

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject: In the matter of Petition 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 for the supply period of April, 2020 along-with applicable Late Payment Surcharge.

ORDER

(Date of Order: 1st. January, 2024)

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.
2nd Floor, NBCC Tower, 15,
Bhikaji Cama Place,
New Delhi – 110066.

} - **Respondents**

Shri Deepak Khurana, Advocate and Shri Anil Sharma appeared on behalf of Petitioner.
Shri Ashish Barnard, Advocate, Shri Kabeer Paul, Advocate and Shri Nitin Khatri appeared on behalf of Respondent No. 1.
Shri Ravi Kishor, Advocate appeared on behalf of Respondent No. 2.

M/s Lanco Amarkantak Power Ltd. (hereinafter referred as the 'Petitioner') has filed subject petition 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 Charges /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 Covid19 pandemic.

2. The Petitioner is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 has established and is operating a coal based thermal power station having two units with capacity of 300 MW each (Unit-I & Unit-2) 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 of Madhya Pradesh.
4. The Respondent No. 2 (PTC India Limited or PTC) 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 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. Because of some disputes arose in respect of the PPA, the Petitioner, vide its letter dated 14.01.2008, terminated the PPA with the Respondent No. 2. Thereafter, vide its letter dated 10.08.2009, the Respondent No. 2 terminated the PSA with Respondent No. 1.
6. Thereafter, the Petitioner and the Respondents amicably resolved their disputes of termination and accordingly they signed a Settlement Agreement dated 16.10.2012. In terms of the Settlement Agreement, the Petitioner and Respondent No. 2 entered into an Implementation Mechanism for PPA dated 24.11.2012 containing modified terms and conditions of the PPA. Similarly, Respondent No. 1&2 entered into an Implementation Mechanism for PSA dated 26.11.2012 containing modified terms and conditions of the PSA. 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.
7. Date of Commercial Operation (CoD) of the 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.

8. The main issue in the subject petition is under recovery of Capacity charges during the month of April, 2020. The Respondent No. 1 by invoking 'force majeure clause' under PPA/PSA due to nationwide lockdown declared by the Government of India in respect of Covid-19 pandemic and paid Capacity charges corresponding to the actual power scheduled from the generating stations on daily basis and not for the full DC given by the generating station. The ground on which the Respondent No. 1 (MPPMCL) sought to invoke the provisions of Force Majeure was on account of the purported reduction in the power demand in the State of Madhya Pradesh and consequent reduction in the revenue due to nationwide lockdown.
9. Petitioner in the subject petition has broadly submitted the following-
- i. On 19.02.2020, the Ministry of Finance ('MoF'), Government of India issued a circular wherein while referring to para 9.7.7 of the 'Manual for Procurement of Goods, 2017' it was stated that the disruption in supply chains due to spread of the Covid-19 virus in China or any other country should be considered as a case of natural calamity and the Force Majeure Clause may be invoked, wherever considered appropriate.*
 - ii. Pursuant to the above, on 24.03.2020, Ministry of Home Affairs ('MHA'), Government of India, in exercise of powers under Section 10(2)(I) of the Disaster Management Act 2005, issued Guidelines with respect to measures to be taken by Central Government and State Governments for containing the spread of Corona Virus/Covid-19 in the country. In terms of the MHA Guidelines, a nation-wide lockdown was imposed in the country and all government, commercial and private establishments were directed to be closed except for those providing essential services. **In terms of Clause 4(g) of the MHA Guidelines, power generation, transmission and distribution were recognized as essential services and were exempt from the lockdown.** In view thereof, all activities pertaining to generation and distribution of power were to continue like normal.*
 - iii. On 25.03.2020 Ministry of Power ('MoP'), Government of India issued a letter to the State Secretaries of Power Department stating that generation and supply of electricity being essential commodity/services are exempted from the restrictions imposed by lockdown. The MoP further stated that power generation utilities, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), shall supply inter-state electricity to the grid. Hence, their operations are critical for maintaining*

power supply across the country. Accordingly, MoP requested all the State Secretaries to ensure that the restrictions of lockdown do not hamper the movement of staff and raw materials of these power plants.

- iv. On 27.03.2020, the MoP issued an order to the Load Despatch Centres, Electricity Regulatory Commissions, Central Electricity Authority, and all the generating and distribution companies, providing that in light of the negative impact of the lockdown on the liquidity of Discoms, it had been decided that till 30.06.2020 power would be scheduled even if payment security mechanism was established for 50% of the amount for which payment security mechanism is to be otherwise established contractually.*
- v. On 28.03.2020, MoP, issued a Press Release stating that despite the lockdown imposed to contain the spread of the COVID 19 pandemic, the whole workforce of the power sector, viz: generation, transmission, distribution and system operations is working round the clock to keep all homes and establishments lighted, as MoP is committed to provide 24x7 supply of electricity to all consumers. On 28.03.2020, MoP also issued directions to the CERC under Section 107 of the Electricity Act regarding reduction in the rate of Late Payment Surcharge payable by the Distribution Licensees till 30.06.2020.*
- vi. In view of the above, it is submitted that the Petitioner as well as Respondent No. 1/MPPMCL engaged in providing essential services viz, Generation and Distribution of electricity to the consumers of Madhya Pradesh, during the period of lockdown MPPMCL, was exempted from the restrictions imposed due to lockdown and continued to be operational for generating and supplying power with no change/waiver in its respective contractual obligations under the under the Settlement Agreement dated 16.10.2012, the Implementation Mechanism for PPA dated 24.11.2012 and Implementation Mechanism for PSA dated 26.11.2012.*
- vii. The Respondent No. 1, on 30.03.2020, issued a Notice to the Respondent No. 2 ('Force Majeure Notice') claiming that the nationwide lockdown imposed by MHA Order dated 24.03.2020 due to the outbreak of Covid-19 Pandemic was an event of Force Majeure. By way of the Force Majeure Notice, MPPMCL inter alia, stated that:*
 - (a) the spread of corona virus and resulting nationwide lockdown should be considered as a case of natural calamity and was a force majeure situation.*

- (b) *as a result of the outbreak of the pandemic, the Discoms and trading licencees such as the Respondent No. 1 were facing the challenge of drastic reduction in collection of revenue from retail consumers. It was further state that the demand of the State was reduced sharply due to closure of industries, shops and major establishments forcing Discoms in Madhya Pradesh not to schedule or partly schedule power from generating companies.*
 - (c) *the Respondent No. 1 sought to invoke the provisions of the force majeure clause provided in the PPA/PSA and claimed the events of nationwide lockdown and steps being taken to contain spread of Covid-19 as the force majeure event.*
 - (d) *due to fall in collection of revenue, the Respondent No. 1 stated that payment of power purchase bills of the scheduled capacity may be delayed.*
- viii. *The Respondent No. 2, vide letter dated 31.03.2020, addressed to the Petitioner stated that the relief of 'Force Majeure' event as available in the PPA would be applicable and that due to the extraordinary situation the ability of Respondent No. 2 meet its performance obligations was being impeded. Reference was made to the Press Release dated 28.03.2020 of the MoP and circular dated 27.03.2020 issued by the Reserve Bank of India ('RBI'), to notify the Force Majeure event. It was stated that the Respondent No. 2 would be constrained to schedule power based on the demand requisition of the DISCOMs and that it would endeavor to make payments when the cash flow improves. The Petitioner was requested to continue to supply power and raise all bills (for periods after 01.03.2020), keeping in view the Government/RBI orders. The Petitioner was further informed about the receipt of the Force Majeure Notice from the Respondent No. 1.*
- ix. *On 04.04.2020, the Government of Madhya Pradesh ('GoMP') issued directions under Section 108 of the Electricity Act to the Commission to specify a reduced rate of LPS to be charged by generating companies and transmission licensees during the period of 24.03.2020 to 30.06.2020 on account of the unprecedented situation arising due to restrictions placed by the Central Government to contain COVID-19.*
- x. *For implementation of GoMP directions dated 04.04.2020, the Commission passed a Suo-Motu Order on 05.04.2020 and held that if any delayed payment is made by MPPMCL/MP Discoms to the generating companies and/or intra-State Transmission licensees beyond 45 days from the date of the presentation of the bills/invoices or due date mentioned in PPA falls between 24.03.2020 and 30.06.2020,*

MPPMCL/Distribution Companies shall make payment with LPS at the rate reduced by 0.50% per month on existing LPS rate specified in the respective Regulations.

- xi. Pertinently, on 06.04.2020, MoP, issued a further clarification to its earlier letters/Notifications dated 27.03.2020 and 28.03.2020, stating that no exemption has been given to Distribution Licensees from making payment of bills within 45 days of its presentation and obligation to pay for Capacity Charges under PPA shall continue. The directions of MoP in aforesaid clarificatory order are summarized below:*
- “(a) The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.*
- (b) Late payment surcharge shall apply at reduced rate only for the period between 24.03.2020 to 30.06.2020 (on those payments that become overdue during the period 24.03.2020 to 30.06.2020 and not on those payments which were already overdue before 24.03.2020) and after 30.06.2020, the delayed payment surcharge shall be payable at rates given in the PPA/Regulations.*
- (c) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges.*
-”*
- xii. The Respondent No. 1, vide letter dated 07.04.2020, in continuation of its earlier letter dated 30.03.2020, stated that it shall only be paying for the “Declared Capacity” (‘DC’) corresponding to the actual power scheduled from the generating stations on daily basis and not for the full DC given by the generation station. It was stated that the commencement of the event of force majeure shall be 24.03.2020 and will continue till the situation is revised by the National Disaster Management Authority. The Respondent No. 1 further stated that it was unable to determine how long the purported force majeure situation will continue and that it will review the situation and inform as and when clarity is received. The said letter of the Respondent No. 1 was forwarded to the Petitioner by the Respondent No. 2 vide its letter dated 16.04.2020.*
- xiii. On 15.04.2020, MHA issued guidelines extending the nationwide lockdown till 03.05.2020. In terms of Clause 11(iii) of said MHA Guidelines, Power Generating Company and Distribution Licensees continue to be exempted from the restrictions imposed due to lockdown on account of providing essential services. It is submitted that similar guidelines were issued by MHA on 01.05.2020 further extending the lockdown till 17.05.2020.*

- xiv. *Vide email dated 16.04.2020, the Petitioner replied to the Respondent No. 1's Force Majeure letter and while disputing the claim of the Respondent for an event of force majeure stated as under:*
- (a) *The decision of the Respondent No. 1 to make payment on the actual power scheduled from the generating station on daily basis and not for full DC given by the generating station was incorrect and contrary to the Regulations based on which payment was required to be made to the Petitioner.*
 - (b) *It was well within the knowledge of the Respondent No. 1 that the tariff comprising of capacity charges and energy charges for a thermal generating station is computed and billed as per the applicable Regulations which is payable by the Discom/Procuree to the generating station. As per the Regulations, the summation of the daily DC declared by the generating station up to the end of the month leads to Plant Availability Factor achieved for the Month which further at the end of the year cumulates to the Plant Availability Factor for the year. As per the Regulations, the capacity charges of a thermal generating station have to be computed on annual basis based on the norms specified under the applicable regulations and recovered on monthly basis under capacity charge. There was no basis for the Respondent No. 1 to consider actual power scheduled as the basis for computation of DC for making payment of fixed charges as energy charges are computed and billed based on the actual power scheduled.*
 - (c) *The Petitioner stated that it was running operations of its power station round the clock with minimum skeleton manpower of about 40% to maintain continuity in power generation while deferring all non-critical routine maintenance activities and that despite all the massive issues being faced by the Petitioner, it was prioritizing running of the power plant at the given schedule without any breakdown. It was further stated that in the circumstances the deduction in fixed charges or delay in payments might lead to severe liquidity issues for fuel, transportation, salaries etc. which are critical for maintaining power generation.*
 - (d) *The Petitioner requested the Respondent No. 1 to withdraw its letter and consider making payments based on the actual DC declared by the generating station on daily basis as per the applicable provisions and make timely payments for fixed and energy charges against monthly bills in terms of the applicable Regulations.*
- xv. *The Respondent No. 1, vide letter dated 28.04.2020, in response to the above email dated 16.04.2020 from the Petitioner, stated that:*

- (a) *The Respondent No. 1 was invoking the force majeure conditions due to the unprecedented steep reduction in demand of power from its consumers, especially commercial/industrial, faced by it in view of the lockdown, which had led to reduction in revenue for the Respondent No. 1 and the same was preventing the Respondent No. 1 from performing its obligations under the PSA.*
 - (b) *The issue of Late Payment Surcharge had been addressed in the order dated 03.04.2020 passed by the Hon'ble CERC in the matter of Implementation of directions of the MoP, Govt to CERC under Section 107 of the Act regarding reduction of LPS.*
 - (c) *The reduction in the demand of power by the commercial/industrial sector had culminated to the Respondent being forced to schedule power in low quantum. The abnormal reduction in demand qualifies as a force majeure event and hence capacity charges corresponding to the reduced demand shall also qualify under force majeure*
 - (d) *The Respondent No. 1 reiterated its request for relaxation in the capacity charge during the purported force majeure event as stated above.*
- xvi. *The Petitioner, vide email dated 01.05.2020, again denied the occurrence of a force majeure event, and stated that the decrease in demand would not qualify as a force majeure event. It was reiterated by the Petitioner that energy charges for a thermal power station was computed and billed as per the applicable Regulations and that the action of the Respondent No. 1 in unilaterally modifying the computation and billing of payments was contrary to the provisions of the applicable Regulations and applicable provisions of the Grid Code. The Petitioner further stated that the Respondent No. 1 had been paying only 90% (i.e. after deducting 10% fixed charges from the petitioner's monthly bills) of the fixed charges of the Unit since last two years without specifying any basis for the same and that any further reduction in the fixed charges would aggravate the precarious financial position of the Petitioner and may affect the operations of its Unit. The Respondent No. 1 was therefore requested to withdraw its letter and make payments against the monthly bills of the Petitioner as per applicable Grid Code and Tariff Regulations.*
- xvii. *On 05.05.2020, the Petitioner raised Monthly Tariff Invoice(s) upon the Respondent No. 1 for supply of power during month of April 2020 amounting to Rs.50,23,38,208/- which included Capacity Charges amounting to Rs. 22,37,83, 334/-.*

- xviii. *Further to the above, the Petitioner lodged its protest to the reduction of the Fixed Charges based on Scheduled Energy instead of Declared Capacity by the Respondent No. 1 and the deduction that had been made from the Fixed Charges payable to the Petitioner against the billed amount for the month of April, 2020 as the same was contrary to terms of the agreement and the applicable Regulations. The Petitioner requested for release of the differential amount of Rs. 1,07,11,587/- towards Fixed/Capacity charges for the month of April, 2020 and provided the Respondent No. 1 with details of calculation for differential fixed charges.*
- xix. *That pursuant to the above, MHA issued order dated 30.05.2020 extending lockdown in Containment Zones upto 30.06.2020 and to re-open the prohibited activities.*
- xx. *The Respondent No. 1, vide letter dated 05.06.2020, while referring to the order dated 30.05.2020 of the MHA announced cessation of the purported force majeure and vis major situations invoked by the above mentioned notices issued for the period 24.03.2020 till 31.05.2020 and restoration of its rights or obligations with immediate effect i.e. from 01.06.2020. The decision of the Respondent No. 1 was further intimated to the Petitioner by the Respondent No. 2 vide its letter dated 05.06.2020 confirming cessation of the force majeure event.*
- xxi. *Aggrieved by such unilateral and illegal deduction of Capacity (Fixed) Charges of Rs. 1,07,11,587/-, the Petitioner, wrote various communications to the Respondent No. 1 regarding the deficit payment received by the Petitioner against the Monthly Tariff Invoices raised for supply of power during the month of April, 2020*
- xxii. *The Petitioner, vide letter dated 16.03.2023, requested for release of the deficit payment of Rs. 1,07,11,587/- received by the Petitioner against the Monthly Tariff Invoices raised for supply of power during the month of April 2020.*
- xxiii. *It is further submitted that the Respondent No. 1 has not been making full payment of the monthly tariff invoices raised by the Petitioner for the power supplied to the Respondent No. 1 without any basis. As on date, tariff payment of Rs. 1,07, 11,587/- is outstanding on part of the Respondent No. 1 for the power procured by it from the Petitioner. It is submitted that the Respondent No. 1 has unilaterally and wrongfully withhold payments to be made to the Petitioner.*
- xxiv. *It is submitted that during the nationwide lockdown, Generating Companies and Distribution Licensees were directed to remain operational on account of providing essential services, viz; generation and distribution of electricity. Accordingly, the*

Petitioner has been declaring the availability of its generation capacity for offtake by the Respondent No. 1 as per the Government Orders, PPA/PSA, Settlement Agreement, Implementation Mechanism of the PPA/PSA and the other prevailing regulations including the applicable Grid Code etc. Therefore, performance of obligations under the PPA/PSA etc. by the Respondent No. 1 as well as the Petitioner were not impacted by imposition of lockdown in any manner. Since there was no hindrance or stoppage of activities pertaining to generation and distribution of electricity, the Respondent No. 1's claim that the nationwide lockdown imposed by Government of India due to the outbreak of Covid-19 Pandemic, constitutes an event of Force Majeure under the PPA, is erroneous and illegal.

- xxv. It is submitted that the Order dated 24.03.2020 of the MHA was issued to take effective measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country. The Guidelines issued provided for a complete lockdown in the country, while ensuring maintenance of essential services and supplies. In terms of the above, the activities relating to power generation, transmission and distribution, being essential in nature, were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19. Therefore, the Respondent No. 1 sought to wrongfully take advantage of the conditions prevailing at the contemporaneous time.*
- xxvi. It is further submitted that letter dated 25.03.2020 issued by the MoP clarified that the generation and supply of electricity being an essential commodity/services was exempted from the restrictions imposed by lockdown. Furthermore, the letter dated 27.03.2020 issued by the MoP directions were issued to generating companies such as the Petitioner herein and distribution licensees regarding payment security mechanism.*
- xxvii. Pertinently, vide letter dated 06.04.2020, the MoP issued a clarification to its earlier order dated 27.03.2020 and stated that there has been some mis-conception regarding interpretation of its previous order and clarified that the obligation to pay for Capacity Charges by the procurer shall continue, as does the obligation to pay for transmission charges.*
- xxviii. It is therefore submitted that both the Petitioner and the Respondents were operational during the lockdown period, as they were exempted from the restrictions imposed due to lockdown on account of providing essential services. Therefore,*

imposition of nationwide lockdown due to outbreak of Covid-19 does not qualify as an event of Force Majeure under the PPA/PSA.

xxix. Without prejudice to the foregoing, it is submitted that the Covid-19 and consequent lockdown was not an event of Force Majeure as the generation, supply, transmission etc. of electricity was an essential commodity exempt from the restrictions imposed by the lockdown. It is further submitted that the Covid-19 and the lockdown did not affect the performance of the obligations of the Respondents and therefore there was no reason whatsoever for the Respondents to seek to invoke the provisions of Force Majeure under the PPA/PSA.

xxx. It is further submitted that the ground on which the Respondent sought to invoke the provisions of Force Majeure was on account of the purported reduction in the power demand in the State of Madhya Pradesh and the consequent reduction in the revenue. In this regard, it is submitted that mere reduction in demand of power and/or collection of revenue cannot be any stretch of imagination be considered as an event of Force Majeure.

xxxi. Without prejudice to the foregoing, it is submitted that the recovery of Capacity (Fixed) Charges by the generating companies under the disputed period is governed by the provisions of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 ('MPERC Tariff Regulations'). A bare perusal of the MPERC Tariff Regulations, would show that the Capacity (Fixed) Charges are payable to the generator based on the actual plant availability factor with reference to normative plant availability factor. The actual plant availability factor is to be determined based on the Declared Capacity (DC) of the generating unit/station on day ahead basis in terms of the provisions under the Regulations. However, the Respondent No. 1 while invoking force majeure clause has wrongfully computed Capacity (Fixed) Charges for the Petitioner's plant based on scheduled Power, which was not in accordance to the aforesaid provisions under MPERC Tariff Regulations.

xxxii. It is further submitted that the Commission, in a petition i.e. Petition No. 10 of 2021 titled 'M/s Jhabua Power Ltd. vs the Managing Director, M.P. Power Management Company Ltd.', wherein similar issue was raised by the generator regarding non-payment of Capacity (Fixed) Charges by the Respondent No. 1 on the declared capacity which were sought to be refused by the Respondent No. 1 on similar grounds, vide order dated 18.11.2021, directed the Respondent No. 1 to pay Capacity/Fixed Charges for the period of April and May, 2020 along-with LPS in

accordance with the MPERC Tariff Regulations and the power purchase agreement read with the Commission's order dated 05.04.2020, regarding reduction in the LPS. Against the order dated 18.11.2021, the Respondent No. 1 filed a petition i.e. Petition No. 53 of 2022 seeking review, which also was dismissed by the Commission vide its order dated 11.10.2022.

xxxiii. Further to the above, the Commission has passed various other orders in favour of generators in similar set of facts whereby the Respondent No. 1/M.P Discoms have been directed to pay Capacity/Fixed Charges for the period of April and May, 2020 along-with LPS. In this regard, the Petitioner is placing on record for consideration of the Commission order dated 26.07.2022 passed in Petition No. 72 of 2021 and order dated 09.09.2022 passed in Petition No. 27 of 2022.

xxxiv. In view of the above, it is submitted that the Respondent No. 1 is liable to pay Capacity/Fixed Charges for April 2020 along-with applicable Late Payment Surcharge in accordance to provisions under the MPERC Tariff Regulations, 2020, the PPA/PSA read with the Settlement Agreement and Implementation Mechanism of the PPA/PSA executed between the parties. It is further submitted that the purported invocation of the Force Majeure clause by Respondent No. 1/Respondent No. 2 is not valid as already held by the Commission in various other matters.

10. With the above submissions, the petitioner prayed the following:

a. *“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;”*

11. The subject petition was admitted at the motion hearing held on 18th July, 2023. Vide order 18th 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 also asked to file rejoinder within a week, thereafter. The case was fixed for hearing on the 5th September, 2023.

12. By affidavit dated 22.08.2023, respondent No. 1 (MPPMCL) filed response to the subject petition. By affidavit dated 31.08.2023, the petitioner filed rejoinder on the response filed by respondent No. 1.

13. At the next hearing in this matter held on 5th September, 2023, representative appeared 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.
14. Further, during the hearing of other matters held on 12th 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 20th September, 2023.
15. At the hearing held on 20th 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.
16. Vide Order dated 3rd December, 2023, the Commission found the petition maintainable and was listed for final hearing on 05.12.2023 on merits.
17. The subject petition was last heard on 5th December, 2023, wherein arguments completed by the parties and having heard the parties, the case was reserved for order.

Submissions by the parties:

18. By affidavit dated 22.08.2023, the Respondent No. 1 has broadly submitted the following on merits:-
 - i. *Without prejudice to the submissions on the maintainability of the Petition, with respect to the merits of the case it is most respectfully submitted that it is the entire case of the Petitioner that:*

- a) *There can be no "Force Majeure" with respect to the purchase of power under the PPA as power generation and distribution were under the exempted category from the lockdown imposed due to Covid-19 by the Union of India. Further in this regard the petitioner has relied on several letters of the Union of India.*
- b) *Therefore, on merit the submissions of the Petitioner is that there is no Force Majeure under the PPA.*
- ii. *With respect to the first submission raised by the petitioner that power generation, transmission and distribution are under the exempted category as per the circular dated 24.03.2020 of the Union of India issued during the National Lockdown imposed, it is most respectfully submitted that the perusal of the said circular highlights that the exception from close down in Clause 1 of the order dated 24.03.2020 is only towards power generation and transmission of units and further any exceptions from Close down of any entity does not in any way establish that there was no Force Majeure Condition as adjudication of force majeure has to be undertaken on basis of provisions of the PPA.*
- iii. *It is submitted that undoubtedly, Covid-19 has been a force majeure event and therefore the Commission needs to examine the provisions of the PPA and provisions of the Contract Law for adjudication of the instant petition.*
- iv. *However, without prejudice it is submitted that the supply of electricity is undoubtedly an important service, therefore, the respondent and the State DISCOMS were engaged in continuous supply of the electricity. However, as mentioned in the notice of Force Majeure dt.30.03.2020 & 31.03.2020 it has been clearly stated that as the consumption and demand of electricity has drastically reduced, therefore, there is force Majeure situation and in this light that the notice of force Majeure was issued. It is also submitted that the lockdown imposed in March 2020 was a once in a lifetime issue and Respondent had rightfully invoked force majeure provisions working from their respective homes.*
- v. *However, the issuance of the Force Majeure notice does not mean the supply of electricity to the Consumers has been completely stopped. It is submitted that the Force Majeure notice was issued as there was admittedly a drastic drop in the demand of electricity and public interest mandated that the Force majeure notice is issued so that appropriate financial resources could be saved and used for efficiently. It is submitted that eventually all tariff is a pass through to the consumer and by invoking of Force Majeure as per the terms of the PPA the Respondent has exercised its contractual rights correctly and in accordance with public interest. It is submitted that the drastic reduction in demand due to lockdown was anticipated by the officials of the Respondent and*

accordingly the notice of Force Majeure was issued to not just the Petitioner but also several other generators such as JP Bina, JP Nigrie, BLA, PTC (Torrent), NTPC& MPPGCL. The Respondent is attaching a comparative chart showing demand of electricity during the month of April 2020 and May 2020 in comparison with the month of April-May 2019 to demonstrate the drop in demand during the lockdown.

- vi. Further reliance of the petitioner on the circular dated 27.03.2020 does not favour the petitioner case in any manner as the same is only limited to the opening and maintaining of letter of credit as a payment security mechanism by the distribution licensee. In this order of 27.03.2020 it was directed by the Union of India that looking to the unprecedented and force majeure situation the payment security mechanism for scheduling of power shall be at 50%.
- vii. It is further submitted that in this order of 27.03.2020, GOI clearly held in para -3 that the Covid-19 pandemic is unprecedented and force majeure situation. It is submitted that it is the entire case of the respondent herein that the Covid-19 pandemic is a once in a life time pandemic and is a natural force majeure under the terms of power purchase agreement and is unprecedented in nature and therefore, it is completely incorrect on the part of the petitioner to aver or allege that the invocation of force majeure clause is not as per the provisions of PPA. It is submitted that the Covid-19 pandemic being once in a century or life time has affected millions of public globally and when it struck India in the year 2020, there is no knowledge of kind of virus erupted and the fear in the mind of the public was unprecedented towards this unknown virus and it is perhaps for the first time in the history of independent India that a national lockdown was imposed, thus it is completely incorrect on the part of the petitioner to aver or allege that the covid-19 pandemic is not force majeure as per the provisions of the PPA.
- viii. It is most respectfully submitted that as per Article of force majeure of the PPA, the covid-19 pandemic is a force majeure event therefore, no tariff is payable to the petitioner at the duration of Force majeure by the Respondent.
- ix. Further the reliance of the petitioner on the letter dated 06.04.2020 and in particular at Para -3(C) of the said letter wherein the Union of India has clarified that the obligation to pay capacity charges as per the PPA shall continue. It is submitted that the said letter of GOI does not in any manner state that capacity charges have to be paid even if the respondent or the purchaser has invoked the force majeure clause. Further, it is reiterated that as per PPA, no tariff is payable to the petitioner at the duration of Force majeure by the Respondent. It is submitted, without prejudice, that the PPA prevails over any such circular. It is humbly submitted that however, the Respondent made

payment of full Capacity charges and Variable charges for all the energy scheduled during this period to the Petitioner.

- x. It is submitted that a careful reading of para-3(C) of the letter dated 06.04.2020 of the Union of India highlights that the obligation to pay capacity charges is 'as per the PPA' and therefore, the Commission would have to examine the payment of capacity charges in terms & provisions of the PPA, which contains rights and obligations of the parties, and in the instant case, the respondent has invoked the force majeure clause of the PPA and as per the same no tariff is payable to the petitioner, therefore, even reliance of the petitioner on the letter dated 06.04.2020 of the GOI is of no help to the petitioner.*
- xi. It is further submitted the reliance of the petitioner on the letter dated 28.03.2020 issued by the Union of India issued U/s 107 of the Electricity Act is also of no help to the petitioner as firstly the letter dated 28.03.2020 clearly acknowledges that the covid-19 event is force majeure and secondly the directions given in the said letter are only in relation with reduction in the rate of late payment surcharge and do not give any direction that capacity charges has to be paid even in the event of invocation of force majeure by the Purchaser (DISCOM) under the PPA. This decision, in itself, implies that Union of India was fully aware of precarious situation faced by all Discoms during lockdown and intended to help them by directing to make fullest use of their dwindling resources and stopping/reducing all phantom payments like high rates of LPSC which do not contribute to purchase of electricity. It is humbly submitted that payment of idle Capacity charges to the Petitioner without procuring energy also falls under this category of phantom payments and hence, the Respondent diligently made payment of Capacity and variable charges for all the energy scheduled during this period.*
- xii. Lastly the reliance of the petitioner on the letter dated 15.05.2020 is also of no avail as it is a request to the generating company and the transmission company of the central sector by the Union of India, to offer a rebate to the distribution companies. In this regard it is most respectfully submitted that the respondent has in view of the said letter dated 15.05.2020 been successful in getting a rebate from NTPC and MP Genco to the tune of Rs. 147.08 Cr. & Rs. 96.42 Crores respectively.*
- xiii. It is further submitted, without prejudice, that the letters and circulars of the Union of India, cannot in any manner also be helpful to the Petitioner for the simple reason that the Commission is required to examine the instant dispute in accordance with the terms of the PPA, which is the contract between the parties. Further without prejudice it is submitted that even the letters of the Union of India clearly hold and state that covid-19 is a force majeure situation and secondly, payment of capacity charges has to be as per*

the PPA. It is submitted that it is undeniable that the Covid-19 is a force majeure and was a global pandemic.

- xiv. *It is submitted that undoubtedly, Covid-19 has been a natural force majeure event and therefore the Commission needs to examine the provisions of the PPA and provisions of the Contract Law (section 32 and 56) for adjudication of the instant petition. It is further an admitted fact that the electricity has to be supplied to hospitals and private homes and therefore it is not the case of the Respondent that there was no supply to be made during lockdown. It is submitted that due to the lockdown there was a drop in demand due to closure of commercial and industrial establishment and this even of covid-19 lockdown is a force majeure event under the PPA and therefore no tariff payment is payable under Force Majeure event.*
- xv. *That, to summarize the question of law raised by the petitioner, “whether the Nationwide lock down imposed by the government of India declaring the COVID 19 as pandemic was a Force majeure Event or not?”, it is most humbly submitted that the instant dispute is a contractual dispute governed by the PPA wherein an inclusive list of Force Majeure events has been laid down, the said list is not exhaustive and gives scope for inclusion to an unprecedented event due to which the petitioner/respondent could not perform its duties as laid down in the PPA, in the instant case the lockdown had a far reaching effect and the demand for electricity had unpredictably dropped drastically, due to which the respondent could not have performed its obligation under the PPA, the liberty (exemption), granted by Gol to the officials of DISCOMs, TRANSCOMs, to freely move during the lockdown to meet power requirement, cannot be construed otherwise and forgo the fact that the Force Majeure event did existed. It is further submitted that the reliance on the letter dated 15.5.2020 of the Ministry of Power is of no avail as the same was not concerning the IPP’s but was for State Genco’s and even they have granted 25% rebate on bills.*
- xvi. *It is pertinent to mention that power supply is a dynamic situation and the lockdown does not mean that power shall not be supplied to hospitals etc. In fact, when there was a demand the power was drawn from the Petitioner strictly as per MOD during the force majeure period.*
- xvii. *It is lastly submitted that the reliance of the Petitioner on the case of Petition no. 10/21 and order passed by the Commission it is respectfully submitted that the Respondent no.1 has challenged the same before the Hon’ble High Court of MP and the Hon’ble High Court has granted stay on the order dated 18.11.2021 vide its order dated 4.3.2022 and now the appeals are pending before the Hon’ble APTEL.*

19. By affidavit dated 31.08.2023, the Petitioner filed the rejoinder and broadly submitted the following:
- i. *The Respondent has sought to contend in para 6 of the Reply that Clause 1 of the order dated 24.03.2020 provides that the exemption is only towards power generation and transmission and that the same does not establish that there was no Force Majeure Condition as the adjudication of Force Majeure has to be undertaken as per the provisions of PPA. It is submitted at the outset that declaration of nationwide lockdown by the Government of India does not amount to Force Majeure in terms of the PPA entered into between the parties. The Government considered the power sector to be an essential service and it was exempted from the nationwide lockdown declared by the Government. The submission of the Respondent regarding the order dated 24.03.2020 pertaining only to generation and transmission is incorrect and misconceived.*
 - ii. *The Respondent further stated that it was facing challenge of drastic reduction in the collection of revenue and reduction in demand. In this regard, the Petitioner, has been regularly denying the occurrence of a force majeure event under the PPA/PSA. It is stated that decrease in the demand of power or revenue would not qualify as a force majeure event. If such argument of Respondent was to be accepted, even a sudden increase in demand/revenue would amount to a force majeure event. Such illogical interpretation cannot be given to a contract between commercial entities.*
 - iii. *The Respondent has further sought to state in para 8 of the Reply that the lockdown pursuant to the outbreak was once in a lifetime and thus the Respondent rightfully invoked the force majeure provisions. However, the supply of electricity had not completely stopped. The Respondent has sought to state that the notice was issued for saving the financial resources and the same was in public interest. In this regard, it is submitted that the contentions of the Respondent are self-destructive.*
 - iv. *The Respondent has stated that it gave force majeure notice to several generators to save appropriate financial resources. It is submitted that this only shows that there was no force majeure affecting the Respondent receiving electricity but the Respondent, only to manage its commercial and financial affairs claimed it as a force majeure.*
 - v. *The Respondent has, in para 10 of the Reply, stated that the reliance of Petitioner on the circular dated 27.03.2020 does not favour the Petitioner's case as the same is limited to the opening and maintaining of the letter of credit as payment security mechanism by the distribution licensee. In the order of 27.03.2020, it is stated that there was an unprecedented force majeure situation and the payment security mechanism shall be at*

- 50%. The contention of the Respondent is misconceived and holds no water. It is submitted that the letter dated 06.04.2020 of the MoP has clarified the earlier letter dated 27.03.2020 stating, inter alia, that the obligation to pay for Capacity Charges as per the PPA shall continue as does the obligation to pay for transmission charges.
- vi. The Respondent has stated that the letter dated 06.04.2020 does not in any manner state that capacity charges have to be paid even if the purchaser has invoked the force majeure clause. As per the Respondent, PPA prevails over the circular. In this regard, it is submitted that the circular dated 06.04.2020 has in unequivocal terms clarified that the obligation to pay for power shall remain unchanged and that the obligation to pay for Capacity Charges shall continue. It was further stated in the circular that LPS shall apply for delayed payments. There is no other clarification which was required to be given. The circular dated 24.03.2020 read with circulars dated 27.03.2020, 28.03.2020 and 06.04.2020 makes it loud and clear that irrespective of the provisions of the PPA the obligations for supply of power and for payment for such supply and for capacity charges shall continue during the lockdown. If the intention of MoP was that everything would be subjected to PPA, there was probably no need for issuing any such circulars.
- vii. The Respondent has further sought to state in para 15 that the letter dated 28.03.2020 is a force majeure event and that the directions given in the said letter are only in relation to the rate of late payment surcharge. In this regard, it is submitted that the letter clearly recognizes the relief which needs to be extended by generating companies to the distribution licensees even assuming but not admitting that the Covid-19 affected the rights and obligations of parties. In the said letter, MoP has issued a policy directive with regard to reduction in the rate of LPS and clearly recognizes the extent of relief that was to be given by generators to distribution licensees. The letter cannot be read negatively i.e. in the manner suggested by the Respondent.
- viii. In so far as the contention of the Respondent regarding Covid-19 being a force majeure event, it is submitted that in view of the various orders/circulars etc. stated in the Petition and referred to hereinabove, there is an obligation cast upon the Petitioner to pay to the Respondent capacity (fixed) charges based on the actual plant availability factor even for the duration of lockdown.
- ix. It is submitted that similar objections raised by the Respondent No. 1 as above, have already been rejected by the Commission in Order dated 18.11.2021 and 11.10.2022 in Petition No. 10 of 2021 filed by 'M/s Jhabua Power Ltd. and in other generating companies such as M.B. Power and Jaypee Power supplying power to the Respondent No. 2 on the same issue of wrongful deduction of capacity charges.

Commission's Observations

20. The subject Petition is filed by M/s Lanco Amarkantak Power Limited 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 period of April, 2020 along-with applicable Late Payment Surcharge (LPS). The issue under dispute in this petition is non-payment of Capacity/Fixed Charges by the Respondent No. 1 (MPPMCL) to the Petitioner corresponding to the actual Plant Availability Factor (PAF) based on declared capacity (DC) for the period of 'April, 2020'. During the aforesaid period, the Respondent No. 1 (MPPMCL) while invoking Force Majeure event under the provisions of PPA/PSA on account of nationwide lockdown due to Covid-19 pandemic, had restricted payment of Capacity charges/Fixed charges to the extent of power actually scheduled by Respondent No. 1, without considering the actual Plant Availability Factor based on the Declared Capacity of the plant.
21. On account of Covid-19, the Ministry of Home Affairs ('MHA'), issued Guidelines with respect to measures to be taken for containing the spread of Corona Virus in the country. In terms of the MHA Guidelines, a nation-wide lockdown was imposed in the country and all government, commercial and private establishments were directed to be closed, except for those providing essential services. In terms of Clause 4(g) of the MHA Guidelines, power generation, transmission and distribution were recognized as essential services and were exempted from the lockdown.
22. The dispute in the subject matter occurred when the Respondent No. 1 (MPPMCL) vide letter dated 30.03.2020 issued a Notice to the Respondent No. 2 ('Force Majeure Notice') invoked Force Majeure clause under the PPA mentioning that the nationwide lockdown imposed by MHA vide Order dated 24.03.2020 due to the outbreak of Covid-19 Pandemic was an event of Force Majeure. By way of the aforesaid Notice, the Respondent No. 1 sought to state that due to outbreak of Covid-19, demand of power in the State of Madhya Pradesh had purportedly reduced, which was leading to reduction in revenue of the Respondent No. 1.
23. While issuing the aforesaid force majeure notice, Respondent No. 1 referred the order dated 24.03.2020 of National Disaster Management Authority (NDMA), which was addressed to the Union Home Secretary, Gol to take effective measures for ensuring social distancing to prevent spread of COVID-19 in the country. It is observed that the Guidelines issued by NDMA provided for a complete lockdown in the country while ensuring maintenance of

essential services and supplies. In the aforesaid guidelines, the services of power generation, transmission and distribution, being essential in nature, were exempted from the purview of the said lockdown. The Respondent No. 1 had also referred the Ministry of Power, Government of India's letter dated 27.03.2020 vide which certain directions were issued to generating companies and distribution licensees regarding payment security mechanism as mentioned below:

“Considering the unprecedented and force majeure situation, it has been decided that power may be scheduled even if payment security mechanism is established, for 50% of the amount for which payment security mechanism is to be otherwise established contractually.”

24. It is further observed that vide letter dated 06.04.2020, Ministry of Power issued a clarification to its earlier order dated 27.03.2020 and 28.03.2020, mentioning that there has been some mis-conception regarding interpretation of its previous orders and clarified that the obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges. The directions of MOP in aforesaid clarificatory order are summarized below:
- a. “The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.
 - b. Late payment surcharge shall apply at reduced rate only for the period between 24.03.2020 to 30.06.2020 (on those payments that become overdue during the period 24.03.2020 to 30.06.2020 and not on those payments which were already overdue before 24.03.2020) and after 30.06.2020, the delayed payment surcharge shall be payable at rates given in the PPA/Regulations.
 - c. Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges. Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly; However, Discoms may also raise funds, if required, to meet the crises.”
25. In continuation to letter dated 30.03.2020, Respondent No. 1 wrote another letter dated 07.04.2020 informing the Respondent No. 2 that the Respondent No. 1 is not desirous to avail power from the petitioner's power plant as there is no such power requirement due to massive drop in consumers' demand and that the Declared Capacity (DC) is not being accepted by it till further notice and MPPMCL shall only be paying for the DC corresponding to the actual power scheduled from generating stations. MPPMCL stated that the date of commencement of the Force Majeure event is 24.03.2020 and will continue till the situation is revised by the National Disaster Management Authority.

26. The Petitioner, vide email dated 16.04.2020, replied to the Respondent No. 1's force majeure Notice/letter, and while disputing the claim of the Respondent as for the purported event of force majeure under the PPA/PSA stated that the decision of the Respondent No. 1 to make payment on the actual power scheduled from the generating station on daily basis and not for full DC given by the generating station was incorrect and contrary to the Regulations based on which payment was required to be made to the Petitioner. It was further stated that tariff comprising of capacity charges and energy charges for a thermal generating station is computed and payable by the Discom/Procurer in terms of the Regulations. The Petitioner requested the Respondent No. 1 to withdraw its letter and make payments based on the actual DC declared by generating station and make timely payments for the invoices in terms of the applicable Regulations.
27. Vide order dated 15.04.2020, MHA, GoI issued guidelines extending the nationwide lockdown till 03.05.2020. In terms of Clause 11(ii) of said MHA Guidelines, Power Generating Company and Distribution Licensees continued to be exempted from the restrictions imposed due to lockdown. It is observed that the similar guidelines were issued by MHA on 01.05.2020, further extending the lockdown till 17.05.2020.
28. In response to the above email of petitioner dated 16.04.2020, vide letter dated 28.04.2020, Respondent No. 1 stated that:
- (a) The Respondent No. 1 was invoking the force majeure conditions due to the unprecedented steep reduction in demand of power from its consumers, especially commercial/industrial, faced by it in view of the lockdown, which had led to reduction in revenue for the Respondent No. 1 and the same was preventing the Respondent No. 1 from performing its obligations under the PSA.
 - (b) The issue of Late Payment Surcharge had been addressed in order dated 03.04.2020 passed by the CERC in the matter of Implementation of directions of the MoP, GoI to CERC under Section 107 of the Act regarding reduction of LPS.
 - (c) The reduction in the demand of power by the commercial/industrial sector had culminated to the Respondent being forced to schedule power in low quantum. The abnormal reduction in demand qualifies as a force majeure event and hence capacity charges corresponding to the reduced demand shall also qualify under force majeure.
 - (d) The Respondent No. 1 reiterated its request for relaxation in the capacity charge during the purported force majeure event as stated above.

29. In response to the above, the Petitioner vide email dated 01.05.2020 again denied the occurrence of a force majeure event, and stated that the decrease in demand would not qualify as a force majeure event. It was reiterated by the Petitioner that energy charges for a thermal power station was computed and billed as per the applicable Regulations and that the action of the Respondent No. 1 in unilaterally modifying the computation and billing of payments was contrary to the provisions of the applicable Regulations and applicable provisions of the Grid Code. With the above submission, the petitioner requested the Respondent No. 1 to withdraw its letter invoking force majeure and make payments against the monthly bills of the Petitioner as per applicable Grid Code and Tariff Regulations.
30. The Petitioner did not receive balance of Rs. 1,07,11,587/- being the differential amount deducted by the Respondent No. 1 for the supply period of April, 2020 based on the capacity declared by the Petitioner. The Respondent No.1 (MPPMCL) has made deduction in the Capacity/Fixed Charges for the supply period of April, 2020 considering the scheduled energy instead of capacity declared by the Petitioner.
31. Further, vide order dated 30.05.2020, MHA issued directions for extending the lockdown in Containment Zones upto 30.06.2020 and to re-open the prohibited activities.
32. Vide letter dated 05.06.2020, the Respondent No. 1, while referring to the order dated 30.05.2020 of the MHA announced cessation of the force majeure invoked by the above mentioned notices issued for the period 24.03.2020 till 31.05.2020 and restoration of its rights or obligations with immediate effect i.e. from 01.06.2020. The decision of the Respondent No. 1 was further intimated to the Petitioner by the Respondent No. 2 vide its letter dated 05.06.2020 confirming cessation of the force majeure event.
33. The Petitioner, vide letter dated 16.03.2023 again requested for release of the balance payment of Rs. 1,07,11,587/- against the Monthly Tariff Invoices raised for supply of power during the month of April, 2020. The petitioner, submitted that since the parties have failed to amicably settle the dispute pertaining to payment of capacity charges for the period April, 2020, the petitioner is constrained to file the present Petition under Section 86(1)(f) of the Electricity Act' 2003.
34. MPPMCL in its Reply to subject petition submitted that exceptions laid down under Clause 1 of the Order dated 24.03.2020 passed by the Ministry of Home Affairs, Government of India were limited towards the power generation and transmission of units. MPPMCL further

contended that the consumption and demand of electricity was reduced drastically therefore, the consequential impact of COVID-19 qualify as a Force Majeure event under the provisions of the PPA and MPPMCL had exercised its contractual rights.

35. Respondent No. 1 has further submitted that the Covid-19 pandemic is a once in a life time pandemic and is a natural force majeure under the terms of power purchase agreement and is unprecedented in nature and therefore, it is completely incorrect on the part of the petitioner to say that the invocation of force majeure clause is not as per the provisions of PPA. MPPMCL has also submitted that the Covid-19 pandemic being once in a century or life time has affected millions of public globally and when it struck India in the year 2020, there is no knowledge of kind of virus erupted and the fear in the mind of the public was unprecedented towards this unknown virus and it is perhaps for the first time in the history of independent India that a national lockdown was imposed, thus it is completely incorrect on the part of the petitioner to aver or allege that the covid-19 pandemic is not force majeure as per the provisions of the PPA.
36. With regard to reliance of the Petitioner on the order passed in a similar matter by this Commission in Petition No. 10/2021, the Respondent No. 1 has stated that it has challenged the order dated 04.03.2022 before the Hon'ble High Court of Madhya Pradesh and has been granted stay vide order dated 04.03.2022 and now the appeals are pending before APTEL. In this regard, the petitioner has submitted that the Misc. Petition No. 564 of 2022 filed by Respondent No. 1 before the High Court of Madhya Pradesh, has been, vide order dated 01.08.2023, disposed of for the same not being maintainable. It is further submitted by the petitioner that in the Appeal filed by Respondent No. 1 before the Hon'ble APTEL being Appeal No. 489/2023, admittedly, there is no interim stay of the Order dated 18.11.2021 passed by the Commission.
37. With regard to status of aforesaid Miscellanies Petition No. MP 564 of 2022 filed before Hon'ble High Court by MPPMCL against Commission's Order dated 18.11.2021, the Commission has observed that vide Order dated 1st August' 2022, Hon'ble High Court has **disposed of this** Miscellanies Petition with following observations and directions:

“Heard on the question of admission and interim relief.

Initially, this Court had entertained the writ petition and vide order dated 04.03.2022 had issued notice to the respondents and in the meanwhile had stayed the effect and operation of the orders dated 18.11.2021 and 18.12.2021 till the next date of hearing. After notice, the respondents have filed preliminary objection with regard to maintainability of the writ petition on the ground that the petitioners have an

alternative efficacious statutory remedy under Section 111 of the Electricity Act, 2003. As such, this petition is not maintainable and the same is liable to be dismissed on this ground alone.

Learned senior counsel appearing for the petitioner, however disputed that the issue involved in the writ petition is not covered by the aforesaid decisions and also submitted that he has a remedy to file a review under Section 94 (1)(f) of the Act. In the impugned order, there is perversity, therefore he would like to file review petition under Section 94 of the Act. Learned senior counsel for the respondent No.2 has no objection, in case the petitioner avails the remedy of review under Section 94 of the Act within a period of three weeks from today.

In view of the aforesaid, this Court is not inclined to entertain the writ petition but relegates the petitioner to avail remedy of review under Section 94 of the Act by filing the same within a period of three weeks from today along with the application for interim relief. If such review petition is filed, the reviewing authority shall consider the application for interim relief and pass such appropriate orders in accordance with law after hearing both the sides. The interim order granted by this Court on 04.03.2022 shall continue till the date of first hearing by the Commission.

*With the aforesaid liberty, this petition is **disposed of**.*

38. Further, MPPMCL had filed review petition No. 53 of 2022 for review of Commission's Order dated 18.11.2021 and vide order dated 11.10.2022, the review petition was found non-maintainable and hence, dismissed by the Commission. Therefore, as of now, no stay granted by Hon'ble High Court on order dated 18.11.2021 and contention of the Respondent No. 1 in this regard is wrong and contrary to the order passed by Hon'ble High Court.

39. Further, the Commission has observed that the CERC also in its Order dated 20.01.2022 passed in petition No. 594/MP/2020 GMR Warora Energy Ltd. Vs. DNH Power Distribution Co. Ltd. held as follows:

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

40. In a recent decision, on March 20, 2023, Hon'ble Supreme Court in SLP (C) Nos. 4067/2023 and 4125/2023, PSPCLB v. Talwandi Sabo Power, in similar facts, declined to give any relief to the Punjab Holding Company (PSPCL), who similarly sought to avoid payment of capacity charges and late payment surcharge by attempting to invoke the pandemic as a force majeure event; and declined to interfere with the division bench order of Hon'ble Punjab and Haryana High Court of 30.01.2023 in LPA 767/2022 and LPA 770/2022 upholding the obligation of the procurer to pay the capacity charges and late payment surcharge.
41. MPPMCL has submitted that the Covid-19 has been a natural force majeure event and therefore the Commission needs to examine the provisions of the PPA for adjudication of the instant petition. MPPMCL has further submitted that the electricity has to be supplied to hospitals and private homes and therefore it is not the case of the Respondent No. 1 that there was no supply to be made during lockdown. In fact, during lockdown period, there was a drop in demand due to closure of commercial and industrial establishment and this even of covid-19 lockdown is a force majeure event under the PPA and therefore no tariff payment is payable under Force Majeure event.
42. Let us now look into the articulations regarding Force Majeure Events under Article 11 of the PPA dated 11.05.2005 executed between the parties in this matter, which are as follows:

FORCE MAJEURE

11.1 Definitions

In this Article 11, the following terms shall have the following meanings:

11.1.1 Affected Party

means the Company or PTC whose performance has been affected by an event of Force Majeure.

An event of Force Majeure affecting the CTU in relation to the transmission system shall be deemed to be an event of Force Majeure which materially and adversely affects the obligations of PTC, subject to CTU and PTC complying with the other requirements of this Article.

An event of Force Majeure affecting the Purchaser shall be deemed to be an event of Force Majeure affecting PTC, subject to PTC complying with other requirements of this Article.

Any event of Force Majeure affecting the performance of the Construction Contractor or Fuel Oil Supplier or Coal Supplier-or the transport contractors under the Fuel Oil Supply Agreement and the Coal Supply Agreement shall be deemed to be an event of Force Majeure which materially and adversely affects the obligations of the Company,

subject to the Company and such Construction Contractor, Fuel Oil Supplier, Coal Supplier, transport contractors under the Fuel Oil Supply Agreement and the Coal Supply Agreement complying with the other requirements of this Article.

11.1.2 Force Majeure

means any event or circumstance or combination of events and circumstances Including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

- (i) act of God, Including lightning, drought, fire, explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, thunderstorm, or exceptionally heavy rains which are in excess of the statistical measures for the last hundred (100) years, or*
- (ii) any explosion, accident, breakage of facilities, plant or equipment, structural collapse or a chemical contamination caused by a person not being the Affected Party and not being due to inherent defects in the Project or the Transmission Facilities, or*
- (iii) any epidemic, plague or quarantine, or*
- (iv) meteorite crash, air crash, damage caused by objects falling from aircraft, or other flying devices or vehicles, pressure waves caused by aircraft or aerial devices travelling at supersonic speed, shipwreck, train wrecks, or*
- (v) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo (including, causing unavailability or shortage of fuel or materials), revolution, riot, Insurrection, civil commotion. religious strife, communal violence, act of terrorism, extremist action or politically motivated sabotage or abduction, or*
- (vi) radioactive contamination or ionizing radiation, or*
- (vii) strikes, sabotage, go-slows or similar Industrial disputes at the Project or at the works of boiler, steam turbine and generator manufacturer, or the Grid excluding such events which are Site specific / and/or attributable to the Company or such manufacturers, or*
- (viii) expropriation, requisition, confiscation, nationalization, export or Import restrictions, requirements, action or omissions to act on the part of any Government Instrumentality or any person controlled by a Government Instrumentality; or*

- (ix) *archaeological findings that were not reasonably foreseeable or discovery of historically significant artifacts on the Site, or*
- (x) *the revocation or cancellation or delay in renewing (other than for cause) of any Consent; or*
- (xi) *acts of government, or compliance with such acts, which directly affects such Party's ability to perform its obligations hereunder, or*
- (xii) *any event or circumstance of a nature analogous to any of the foregoing.*

11.2 Non Force Majeure Events

None of the following conditions shall constitute an event of Force Majeure, unless the existence of such condition is the result of an event of Force Majeure:

- (i) *late delivery of plant, machinery, equipment, material: spare parts or consumables for the Project or Interconnection Facilities, or*
- (ii) *a delay in the performance of any Construction Contractor or the construction contractor of the Interconnection Facilities.*
- (iii) *Strikes or Boycotts Interrupting supplies and services to the Project particular to the Company and Involves the Company or the Company's Contractors or their respective employees, agents or representatives or any strike or boycott attributable to any unfair policy or practice of the aforementioned persons.*

11.3 Notification of Force Majeure Event

11.3.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it not reasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed, and the Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the situation.

11.3.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure, and (ii) the cessation of the effects of such event of Force Majeure in the performance of. Its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

.....

43. On perusal of the aforesaid conditions, the events for Natural force majeure as articulated under PPA are act of God, including but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions, which are in excess of the statistical measures for the last hundred (100) years. When in definition certain terms are used and thereafter there is a general term, the general term has to be construed to the words used prior in the very same definition. However, in the instant case, the reasons enumerated by the Respondent No. 1 like sharp decrease in demand due to closure of industries, shops and other major establishments due to the lockdown and disruption in the economic activity caused reduction in collections of revenue by the Respondent No. 1 from the consumers does not fall under the events/conditions for natural force majeure under clause 11.1.2 of the PPA.
44. It is observed that Ministry of Power, Government of India's vide letter dated 27.03.2020 issued certain directions to generating companies and distribution licensees regarding payment security mechanism. Vide letter dated 06.04.2020, the Ministry of Power issued a clarification to its earlier order dated 27.03.2020 and stated that there has been some misconception regarding interpretation of its previous order and clarified that the obligation to pay for Capacity Charges by the procurer as per the PPA shall continue, as does the obligation to pay for transmission charges.
45. Moreover, the recovery of Capacity (Fixed) Charges by the generating companies under the disputed period be governed in accordance to the provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020. Therefore, let us look into the provisions under Generation Tariff Regulations, 2020 for recovery of capacity Charges by the Generator:

“The fixed cost of a thermal generating station shall be computed on annual basis, based on norms specified under these Regulations, and recovered on monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share / allocation in the capacity of the generating station. The capacity charge shall be recovered under two segments of the year, i.e. High Demand Season (period of three months) and Low Demand Season (period of remaining nine months), and within each season in two parts viz, Capacity Charge for Peak Hours of the month and Capacity Charge for Off-Peak hours of the month as follows ---- :

Normative Plant Availability Factor for “Peak” and “Off-Peak” Hours in a month shall be equivalent to the NAPAF specified in Regulation 49 of these Regulations.

The Plant Availability Factor achieved for a Month (PAFM) shall be computed in accordance with the following formula:

$$PAFM = 1000 \times \sum_{i=1}^N \frac{DCi}{[N \times IC \times (100 - Aux)]} \%$$

Where,

AUX= Normative auxiliary energy consumption in percentage.

DCi = Average declared capacity (in ex-bus MW), for the 1 th day of the period i.e. the month or the year as the case may be, as certified by the concerned load dispatch centre after the day is over.

IC = Installed Capacity (in MW) of the generating station

N = Number of days during the period

Note: DCi and IC shall exclude the capacity of generating units not declared under commercial operation. In case of a change in IC during the concerned period, its average value shall be taken.

46. As per the above provisions under the Tariff Regulations, 2020, the Capacity (fixed) Charges are payable to the generator based on the actual plant availability factor with reference to normative plant availability factor. The actual plant availability factor is to be determined based on the declared capacity (DC) of the generating unit/station on day ahead basis in terms of the provisions under the Regulations. However, the Respondent No. 1, while invoking force majeure clause has computed Capacity (fixed) Charges for the petitioner’s plant based on scheduled Power, which is not in accordance to the aforesaid provisions under MPERC Tariff Regulations,2020.
47. In view of the foregoing observations as well as examining the records, the PPA/ PSA and relevant Regulations, the Commission has observed that the reasons/conditions for invocation of Force Majeure clause by MPPMCL were not in accordance to the provisions of the PPA/PSA and MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020. The Commission found that the Government communications/orders did not exempt the procurer from payment of capacity charges as per the PPA. The Commission further observed that “recovery of Capacity (Fixed) Charges by the generating companies under the disputed period shall be governed in accordance to the provisions under

Generation Tariff Regulations, 2020”, according to which, the Capacity Charges “are payable to the generator based on the actual plant availability factor with reference to normative plant availability factor. Accordingly, the Commission allows the petition, and directs the Respondent No. 1 (MPPMCL) to pay the balance Capacity Charges / Fixed Charges for the period of April, 2020 along with late payment surcharge in accordance to the provisions under the MPERC Tariff Regulations, 2020, the PPA/PSA executed between the parties read with Commission’s order dated 5th April, 2020, regarding reduction of Late Payment Surcharge (LPS).”

With the above observations and directions, the subject petition is disposed of.

(Prashant Chaturvedi)
Member

(Gopal Srivastava)
Member (Law)

(S. P. S. Parihar)
Chairman