

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Petition No.85/2012

Subject: In the matter of review of the order dated 7th September, 2012 passed by this Hon'ble Commission, inter alia, in respect of petition No.10 of 2012 modifying the Power Purchase Agreement dated 5th January, 2011 executed between the Respondents 1 to 4 and the Petitioner herein.

ORDER

(Date of Order: 7th February, 2013)

M/s BLA Power Pvt. Ltd., Mumbai

Petitioner

V/s

- 1. M. P. Power Management Co. Ltd., Jabalpur**
- 2. M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur**
- 3. M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal**
- 4. M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore**

Respondents

Shri Sanjay Sen, Advocate, Shri K. S. Parihar, Director, Shri Pratik Bhurat, Manager (Commercial) and Shri Anurag Sharma, Advocate appeared on behalf of the petitioner.

Shri Prakash Pachori, DGM (Comml.) and Shri R. V. Saxena, DGM appeared on behalf of Respondent No.1 and also on behalf of Respondent No.2.

Shri V. Ramesh Iyer, DGM (Comml.) appeared on behalf of Respondent No.3.

Shri Anant Chaure, Law Officer appeared on behalf of Respondent No.4.

The petitioner has filed the subject petition seeking review of the Order passed by the Commission dated 7th September, 2012 inter alia, in respect of petition No.10 of 2012 modifying the Power Purchase Agreement dated 5th January, 2011 executed between the Respondents 1 to 4 and the Petitioner herein.

2. The petitioner broadly submitted the following in its petition and the written note filed with the Commission on 16th January, 2013 :

- a) *“The present review petition is being filed on behalf of M/s BLA Power Pvt. Ltd. (hereinafter “the Petitioner”) seeking a review of the Order dated 07.09.2012 (“Impugned Order”) passed by this Hon’ble Commission in Petition No.10 of 2012 filed by the Respondent Nos.1 to 4 herein, to the extent of certain additions/modifications directed to be incorporated in the Power Purchase Agreement dated 05.01.2011 (“the PPA”) by this Hon’ble Commission.*
- b) *On 24.07.2012, this Hon’ble Commission in exercising jurisdiction available under section 62 read with section 86(1)(a) and (b) of the Electricity Act, 2003, approved the provisional tariff of the Petitioner. In the said order, the Hon’ble Commission was, inter alia, pleased to approve the tariff which includes the variable cost as well as the fixed cost. Having approved the tariff, the Hon’ble Commission thereafter proceeded with the process of approval of PPA.*
- c) *The Petitioner in its comments to the PPA raised certain issues in respect to Sub-Articles 4.2, 4.3.7 and 10.1.1. However, no comments were raised in respect to Sub-Articles 4.1.1(iii) or seek the addition of Sub-Article 3.1.1.2. Therefore, it appears that this Hon’ble Commission, suo-motu has modified Sub-Article 4.1.1(iii) and added Sub-Article 3.1.1.2 to the PPA.*
- d) *After hearing the parties to the present Petition and the other clubbed Petitions, this Hon’ble Commission accorded approval to the power purchase agreements including the PPA between the parties herein, vide the Impugned Order. However, such approval was subject to incorporation of certain additions/modifications to various clauses of the PPA, including Sub-Article 4.1.1(iii) and the Sub-Article 3.1.1.2, which are the subject matter of review by way of the present petition.*
- e) *In the present case, it is necessary to highlight that at no stage during the PPA approval process was there any demand from the Respondents for insertion of the Impugned amendment. In fact, there was no occasion for any party to address the Commission on this issue because the same was never the subject matter of enquiry. Therefore, the Petitioners have not had any opportunity of being heard by the Hon’ble Commission in before this Hon’ble Commission decided to introduce the Impugned amendment to the PPA.*
- f) *It is submitted that in the present case after execution of the PPA, the Petitioner has been supplying power to the respondents at the tariff approved by the Hon’ble Commission. Therefore, the PPA has been acted upon and as such, binding rights and obligations have arisen in terms thereunder.*

g) *The Petitioner's case can be broadly classified under the following heads:*

- (i) *This Hon'ble Commission does not have the jurisdiction to amend terms of a Power Purchase Agreement, particularly when the proposed amendment has the effect of allowing and / or enabling the Respondent (M.P. Power Management Co. Ltd.) to exit from the PPA.*
- (ii) *The power to regulate a Power Purchase Agreement under section 86(1)(b) of the Electricity Act, 2003, cannot be extended to permit a modification in the PPA, which modification makes the agreement itself uncertain and capable of not being performed at all.*
- (iii) *The Hon'ble Commission has failed to appreciate that the cost of fuel is an intrinsic part of tariff. Under Section 62 read with provisions of the MPERC (Terms and Conditions for Determination of Tariff) Regulations, the Commission has an obligation to determine the tariff, which includes both the capacity charge as well as the variable (fuel) charge. The amendment in the PPA has effectively resulted in the Hon'ble Commission handing over/delegating an essential regulatory function to the Respondent. The Respondent now has the ability by virtue of the proposed amendment to decide whether the tariff (the fuel cost portion) is appropriate or not. This is outside the scheme of the Electricity Act, 2003 and the regulations. It constitutes abdication of essential regulatory function.*
- (iv) *The regulation framed by the Hon'ble Commission under the statutory principles in terms of the statutory principles enunciated under Section 61 of the Act does not recognize any ability of the procurer to decide on the issue of tariff.*
- (v) *Further, the determination of tariff under section 62 presupposes the existence of a PPA. The proposed amendment allows the Respondent to abandon the PPA after tariff has been determined. Effectively the Respondent has the ability to negate and/ or render nullity the exercise undertaken by the Hon'ble Commission for determination of tariff under section 62 of the Electricity Act, 2003.*
- (vi) *The Hon'ble Commission has failed to appreciate that the Power Purchase Agreement is binding on the parties. The Hon'ble Commission's ability to regulate the Power Purchase Agreement is limited to regulating certain "statutory" aspects of the PPA. The statutory aspects of the PPA can be classified as follows:*
 - i.) *the process of procurement of power; and*
 - ii.) *the tariff itself.*

Apart from the aforesaid, the other parts of the PPA are subject to the laws of contract and the Commission cannot modify / amend the terms of contract.

The statutory aspects do not have elements of mutuality, which is an essential ingredient of a contract. This is well explained in the following judgment of the Hon'ble Apex Court.

(vii) *In this context, it is necessary to appreciate that the power to regulate the power purchase and power procurement process does not ipso facto permit the Commission to amend or modify the terms of the contract between a generating company and a distribution licensee except to the extent provided in the Electricity Act, 2003. A careful reading of the Electricity Act, 2003 will demonstrate that while the power procurement process of a distribution licensee can be classified under two heads (a) a procurement process through cost plus or (b) a procurement process through competitive bidding. This is a pre – contract stage. The power procurement process culminates with the execution of the contract. Once the contract comes into existence, there is no question of reopening and / or modifying the same, except to the extent provided in the Electricity Act, 2003 (that is, tariff revision). Section 86 (1) (b) is limited to regulating the “power purchase”, “power procurement process” and “price’. There is no scope to read any general power to amend contracts within Section 86 (1) (b). To introduce such power by a process of statutory interpretation will result in uncertainty and chaos. The principle of sanctity of contract will be lost.*

While the Commission is fully entitled to regulate the procurement process of a distribution licensee, the statute does not permit the Commission to extend its regulatory powers to regulate the terms of the Power Purchase Agreement after the same has been executed and, as in the case of BLA Power, has been implemented.

It is well possible for the Commission to approve model Power Purchase Agreement that a distribution licensee ought to execute. However, after the distribution licensee has executed a Power Purchase Agreement, the Commission cannot thereafter use its regulatory powers to amend/ modify the terms of the Power Purchase Agreement. It is submitted that the Commission’s power to modify tariff will always remain because tariff is not a part of contract in the true sense. Tariff does not have elements of mutuality. Parties cannot sit across and agree on tariff. Tariff is a result of a statutory exercise of power (either under Section 62 or 63), over which the Commission will always have jurisdiction.

h) In view of the above submissions, the Hon’ble Commission may consider allowing the review petition filed by the Petitioner herein.”

3. The case was listed for motion hearing when the Counsel on behalf of the petitioner argued, inter-alia, that satisfaction of the conditions subsequent by the company for having obtained concurrence of the procurer to the Fuel Supply Agreement entered into with the fuel supplier was neither agitated/deliberated in any previous hearing nor discussed in any of the daily orders issued by the Commission in the matter. The petitioner, therefore, did not get any opportunity to examine and respond in the matter.

4. Considering this argument, the subject review petition was admitted under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and the petitioner was directed to serve copy of the petition on all respondents. The respondents were also directed to appear before the Commission in this matter on the date of next hearing and file their reply on the issues in the petition by 10th December, 2012.

5. M P Power Management Co. Ltd., Jabalpur, Respondent No.1 in the matter, filed its response with the Commission on 14th December, 2012. The respondent broadly submitted the following:

- (i) *“The petition filed by the Review Petitioner for review of the judgement and order dated 7.9.2012 passed by the Hon’ble Commission is totally misconceived and is without any merit. It is well settled that a petition for review is maintainable only on error apparent on the face of record or for sufficient reasons akin to the same or for discovery of any material which were not available at the time of the hearing of the main petition.*
- (ii) *The decision of this Hon’ble Commission in the Order dated 7th September, 2012, in particular, in paragraph 12 (iii) and (v) have been taken consciously in the circumstances that fuel constitutes significant part of the cost of power generation and sale of electricity by the Review Petitioner to Respondents. The higher fuel cost will be against the interest of the consumers. The said decision of the Hon’ble Commission cannot be said to be erroneous much less an “error apparent on the face of the record”.*
- (iii) *In terms of clause 3.2 (iii) of the PPA, the review petitioner has duly agreed to implement the PPA “with such modification to the terms thereof as may be decided by the Appropriate Commission”. Accordingly, the decision of the Hon’ble Commission on the aspect of modification to clauses 3.1.1.2 and clause 4.1(iii) of the PPA are fully in accordance with the terms agreed to by the review petitioner in the PPA.*
- (iv) *MPPMCL while denying all the arguments put forth by the review petitioner has stated that there is no merit in this review petition filed by the review petitioner.”*

6. During hearing held on 18th December, 2012 :

- a) Respondent No.1 stated : that it had filed its reply with the Commission on 17th December, 2012.
- b) Respondent No.2 authorized Respondent No.1 to represent it before the Commission in the subject matter.

- c) Counsel for the petitioner sought two weeks' time to file a rejoinder to the reply filed by Respondent No.1 since the reply from Respondent No.1 was received only on 15th December, 2012.

7. By affidavit dated 29th December, 2012, the petitioner filed a rejoinder to the reply filed by Respondent No.1. The petitioner broadly submitted the following in the aforesaid rejoinder :

1. *"In response to paragraph no.1 of the reply, it is respectfully submitted that the Petitioner is aggrieved by the impugned order dated 07.09.2012, only to the extent of the modification to Sub Article 4.1.1.(iii) and the addition of Sub Article 3.1.1.2 to the PPA, by virtue of which, the Hon'ble Commission has imposed a pre-condition for approval of the PPA filed by the Respondents in Petition No.10 of 2012. This modification has been imposed without affording any opportunity of being heard to the parties and against the principles of natural justice. The present review petition is very much maintainable on merits as well as on law and the same is to be allowed in the light of the pleadings/grounds taken in the body of the review petition and the same are not being repeated herein, for the sake of brevity and in order to avoid repetition. The Petitioner craves leave of this Hon'ble Commission to reiterate and refer/rely upon the pleadings/paragraphs/grounds taken in the body of the review petition.*

In so far as the interpretation of Section 94 of the Electricity Act, 2003 and Order 47 Rule 1 of the Code of Civil Procedure, 1908, is concerned, it is respectfully submitted that the same are related to the provisions of law, which is an admitted position and the same are not been denied or disputed. However, the present review petition has been preferred, keeping in mind the said provisions of law only. It is most respectfully submitted that there is an error apparent on the face of the record and there is sufficient reason for this Hon'ble Commission to review its order dated 07.09.2012, in order to review the incorrect delegation of the tariff determination function to the state utility. Further, this review petition is also maintainable to prevent miscarriage of justice by permitting the Hon'ble Commission to overlook its earlier order dated 24.07.2012 and pass two contradictory orders.

2. *In response to paragraph no.2 of the reply, save and except, what all have been matter of record, the contents thereof, as alleged in the manner or at all, are denied and disputed. It is denied that the said decision of the Hon'ble Commission to the extent of the modifications/amendment in the PPA, cannot be said to be erroneous much less an "error apparent on the face of the record". However, it is submitted and reiterated that such modification of sub-article 4.1.1(iii) of the PPA, to the extent that the generating company would have to obtain the concurrence of the procurer in terms of Sub-Article 3.1.1.12 for its Fuel Supply Agreement ("FSA") is entirely unreasonable and only obstructs the entire*

process of supplying power to the State of Madhya Pradesh and moreover, the Hon'ble Commission does not have any jurisdiction to revise and/or review any non-statutory provision of the PPA, which is entirely governed by the laws of contract. In fact, there is no regulation that allows this Hon'ble Commission to delegate the function of tariff determination and to approve the terms of fuel supply to the procurer for a decision. It is further submitted that the Procurer cannot be permitted to pass a judgment on the earlier order dated 24.07.2012 passed by this Hon'ble Commission, by questioning the fuel cost as being against the consumer interest.

- 3. In response to paragraph no.3 & 4 of the reply, save and except, what all have been matter of record, the contents thereof, as alleged in the manner or at all, are denied and disputed. It is denied that the Review Petitioner does not suffer any prejudice by implementing the order of this Hon'ble Commission in regard to seeking concurrence to the Fuel Supply Agreement entered into with the fuel supplier to enable the Respondents to consider the terms and conditions of the Fuel Supply Agreement. In this context, it is submitted that the Hon'ble Commission in the proposed amendment has vested jurisdiction on the procurer to give concurrence to the FSA, including the rates, terms and conditions thereof. This effectively means that the procurer has the power to go behind the Hon'ble Commission order and disapprove the FSA, which agreement has been provisionally approved by the Hon'ble Commission. In fact, at no stage, during the PPA approval process was there any demand from the Respondents for insertion of the impugned amendment and there was no occasion for any party to address the Hon'ble Commission on this issue because the same was never the subject matter of enquiry.*

It is submitted that even though, the clause 3.2(iii) of the PPA provides for the provisions that "the parties agrees to implement this Agreement with such modification to the terms thereof as may be decided by the Appropriate Commission", nonetheless, the same is applicable only to the extent of any modification with regard to the statutory provisions of the PPA, which is again "tariff determination" and which is within the domain and jurisdiction of the Appropriate Commission but not with regard to the non-statutory provisions, as has happened in the present case, therefore, the said stand of the respondents is baseless and without any merits.

It is further submitted and re-iterated that the Hon'ble Commission after taking a decision on the matter has sought to abdicate its essential regulatory function by requiring the procurer to take a decision on fuel supply which is an intrinsic part of tariff. It is settled proposition of law that tariff is a matter which falls solely within the domain of the regulatory commission. Tariff, unless procedure under section 63 is followed, is not a contractual matter which can be subjected to the test of mutuality. It is settled proposition of law that the regulatory commission can only determine tariff. In fact, the very purpose of the reform legislation was to take away the powers of the Board on matters of tariff and vest the same on the regulatory commission, which had to take an independent view in line with the

overall policy objective to add generating capacity. It is submitted that the Hon'ble Commission by introducing the amendment through a judicial order is effectively asking the state utility to take a decision on fuel cost, which is part of tariff. This is wrong and is contrary to the philosophy enshrined under the Electricity Act, 2003.

It is further submitted and reiterated that the Hon'ble Commission has acted without jurisdiction. The Hon'ble Commission does not have the power to go behind the terms of the PPA except those relating to tariff.

As regards tariff the Hon'ble Commission has the jurisdiction to determine the same on the basis of applicable regulatory principles. The proposed amendment is without any legal or statutory basis. Apart from violating the provisions of the Act, it is submitted that there is no regulation that supports the exercise of power by the Hon'ble Commission. The Hon'ble Commission in exercise of its jurisdiction to determine tariff is governed by its regulations.

4. *In response to paragraph no.5, save and except, what all have been matter of record, the contents thereof, as alleged in the manner or at all, are denied and disputed. It is denied that there is no merit in the Review Petition filed by the Petitioner. However, petitioner craves leave of this Hon'ble Court to refer and rely upon the preceding paragraphs of the rejoinder and stand by what has been stated in the pleadings and grounds of the review petition, in order to support his contentions of maintainability of review petition.*

At this stage, it is important to note that the requirement for the concurrence of the procurer for the FSA does not serve any purpose and does not provide any added security to ensure unobstructed fuel supply for the duration of the PPA. Alternatively, such a condition, grants the procurer the right to reject the execution of an FSA without any corresponding obligation to provide the power supplier with any other option for fuel supply. Thus, leaving the power supplier company in the lurch, with the remaining time bound obligations/liabilities, under the PPA to be borne by the supplier company. Therefore, the impugned provisions of the PPA are one sided, unjustified and therefore liable to be reviewed by this Hon'ble Commission.

In view of the aforesaid submissions, it is therefore, submitted that the prayer of the petitioner as prayed for in the review petition is to be allowed.”

8. During the hearing held on 5th January, 2013, the representatives who appeared on behalf of the respondents submitted that they had nothing to add to their written submission already filed with the Commission.

9. Counsel for the petitioner submitted that a rejoinder in support of the arguments made by him on 5th January, 2013 shall be filed with the Commission. He was allowed to file the rejoinder after serving a copy on the other side also by 16th January, 2013. The petitioner filed written note of submissions on 16th January, 2013 with the Commission. The contention of the petitioner in its aforesaid submission has been mentioned in Para 2 of this order.

10. The Commission has carefully considered the arguments put forwarded by the petitioner and respondents. The Commission finds merit in the petitioner's contention that the amendment in Sub-Articles 3.1, 3.2(ii), 4.1.1(iii) and 4.2(ii) directed by the Commission's Order dated 7th September, 2012 injects a certain ambivalence to the clearly agreed and stipulated responsibility of the procurer in so far as the creation of the evacuation infrastructure is concerned. Indeed, in directing the said amendment, the Commission in its Order of 7th September, 2012 was merely seeking to cover all possible options of creating the evacuation infrastructure, whether directly by the procurer or through third agencies. It was never intended to divide or otherwise reduce the procurer's responsibility in this regard. The Commission has therefore, decided to clarify the issue.

11. The second objection of the petitioner is regarding the Commission's direction dated 7th September, 2012 that it would have to seek the concurrence of the procurer to the terms and conditions etc. of the FSA. The petitioner believes that the amendment directed by the Commission would confer on the procurer an extra right to walk out of a duly executed PPA at its own pleasure. The petitioner believes that giving such right to one party will violate the balance of responsibility and authority inherent in any agreement between parties. The petitioner feels that this makes the agreement unequal and can, at the hand of the procurer, adversely impact the long term prospects of the power generation venture. Such a PPA would also raise doubts in the minds of the lenders who could demand unaffordable guarantees to cover unforeseen and indeterminate risks. The petitioner would have no objection to any authority of this kind being vested in the Commission itself but definitely to the way the procurer is sought to be authorized. The petitioner is willing to submit the FSA for examination according to law by the Commission.

12. Having considered this argument, the Commission find itself in agreement with the petitioner that the suggested amendment would, in a manner, confer on the procurer a virtual regulatory authority which would not be in order.

13. In view of the foregoing analysis, the Commission, on review has decided that its Order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012, be amended in respect of petition No.10 of 2012 as follows :

a) Para 12 (i) be deleted.

b) **Para 12 (ii) be read as follows :**

Definition of “Scheduled Connection Date’ in Sub-Article 1.1 in Article 1 of the PPAs be amended :

“Scheduled Connection Date shall mean the date on or before which the availability of evacuation facilities for the Contracted Energy beyond the Delivery Point shall be established or ensured by the Procurer, which shall be the date falling two hundred and ten (210) days before the Scheduled COD or Revised Scheduled COD, as the case may be, of the first Unit.”

c) **Para 12 (iii) is deleted.**

d) **Para 12 (iv) be read as follows :**

Sub-Article 3.2 (ii) in Article 3 of the PPAs be amended :

“The procurer shall establish at its cost or ensure availability of necessary evacuation infrastructure through CTU/STU or any other agency beyond the delivery point required for evacuation of the Scheduled Energy at least 210 days prior to commissioning of the first unit.”

e) **Para 12 (v) is deleted.**

f) **Para 12 (vi) be read as follows :**

Sub-Article 4.2(ii) in Article 4 of the PPAs be modified as given below :

“Establishing or ensuring the availability of necessary evacuation infrastructure through CTU/STU or any other agency beyond the delivery point required for evacuation of the Contracted Capacity at least 210 days prior to commissioning of the first unit.”

14. All other conditions and directions in the Commission’s order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012 and the corrigendum issued vide Commission’s letter No.MPERC/D(T)/2012/2701 dated 13th September, 2012 shall remain unchanged.

Ordered accordingly.

sd/-
(Alok Gupta)
Member

sd/-
(A. B. Bajpai)
Member

sd/-
(Rakesh Sahni)
Chairman