.2023/1.4.2023 and the petition being filed on 3.6.2023 is barred by limitation and it is settled law that Courts/Authorities will not entertain actions which are barred by limitation.”*

**Petitioner’s Submission:**

23. Vide written submission dated 30.09.2023, Petitioner has broadly advanced the following arguments on the issue of limitation:

- i. In the hearing held on 20.09.2023, MPPMCL argue that the instant Petition is barred by limitation. At the outset, it is submitted that limitation is mixed question of law and fact & not a ground for challenging maintainability of the Petition.*
- ii. Without prejudice to the foregoing, it is submitted that the contention of MPPMCL in its Reply to the Petition is that the cause of action for filing the present Petition arose on 30.03.2020 when the notice for force majeure was issued by MPPMCL and thus, according to MPPMCL, the limitation period for filing the present Petition expired on 31.03.2023.*
- iii. At the outset it is submitted that the cause of action did not arise when the notice for force majeure was issued. It is firstly submitted that the limitation cannot be counted from the date of notice of alleged force majeure. In this regard, it is submitted that the notice for cessation of force majeure was issued by MPPMCL on 05.06.2020. The relevant period which is the subject matter of adjudication thus ends on 05.06.2020 (i.e. the date of notice of cessation of alleged force majeure), which gives rise to cause of action to file the Petition. The present Petition having been filed on 05.06.2023 i.e. within 3 years from 05.06.2020, is thus within limitation.*
- iv. It is submitted that the Petitioner, on 05.05.2020, raised Monthly Tariff Invoice(s) upon MPPMCL for supply of power during the month of April, 2020 amounting to Rs. 50,23,38,208/- which included Capacity Charges (part of which remained unpaid thereby resulting in filing of the present Petition). The said invoice was payable within the due date of 30 days from the date of invoice (Due Date is a defined term in the PPA and PSA). Therefore, the cause of action arose after expiry of 30 days from the date of invoice i.e. on 05.06.2020, when the amount towards capacity charges was due and payable and was not paid by MPPMCL on the pretext of alleged force majeure. Therefore, the present Petition having been filed on 05.06.2023 is within limitation. As MPPMCL reduced the Fixed Charges based on Scheduled Energy instead of Declared Capacity by MPPMCL and did not pay the Fixed Charges payable, the petitioner requested for release of the differential amount of Rs. 1,07,11,587/-. Thereafter, MPPMCL addressed a communication dated 05.06.2020*

*purportedly announcing cessation of force majeure. It is, therefore, wrong to contend that the present Petition is barred by limitation.*

- v. *Without prejudice to the above, it is further submitted that by virtue of Section 60(6) of the Insolvency and Bankruptcy Code, 2016, the present Petition cannot be barred by limitation inasmuch as the Petitioner Company is under moratorium and the time period of moratorium is liable to be excluded from computation of the limitation period.*
- vi. *In this regard it is submitted that in a Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016, bearing no. C.P. (IB) – 420/2018, titled ‘Axis Bank Ltd v. Lanco Amarkantak Power Ltd. vide order dated 05.09.2019, passed by the Hon’ble National Company Law Tribunal, Hyderabad Bench (‘NCLT’), was admitted and moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (‘IBC’) was declared. It is submitted that the Corporate Insolvency Resolution Process (‘CIRP’) of the Petitioner Company is going on and the moratorium period is still continuing in respect of the Petitioner. In this regard, Section 60 of the IBC Code is reproduced hereunder:*

*“60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.*

***(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”***

*Relevant extract of Section 14 of the IBC is reproduced hereunder:*

***“14. Moratorium—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by***



**order declare moratorium for prohibiting all of the following, namely:— (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; .....**”

vii. Therefore, as per Section 60 (6) of the Code the entire period of moratorium starting from 05.09.2019 till the date of filing of the present Petition (as CIRP is still going on and yet not complete), shall be excluded for the purposes of limitation. Therefore, the present petition has been filed within the period of limitation.

viii. In this regard, it is submitted that the Hon'ble Supreme Court of India in *New Delhi Municipal Council v. Minosha India Limited* (2022) 8 SCC 384 has held as under:

“32. As far as understanding the meaning of Section 60(6) is concerned, there cannot be a slightest doubt that the period of **Moratorium is excluded even in the case of a suit or application brought by a corporate debtor, viz., in regard to the period of the moratorium.** It is true that on the one hand what is tabooed in Section 14 when a Moratorium is put into place is inter alia the institution of suits or continuance of pending suits or proceedings against the corporate debtor including proceeding in execution of inter alia, the decree or order of an arbitration panel. So, also the provision prohibits any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002. Still further, the recovery of any property by an owner or lessor in the occupation of the corporate debtor is forbidden. These provisions do not in any manner appear to stand in the way of the corporate debtor instituting or proceeding with a suit or a proceeding against others. Section 60(6) on the other hand excludes the period during which the Moratorium under Section 14 is in place in computing period of limitation. An ambiguity is introduced, namely the need to exclude the period of limitation for a suit or an application, at the instance of the corporate debtor when a Moratorium ushered in by an order under Section 14 does not pose any bar against a suit or an application at the instance of the corporate debtor. The words for which an order of Moratorium has been made under this part is intended to be the point of reference or the premise for the exclusion of the time for the purpose of computing the period of limitation. Besides being the point of reference and being the sine qua non for



applying Section 60(6), it also specifies the period of time which will be excluded in computing of the period of limitation. In other words, present an order of Moratorium under Section 14, the entire period of the Moratorium is liable to be excluded in computing the period of limitation even in a suit or an application by a corporate debtor.

.....

34. *In other words, notwithstanding the period of limitation under the Limitation Act, the Law Giver has thought it fit to provide that in respect of a corporate debtor if there has been an order of moratorium made in Part II, the period during which such moratorium was in place shall be excluded. 'For which an order of moratorium' cannot bear the interpretation which is sought to be placed by the appellant. The interpretation placed by the appellant is clearly against the plain meaning of the words which have been used. We have already undertaken the task of understanding the purport of the Code and the context in which section 60(6) has been put in place. This Court cannot possibly sit in judgment over the wisdom of the Law Giver. The period of limitation is provided under the Limitation Act. The law giver has contemplated that when a moratorium has been put in place, the said period must be excluded. We cannot overlook also the employment of words 'any suit or application'. This is apart, no doubt, from the words 'by a corporate debtor'. Interpreting the statute in the manner which the appellant seeks would result in our denying the benefit of extending the period of limitation to the corporate debtor, a result, which we think, would not be warranted by the clear words used in the statute."*

- ix. *It is submitted that the aforesaid law laid down by the Hon'ble Supreme Court is binding on all concerned.*
- x. *In the course of arguments, reliance was sought to be placed by MPPMCL on the Order passed by this Commission in the matter of Jhabua Power Ltd. vs. The Managing Director, M.P. Power Management Company Ltd. Petition No. 10 of 2021 (@pg. 84 of the Rejoinder) to state that a similar submission as regards limitation was made by MPPMCL and the same was rejected by this Commission. This contention is wholly misconceived and in fact misleading. It is submitted that in the Jhabua Power matter, it was contended by MPPMCL that in view of Section 14 of the IBC Code, as the Petitioner-Jhabua Power had been admitted by the NCLT for Corporate*

*Insolvency Resolution Process, therefore, the Petition by Jhabua Power was not maintainable. In this regard, this Commission, while rejecting the objection on maintainability raised by MPPMCL held as under:-*

*“23. The above provision under Section 14 is to bar “transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein”. The Petitioner (Corporate Debtor) is not alienating or disposing any legal right or beneficial interest but is claiming the payment withheld by the Respondent. Therefore, the contention of the Respondent on maintainability of the subject petition has no merit.”*

*It is therefore evident that there was no issue raised in Jhabua Power regarding exclusion of limitation under Section 60(6) of the IBC Code and as such the reliance sought to be placed by MPPMCL on the Jhabua Power matter is wholly misplaced and misleading.*

- xi. Still without prejudice to the above, it is submitted that on 23.03.2023, the Hon’ble Supreme Court of India, in view of the difficulties being faced by the litigants across India on account of outbreak of the Covid-19 pandemic, in the matter of ‘In Re: Cognizance for Extension of Limitation’ [Suo Motu Writ Petition (C) No. 3 of 2020], passed an order directing extension of the period of limitation in all proceedings before Courts/Tribunals w.e.f. 15.03.2020. Thereafter, various orders came to be passed by the Supreme Court in the said matter until 10.01.2022, when the matter ‘In Re: Cognizance for Extension of Limitation’ [Suo Moto Writ Petition (C) No. 3 of 2020] was disposed of with the following directions:*

*“5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:*

- I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, **it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under***

***any general or special laws in respect of all judicial or quasi-judicial proceedings.***

II. *Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*

III. *In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, the longer period shall apply.*

IV. ***It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015, and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, out limits (within which the court or tribunal can condone delay) and termination of proceedings.”***

xii. *Thus, in terms of the aforesaid judgment and order dated 10.01.2022 passed by the Hon'ble Supreme Court of India, the period from 15.03.2020 to 28.02.2022 shall stand excluded in computing the period of limitation for the purpose of the present petition. In the present case, cause of action for filing the present Petition, as per both parties, has arisen after 15.03.2020. Therefore, after excluding the period from 15.03.2020 to 28.02.2022, if the period of limitation, as per the aforesaid judgment and order of the Supreme Court, commences on 01.03.2022, the present petition would be clearly within limitation. Therefore, it is submitted that the present petition is well within limitation period in terms of the judgment of the Supreme Court in the above matter.*

24. The respondent no. 2 has not submitted any comments on the limitation issue as it is solely related with the petitioner.

**Commission's Observations:**

**Issue No. 1:**

25. With regard to maintainability of the subject petition, the Respondent No. 1 (MPPMCL) has contended that no proceedings for adjudication can be held against MPPMCL as the Petitioner does not have any Power Purchase Agreement ('PPA') with MPPMCL and MPPMCL has executed PPA with Respondent No. 2 (PTC) only. MPPMCL has further contended that the only PTC can be a party to the present petition and not MPPMCL.
26. At the hearing held on 20.09.2023, MPPMCL submitted that it is not objecting to the jurisdiction of this Commission to adjudicate the subject matter and its objection is confined to it being impleaded as a party to the present Petition, in the absence of any direct PPA between Petitioner and MPPMCL. It was further argued by MPPMCL that PTC can file a Petition against MPPMCL before this Commission concerning the subject matter.
27. MPPMCL relied upon Hon'ble APTEL Orders dated 21.10.2008 and 06.08.2009 passed in Appeal No. 71 of 2008 and 7 of 2009, respectively, wherein Hon'ble Tribunal had observed that the determination of tariff for supply of power from petitioner's Generating station is not under the jurisdiction of this Commission. MPPMCL has further contended that no proceedings can be held for adjudication U/s 86(1)(f) of Electricity Act as the petitioner has not executed any PPA with MPPMCL.
28. In response to aforesaid issue raised by Respondent No. 1, the petitioner has submitted that all the disputes between the parties under the PPA & PSA, which led to the aforesaid Orders passed by Hon'ble APTEL, were settled with the execution of a Tripartite Settlement Agreement dated 16.10.2012 between the Petitioner, PTC & MPPMCL. In terms of the Tripartite Settlement Agreement, Implementation Mechanism (IM) for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012 were also executed. The petitioner further submitted that the aforesaid orders of Hon'ble APTEL decided the issue of jurisdiction of the Commission, prior to the subsequent

developments, i.e. execution of triparty Settlement Agreement and IMs.

29. Respondent No. 2 in its reply has submitted that there is a nexus between the PPA and the PSA and both agreements are inter-connected as PPA and PSA being on back-to-back basis. In terms of the PSA, the petitioner is required to deliver the contracted power from Unit No. 1 of the project in accordance the PPA. It is further submitted that the role of respondent No. 2 in entire transaction is of a facilitator between the generating company and the distribution licensees.
30. On perusal of the submissions of the parties, the Commission has observed that there has been a Settlement Agreement between the parties whereby certain amendments in the earlier PPA and PSA have been agreed. As per the provisions of the Settlement Agreement, parties have agreed to resolve all disputes and to withdraw all the petitions at various forums.
31. After execution of Settlement Agreement and Implementation Mechanism to PPA and PSA, Respondent No. 1 (MPPMCL) had filed petition No. 78 of 2012 before the Commission under Section 86 (1)(b) of the Electricity Act, 2003 for approval of purchase of power from PTC India Limited towards the PSA dated 30<sup>th</sup> May, 2005 which has been sourced from 300 MW Unit No. I of Lanco Amarkantak Power Ltd. under the PPA dated 11<sup>th</sup> May, 2005 based on the CERC (Terms and Conditions for determination of Tariff) Regulations, 2009. Vide Order dated 1<sup>st</sup> December, 2012 the Commission accorded approval to the process of the power procurement under the Settlement Agreement and Implementation Mechanism under section 86(1)(b) of the Electricity Act, 2003 at the annual fixed cost and the energy charges as determined in aforesaid Order.
32. Further, vide judgment dated 19<sup>th</sup> August, 2020 in Appeal No. 327 of 2018, Appeal No. 338 of 2018 and Appeal No. 51 of 2019 filed by M.P. Power Management Company Limited, M/s Lanco Amarkantak Power Limited and M/s PTC India Limited, respectively, Hon'ble Appellate Tribunal for Electricity has established jurisdiction of this Commission and directed the Commission to determine tariff under Section 64(5) of the Electricity Act, 2003. In compliance to the aforesaid directions of Hon'ble Tribunal, the Commission is determining the tariff/true-up of Unit No. 1 of the petitioner's power station and

Respondent No. 1 is making payments accordingly. Respondent No. 1 is only beneficiary of power generated from Unit No. 1 of the petitioner's power station.

33. The fact that PPA & PSA and the subsequent Implementation Mechanism for the PPA/PSA are back-to-back agreement between the parties is evident from a bare perusal of the Implementation Mechanism for the PSA dated 26.11.2012. The Implementation Mechanism for the PSA dated 26.11.2012 clearly specifies that the sale of power to MPPMCL would be from Unit No.1 of the Power Station. It also specifies that the Petitioner entered into a PPA dated 11.05.2005 for sale of power with PTC, which in turn entered into the PSA dated 30.05.2005 with MPPMCL. All the payments towards sale of power from Unit No. 1 is made by MPPMCL being the ultimate beneficiary of power generated from Unit No.1 of petitioner's power station.
34. Moreover, the tariff is being determined by this Commission & therefore any issue with regard to supply of power including non-payment thereof shall have to be decided by this Commission. Further, the Commission previously has adjudicated the issue of transmission charges (Order dated 11.10.2021 in Petition No. 19 of 2017), in principal approval for installation of FGD (Order dated 29.11.2021 in Petition No. 21 of 2021) and issue of fly ash (Order dated 29.11.2021 in Petition No. 26 of 2021) among the parties. All the said Orders had been passed in exercise of the Commission's jurisdiction of adjudication of disputes under the Electricity Act, 2003. In all such proceedings, MPPMCL was impleaded as Respondent and it had contested the matter on its merits. Therefore, in view of the Hon'ble APTEL Judgment dated 19<sup>th</sup> August, 2020 and approach taken by the Commission in earlier petitions of similar nature, objection of Respondent No. 1 on this issue stands no merit.

**Issue No. 2:**

35. The Respondent No. 1 (MPPMCL) contended that the Petitioner has not challenged the letter dated 30.03.2020 & 31.03.2020 by virtue of which the Force Majeure clause was invoked by the Respondent no.1 during the Covid-19 Pandemic.
36. In response to the aforesaid contention of the Respondent No. 1, the petitioner submitted that the present petition is for recovery of the balance Capacity Charges/Fixed Charges

for the period April, 2020 along-with LPS. Force majeure has been raised as a Defense by Respondent No. 1. The petitioner further submitted that in any event, the Respondent No. 1 is resorting to hyper-technical arguments in the present proceedings having no basis whatsoever, in order to justify its untenable Defense. The Petitioner has denied the occurrence of a force majeure event, and stated that the decrease in demand would not qualify as a force majeure event. Since the petitioner has already raised its objection on invoking Force Majeure clause by MPPMCL in aforesaid letters, Therefore, the Commission is of the view that the aforesaid letters being part of current proceedings, there is no need to challenge aforesaid letters separately.

Hence, this issue raised by MPPMCL stands no merit.

**Issue No. 3:**

37. The Respondent No. 1 (MPPMCL) has submitted that the Petition is barred by limitation as the cause of action arose on 30.3.2020, when the notice for force majeure was issued by the Respondent no.1 and the Petition has been filed in or around 3.6.2023. On the issue of limitation, the petitioner has submitted that the present petition is filed within the limitation period and not barred with the limitation Act on following reasons:

- i. Firstly, the notice for cessation of force majeure was issued by MPPMCL on 05.06.2020 and thus, the period of limitation ends on 05.06.2020 which gives rise to cause of action to file the Petition. The present Petition has been filed on 05.06.2023 i.e. within 3 years from 05.06.2020, is thus within limitation.
- ii. Secondly, the Petitioner, on 05.05.2020, raised a Monthly Tariff Invoice(s) upon MPPMCL for supply of power during the month of April, 2020. The said invoice was payable within the due date of 30 days from the date of invoice. Therefore, the cause of action arose after expiry of 30 days from the date of invoice i.e. on 05.06.2020, when the amount towards capacity charges was due and payable and was not paid by MPPMCL by invoking force majeure. Therefore, the present Petition has been filed on 05.06.2023 is within limitation.
- iii. Thirdly, the Petitioner Company is under moratorium starting from 05.09.2019 till the date of filing of the present Petition and as per Section 60(6) of the



Insolvency and Bankruptcy Code, 2016, the time period of moratorium is liable to be excluded from computation of the limitation period.

- iv. Fourthly, vide order dated 13.05.2022, the Commission issued Multi-Year Tariff Order for Unit No. 1 for the control period FY 2019-20 to FY 2023-24 in petition No. 64 of 2021. Further, true-up order for FY 2019-20 to FY 2021-22 was issued on 03.03.2023 in petition No. 74 of 2022. Aforesaid MYT/True-up orders in respect of Unit No. 1 of M/s Lanco Amarkantak were delayed due to which the matter of jurisdiction was pending before Hon'ble APTEL and same has been decided on 19.08.2020.
- v. Lastly, in view of the difficulties being faced by the litigants across India on account of outbreak of the Covid-19 pandemic, Hon'ble Supreme Court of India, vide order dated 10.01.2022 directed that the period from 15.03.2020 to 28.02.2022 shall stand excluded in computing the period of limitation.

38. The petitioner further submitted that MPPMCL in Petition No. 10 of 2021 in the matter of Jhabua Power Ltd., had also argued that in view of Section 14 of the IBC Code, as the Petitioner-Jhabua Power had been admitted by the NCLT for Corporate Insolvency Resolution Process, therefore, the Petition of Jhabua Power was not maintainable. In this regard, the Commission, while rejecting the objection on maintainability raised by MPPMCL, stated as under:-

*“23. The above provision under Section 14 is to bar “transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein”. The Petitioner (Corporate Debtor) is not alienating or disposing any legal right or beneficial interest but is claiming the payment withheld by the Respondent. Therefore, the contention of the Respondent on maintainability of the subject petition has no merit.”*

39. Commission accepts the contentions of the petitioner in this regard. As per directions of Hon'ble Supreme Court, the period from 15.03.2020 to 28.02.2022 stands excluded in computing the period of limitation for the purpose of the present petition. As such, the Commission observes that the subject petition is not barred under limitation. In the

present case, cause of action for filing the present Petition arose on 30.03.2020. Excluding the period up to 28.02.2022, the present petition is well within limitation period. Hence, contention of Respondent No.1 stands no merit.

40. In light of the issues examined in the preceding paragraphs of this order, it is observed that the objections raised by Respondent No. 1 (MPPMCL) on maintainability of the petition are unfounded. The Commission Finds the petition maintainable. The petition be listed for final hearing on 05.12.2023 on merits.

**(Prashant Chaturvedi)**  
Member

**(Gopal Srivastava)**  
Member (Law)

**(S. P. S. Parihar)**  
Chairman