

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

BHOPAL

Sub: In the matter of petition under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, read alongwith Hon'ble Supreme Court order dated 02.12.2019 passed in CA 8860/2019.

Petition No. 05 of 2020

ORDER

(Date of order: 05th May' 2021)

M.P. Power Management Company Ltd.,

Block No. 7, Shakti Bhawan, Rampur, Jabalpur – 482008

- **Petitioner**

Vs.

M/s. Arya Energy Limited

Through its Director,

Third Floor, E-14, Shyam Plaza, Pandri,

Raipur (Chhattisgarh)

- **Respondent**

Shri Aashish Bernard, Advocate, Shri Aditya Vijay Singh, Advocate, Shri R.K. Thukral, GM (RE) and Shri Praful Kotwal, AE appeared on behalf of the petitioner.

Ms. Swapna Sheshadri Advocate, Shri Ashwin Ramnathan, Advocate and Shri Damodar Solanki Advocate appeared on behalf of the Respondent.

The subject petition has been filed by the petitioner M.P. Power Management Co. Ltd. under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, read alongwith the order dated 02.12.2019 passed by the Hon'ble Supreme Court in CA 8860/2019.

2. The petitioner broadly submitted the following in its petition:

"1. It is most respectfully submitted that the petitioner herein had filed an appeal before the Hon'ble Apex Court challenging the order dated 26.08.2019 passed by the Hon'ble APTEL, being Civil Appeal No.8860/2019.

2. It is submitted that by virtue of the order dated 26.08.2019 the Hon'ble Appellate

*Tribunal for Electricity at New Delhi had interalia directed the petitioner to make payments of fixed costs to the respondent No.1 (M/s Arya Energy Limited). It is submitted at the outset that the instant petition is not on the merits or interpretation of the order passed by the Hon'ble APTEL on 26.08.2019 and is only limited to the direction passed by the Hon'ble Supreme Court on 2.12.2019 in C.A 8860/2019 with respect to the issue of security to be submitted by Respondent for taking payment of fixed costs. A copy of the order dated 2.12.2019 passed in CA. No. 8860/2019 is attached as **ANNEXURE-1**.*

3. *It is submitted that the petitioner had also challenged the order dated 15.05.2017 passed in W.P. No.3819/2017 by the Hon'ble High Court of M.P. Principal Seat at Jabalpur by virtue of which the Hon'ble High Court of M.P. was pleased to allow the petition filed by M/s Arya Energy Limited against the termination of Letter of Intent undertaken by the petitioner herein.*
4. *It is submitted that the matters (SLP 29262/18 and CA 8860/19) were clubbed and heard by the Hon'ble Supreme Court on 02.12.2019 and while the Hon'ble Supreme Court was pleased to dismiss Civil Appeal No.8860/2019 it was also pleased pass certain directions in the order with respect to payment of fixed cost to be made to the respondent herein. It is at this stage also pertinent to note that the Hon'ble Supreme Court has been pleased vide the order dated 2.12.2019, to grant leave and admit SLP No.29262/2018 filed by the petitioner herein challenging the High Court's order dated 15.05.2017..*
5. *It is submitted herein that the Hon'ble Supreme Court in its order dated 2nd December, 2019 has specifically directed as under:-*

"The payment of fixed costs that is made will be subject to orders that may be passed by the Madhya Pradesh Electricity Regulatory Commission, insofar as security, if any, is to be given."
6. *A perusal of the instant direction of the Hon'ble Supreme Court clearly highlights that the payment of fixed costs to be made to M/s Arya Energy Limited shall be*

subject to security to be given by M/s Arya Energy Limited. In other words the Hon'ble Apex Court has been pleased to secure the interest of the Petitioner herein during the pendency of the SLP 29262/18.

- 7. It is submitted at this stage and also pertinent to note that the Petitioner has also learnt that, as per the information in the commercial circles, the Respondent 'M/s Arya Energy Limited' is today a non-performing asset or its power plant is today in shut down mode. It is submitted that the issue of security to be submitted by M/s Arya Energy Limited for the payment of fixed costs to be received by it assumes significance in view of the fact that Hon'ble Supreme Court has granted leave and admitted SLP No. 29262/2018 vide order dated 2.12.2019, which is on the most fundamental issue pertaining to termination of Letter of Intent. In other words, if the payment of fixed costs is made without any financial security to M/s Arya Energy Limited and at a later date the SLP filed by the petitioner is allowed by the Hon'ble Supreme Court and the termination of LOI is upheld and held valid by the Hon'ble Supreme Court then it shall be impossible for the petitioner herein to recover these amounts from the respondents herein, without there being any sufficient, appropriate and solvent security.*
- 8. It was, therefore, in this view of the facts that the Hon'ble Supreme Court after granting due hearing to all the parties passed the said direction wherein it directed that the payment of fixed costs shall be subject to the orders on the issue of security to be passed by this Hon'ble Commission. In other words this Hon'ble Commission has to decide the nature, type and details of the security to be furnished by the Respondent for receiving payment of fixed costs. It is submitted that the security to be furnished by the Respondent should be capable of being enforced at a later date and therefore should be itself solvent and payable on demand. In other words the security should be a Bank Guarantee which should be issued by a Scheduled Nationalized Bank.*
- 9. In this view of the fact it is most respectfully submitted that the respondents herein may be directed to provide bank guarantee of an equal amount of fixed*

costs to be paid to it and it may also be directed that the respondents herein should keep such bank guarantee alive till the final disposal of SLP No.29262/2018 by the Hon'ble Supreme Court.

10. *It is submitted that the bank guarantee to be issued by the respondent should be unconditional bank guarantee from scheduled nationalized bank to be paid on demand and without demur by the surety bank.*
 11. *It is submitted that the need for the bank guarantee is more so necessitated in view of the fact and as stated hereinabove, that to the best of knowledge of the petitioner company the respondent herein is a NPA and, therefore, there is a greater need for securitizing and protecting the interest of the Petitioner herein with respect to the payment of fixed costs to be made to the respondents herein.*
 12. *At this stage, it is also pertinent to mention that any payment of fixed cost shall only be released by the Petitioner herein upon satisfactory receipt of bank guarantee of the corresponding amount of fixed costs and in the event there is any delay by the respondent in providing the bank guarantee, then the same shall be at the risk and cost of the Respondent herein and shall not lead to imposition of interest on the petitioner herein for the payment of tariff."*
3. In the subject petition, the petitioner prayed for the following:
- (a) *Direct the respondents herein to provide the bank guarantee in favour of the petitioner herein, as a security from a scheduled nationalized bank which is equal to the corresponding amount of payment of fixed cost as per the order dated 02.12.2019:*
 - (b) *Further be pleased to direct the respondent herein to keep the bank guarantee alive till the disposal of Special Leave Petition No. 29262/2018 by the Hon'ble Supreme Court.*
 - (c) *Any other order which this Hon'ble Commission may deem just and proper in the facts and circumstances of the case may also be passed.*
4. The petition was admitted on 21st January' 2020. The petitioner was directed to serve the copy of subject petition on the Respondent in this matter and report its compliance to the

Commission. The Respondent was directed to file reply to the petition by 14th February' 2020. The Respondent was also directed to serve copy of its reply to the petitioner simultaneously.

5. At the hearing held on 25th February' 2020, the Commission observed the following:

- (i) By affidavit dated 21st February' 2020, the Respondent filed reply to the subject petition.
- (ii) The petitioner sought adjournment in the matter as their Counsel was unable to attend the hearing.

6. In view of the above, the petitioner was directed to file its rejoinder on the reply filed by the Respondent and the case was fixed for hearing on 24th March' 2020. However, the matter could not be heard due to outbreak of COVID followed by Nation wide lockdown. At the hearing held through video conference on 14th May' 2020, Ld. Counsel who appeared for the petitioner stated that the rejoinder could not be filed by the petitioner due to outbreak of Covid19 and lockdown. He sought 15 days' time to file rejoinder on the reply filed by the Respondent. Considering the request, the petitioner was allowed to file its rejoinder within 15 days and to serve a copy of the same to the Respondent simultaneously.

7. At the hearing held on 23rd June' 2020, the Commission observed the following:

- (i) By affidavit dated 5th June' 2020, the petitioner filed its rejoinder to the reply filed by the Respondent.
- (ii) Ld. Counsel of the Respondent stated that she will not file any sur-rejoinder to the above rejoinder filed by the petitioner.
- (iii) Ld. Counsel of the petitioner sought next date for argument.

8. At the hearing held on the 06th October'2020, the following was observed:

- (i) Ld. Counsel of the petitioner requested to fix the matter for arguments on the 13.10.2020.
- (ii) As agreed by the parties, the case was fixed for arguments on 13.10.2020.

9. At the hearing held on the 13th October'2020, Ld. Counsels for both the parties concluded their arguments. They were directed to file their written submissions within ten days. The case

was reserved for order on filing of written submissions by both the parties within the above stipulated date. The Respondent and the petitioner filed their respective written submissions on 31.10.2020 and 02.12.2020 respectively.

Submissions by the Parties:

10. The Respondent by affidavit dated 21.02.2020 submitted the following in its reply to the subject petition:

1. *At the outset, it is stated that the present Petition filed by the Petitioner – Madhya Pradesh Power Management Company Limited (hereinafter ‘Petitioner’) against the Respondent – M/s Arya Energy Limited (hereinafter ‘Respondent’) purportedly under section 86 (1)(b) and (f) of the Electricity Act, 2003 read with the order dated 02/12/2019 passed by the Hon’ble Supreme Court in Civil Appeal No. 8860/2019, is misconceived, and liable to be dismissed by the Hon’ble Commission with heavy cost imposed on the Petitioner. Save as otherwise expressly admitted in the present Reply, the contentions and averments of the Petitioner to the contrary are stated to be wrong and are denied.*
2. *It is respectfully stated that there is no dispute between the parties to be adjudicated since most of the issues stand settled by the orders of the Hon’ble Supreme Court, the Hon’ble Appellate Tribunal as well as this Hon’ble Commission.*
3. *The limited issue before this Hon’ble Commission raised by the Petitioner is that some amount of security needs to be paid by the Respondent in return for payment of fixed costs by the Petitioner to the Respondent. The claim of the Petitioner in this regard is completely misconceived.*
4. *The order of the Hon’ble Supreme Court is not extracted in full in the petition filed by the Petitioner. The order reads as under –*

"ORDER

Heard the learned Senior Counsel appearing for the parties. We do not find any reason to interfere with the impugned order dated 26.08.2019 passed by the Appellate Tribunal for Electricity at New Delhi.

Accordingly, the appeal is dismissed.

However, the signing and handing over of the PPA will be subject to the result of the decision in Special Leave Petition (C) No. 29262/2018.

The payment of fixed costs that is made will be subject to orders that may be passed by the Madhya Pradesh Electricity Regulatory Commission, insofar as security, if any, is to be given."

5. *The above order needs to be read in the context of the matters which were before the Hon'ble Supreme Court. While Civil Appeal No. 8860/2019 had been filed by the Petitioner against the Judgement dated 26/08/2019 passed by the Hon'ble Appellate Tribunal, connected SLP No. 29262/2018 filed by the Petitioner was also listed on the very same date. The SLP has been filed by the Petitioner against the order dated 15/05/2017 passed by the Hon'ble High Court of Madhya Pradesh. The only issue raised in the SLP is whether the High Court could have decided on the viability of a termination notice dated 28/02/2017 issued by the Petitioner to the Respondent when such functions are to be performed by this Hon'ble Commission by exercising jurisdiction under Section 86(1)(f) of the Electricity Act, 2003.*
6. *It was the submission of the counsel for the Petitioner that since the SLP would remain pending but the civil appeal would be dismissed, amounts in excess of Rs. 80 crores would have to be paid by the Petitioner to the Respondent as well as one Orient Green Power Limited which was another Respondent in the Civil Appeal. The submissions were made in open court in the presence of the counsel for the Respondent. The figure of Rs. 80 crores is the estimate of fixed cost component which would have to be paid by the Petitioner to the Respondent and Orient Green Power Limited together till the decision of the Hon'ble Tribunal dated 26/08/2019.*

7. *Since there was no SLP pending against Orient Green Power Limited, and the only dispute was with respect to the wrongful termination of the LOI dated 11/10/2013 with the Respondent, the Petitioner went on insisting that how it can pay these amounts.*
8. *Even though, in the respectful submission of the Respondent, the decision in the SLP would have no bearing on the payment of fixed charges to be made by the Petitioner to the Respondent in terms of the Judgement dated 26/08/2019 of the Hon'ble Tribunal as confirmed by the Hon'ble Supreme Court, since the Petitioner went on insisting, the Hon'ble Supreme Court gave the liberty to the Petitioner to approach this Hon'ble Commission insofar as the issue of security is concerned.*
9. *The further filing of the instant petition by the Petitioner only against the Respondent also indicates that the Petitioner has no issue with Orient Green Power Limited. No security had been demanded by the Petitioner against Orient Green Power Limited and it is understood that the Petitioner is in the process of paying the fixed charge component to Orient Green Power Limited. The fixed charge component along with interest for the Respondent for the period from 17/01/2017 till 26/08/2019 works out to be Rs 46.52 Crores and for Orient Green Power Limited works out to be Rs 38.23 Crores.*
10. *The above amounts total to around Rs. 80 crores which was what was submitted by the counsel for MPPMCL vociferously in the hearing before the Hon'ble Supreme Court. The Hon'ble Supreme Court without expressing any opinion directed that the payment of fixed charges would be subject to security, **"if any"** as decided by this Hon'ble Commission.*
11. *The Petitioner however, is seeking to project the order of the Hon'ble Supreme Court as a mandamus to this Hon'ble Commission to decide that security has to be given by the Respondent for payment of fixed charge component by the Petitioner to it.*
12. *It is respectfully submitted that there is no such direction/mandamus by the Hon'ble Supreme Court and it is for this Hon'ble Commission to decide whether at all any security should be given against the payment of fixed charge component and if the security is to be given, what should be the form of the security.*

13. *It is also stated that as on date, the LOI dated 11/10/2013 has been held to be valid under which power was supplied till 17/01/2017 and thereafter, from 18/01/2017 onwards, there is a validly executed PPA between the Petitioner and the Respondent for the balance life of the plant. The Hon'ble Tribunal vide Judgment dated 26/08/2019 has confirmed this position and directed the Petitioner to release the PPA which has not been done so far. The relationship for sale and purchase of electricity between the Petitioner and the Respondent is thus clear and continuous till the life of the plant.*
14. *In the above background, the Respondent is making its submissions on the above aspects, as under –*
- (i) In the facts and circumstances of the case, no security at all should be given by the Respondent to the Petitioner for the payment of the fixed charges;*
 - (ii) Without prejudice to the above, and in case this Hon'ble Commission comes to the conclusion that security needs to be given, bank guarantee cannot be the form of the security but certain alternatives would be proposed by the Petitioner;*

RE: NO SECURITY AT ALL TO BE GIVEN

15. *This Hon'ble Commission is aware of the long list of litigation between the Petitioner and the Respondent on several issues primarily relating to the tariff to be paid for the electricity supplied from the 12 MW biomass-based power project of the Respondent to the Petitioner. The plant was commissioned on 30/05/2013, and since then the entire electricity generated has been supplied to the Petitioner. The petitioner also took the electricity without any demur or protest till 17/01/2017. The only dispute which is pending between the Petitioner and the Respondent for the power supplied till 17/01/2017 is with respect to payment of arrears arising due to the difference between the tariff paid by the Petitioner and the tariff determined by this Hon'ble Commission in its order dated 30/11/2016 along with interest thereon. This issue is subject matter of dispute in Petition No. 35 of 2018 pending before this Hon'ble Commission.*

16. *For the period after 17/01/2017, the Petitioner had imposed the Merit Order Dispatch principal (MOD) on the Respondent and stop scheduling the electricity from the plant without any notice whatsoever. Even though, the Respondent initially got must run status by a Judgement dated 20/03/2017 passed by the Hon'ble Tribunal in Appeal No. 338 of 2016, the Hon'ble Supreme Court reversed the said judgement only on the issue of applicability of merit order dispatch vide its order dated 26/04/2018.*
17. *In the circumstances, the Petitioner did not schedule any power from the biomass plant of the Respondent from 17/01/2017 onwards. However, the Hon'ble Tribunal vide Judgement dated 26/08/2019 has directed the Petitioner to pay fixed charges/fixed cost component to the Respondent subject to verification by this Hon'ble Commission for the period from 17/01/2017 onwards i.e. for application of MOD. A copy of the Judgment dated 26/08/2019 passed by the Hon'ble Tribunal is attached hereto and marked as **Annexure A**.*
18. *The Petitioner had thereafter filed another Petition being Petition No. 8 of 2020, before this Hon'ble Commission seeking to misinterpret the directions contained in the Judgement dated 26/08/2019 and requesting this Hon'ble Commission to determine the fixed cost component as per the subsequent renewable energy regulations notified by this Hon'ble Commission in the year 2017. The matter had come up before the Hon'ble Commission on 21/01/2020, and the Respondent has filed its reply to the same.*
19. *In addition to the above, the Petitioner had also filed a Petition No. 7 of 2020 before this Hon'ble Commission seeking approval of the new power purchase agreement to be entered into between the Petitioner and the Respondent in purported compliance of the Judgement dated 26/08/2019 passed by the Hon'ble Tribunal. Fortunately, this Hon'ble Commission has dismissed the said petition with its order dated 27/01/2020. A copy of the order dated 27/01/2020 is attached hereto and marked as **Annexure B**.*
20. *By placing the above facts on record, the Respondent is only seeking to point out the conduct of the Petitioner, which has filed numerous unnecessary proceedings before this Hon'ble Commission simply to avoid and delay the payment of legitimate dues to the Respondent.*

21. *In the above background, the following points stand settled –*
- i. There is a PPA dated 18/01/2017 signed between the Petitioner and the Respondent, which governs the legal relationship between the parties.*
 - ii. The PPA is for a period of 20 years from the date of Commissioning i.e. 30/05/2013 to 29/05/2033*
 - iii. There is a finality to the tariff to be paid by the Petitioner to the Respondent for the sale of electricity under the PPA. This tariff is contained in the order dated 30/11/2016 of the Hon'ble Commission.*
 - iv. The termination/non-termination/manner of termination of the LoI dated 19/09/2013 and 10/11/2013 pending in SLP No. 29262/2018 is irrelevant since till 17/01/2017, the electricity has already been purchased by the Petitioner and the only dispute is with regard to the tariff to be paid. From 18/01/2017, a PPA has already been signed between the parties but the plant has not received schedule due to application of merit order dispatch principles.*
22. *In terms of the above, it does not stand to any reason that the Respondent should be directed to furnish any security in lieu of the fixed charges to be paid by the Petitioner to it. The Petitioner has already received the electricity till 17/01/2017. From 18/01/2017, the Petitioner has applied MoD and did not schedule the electricity from the biomass plant till recently. Vide a letter dated 05/02/2020, the Petitioner has ordered the Respondent to declare available capacity to further scheduling by the Petitioner. Copy of the letter dated 05/02/2020 is attached hereto and marked as **Annexure C**.*
23. *Once the plant gets scheduled and starts supplying electricity, the Petitioner would have to pay the monthly tariff to the Respondent and the payment security would have to be given by the Petitioner to the Respondent.*

24. *Therefore, the only question of security arises between 17/01/2019 till 26/08/2019, which the Petitioner also pleaded before the Hon'ble Supreme Court.*
25. *The issue in the pending SLP No. 29262/2018, is only on the power of the Hon'ble High Court, to adjudicate the termination of the LoI. Even if the SLP is allowed, there would be no question of the Petitioner recovering any amounts from the Respondents since the electricity was already supplied by the Respondent to the Petitioner till 17/01/2017 under the LOIs and from 18/01/2017, there is a validly executed PPA between the parties.*
26. *Further, the grounds raised by the Petitioner in the SLP are only on the issue of jurisdiction of the Hon'ble High Court and do not raise any issue on the merits. A copy of the SLP No. 29262/2018 is attached hereto and marked as **Annexure D**.*
27. *In the circumstances, it is completely incorrect on the part of the Petitioner to contend that it would have to recover any amounts from the Respondent if its SLP is allowed. It is only the Respondent which has to recover substantial amounts from the Petitioner which according to the Respondent works out as under:*
- i. Rs. 23.5 Crores towards arrears arising due to difference in tariff paid by the Petitioner and the tariff determined by this Hon'ble Commission vide order dated 30/11/2016 (pending in Petition No. 35 of 2018);*
 - ii. Rs. 21.5 Crores towards interest on the above arrears (interest calculated till today and issue pending in Petition No. 35 of 2018);*
 - iii. Rs. 45 Crores towards fixed charge component from 17/01/2017 till date as per the provisionally determination by the Hon'ble Tribunal i.e. 1.99/unit at 80% PLF;*
 - iv. The above amounts would also increase since this Hon'ble Commission has been directed to verify the fixed charge component in terms of the order dated 30/11/2016.*

28. *The above amounts have completely crippled the Respondents' functioning and the Respondent is in deep financial crisis due to the acts of the Petitioner. In view of the conduct of the Petitioner being so perverse, there is no question of any security to be given by the Respondent to the Petitioner. This Hon'ble Commission being the court of first instance examining the overall conduct of both the Petitioner and the Respondent and also the fact that even if the SLP of the Petitioner is allowed, no amounts would be recoverable by the Petitioner from the Respondent, ought to direct that no security is payable by the Respondent to the Petitioner.*
29. *To summarize the contention of the Respondent, it is stated that under no circumstances, will the Petitioner be entitled to recover any amounts from the Respondent. The first period namely, from the issuance of the Lols dated 19.09.2013 and 11.10.2013 till 17/01/2017, the electricity has already been procured by the Petitioner from the Respondent. Even in the extreme case of the SLP being allowed, the power supplied by the Respondent to the Petitioner cannot be returned by the Petitioner. Further, the Lol was to be in force till the execution of a valid PPA, which was done on 18/01/2017. The dispute in the SLP No. 29262/2018 does not cover the period from 18/01/2017 at all and even if the Petitioner succeeds in the SLP, nothing will change. The electricity stands supplied and the only issue is regarding the difference in tariff paid and to be paid.*
30. *The payment of fixed charge component is only from 18/01/2017 onwards i.e. the period for which MOD was applied. This has nothing to do with the SLP, and cannot possibly secure the Petitioner for the issues pending in the said SLP. The Petitioner further even in the present Petitioner has stated as under:*

2.

*It is submitted at the outset that the instant petition is not on the merits or interpretation of the order passed by the Hon'ble APTEL on 26.08.2019 and is only **limited to the direction passed by the hon'ble Supreme Court on 2.12.2019 in C.A. 8860/2019 with respect to the issue of security to be submitted by Respondent for taking payment of fixed costs.***

31. Further, the prayer of the Petitioner in the Petition reads as under:

A. Direct the respondents herein to provide the bank guarantee in favour of the Petitioner herein, as a security from a scheduled nationalized bank which is equal to the corresponding amount of payment of fixed cost as per order dated 02.12.2019;

32. Therefore, while the security sought for by the Petitioner is only corresponding to the amount for fixed charges, and while the fixed costs only pertain to the period after 18/01/2017 when the Respondent was not given schedule, it is amply clear that even the Petitioner admits that the SLP pertains to the pre 18/01/2017 period. At the cost of repetition, it is stated that even if the SLP filed by the Petitioner is allowed by the Hon'ble Supreme Court, and the termination of the LoI is upheld the Petitioner will not have to recover any amounts from the Respondent. Therefore, there is no question of the Petitioner demanding any kind of security before the Hon'ble Commission.

33. It may be relevant for this Hon'ble Commission to take note of the Petitioners' submission under Para 7 of its Petition, wherein its contention is that if the SLP is allowed by the hon'ble Supreme Court, and the LOI termination is upheld, in view of the alleged NPA status of the Respondent, it would not be able to recover these amounts back from the Respondent. The relevant extract of the Petition reads as under:

"7.

In other words, if the payment of fixed costs is made without any financial security to M/s Arya Energy Limited (which as on date is an NPA to the best of knowledge of the Petitioner) and at a later date the SLP filed by the Petitioner is allowed by the Hon'ble Supreme Court and the termination of LOI is upheld and held valid by the Hon'ble Supreme Court then it shall be impossible for the Petitioner herein to recover these amounts from the respondents herein, without there being any sufficient, appropriate and solvent security."

34. In terms of the above, the Petitioner has somehow come to a conclusion that these amounts pertaining to fixed charges, would become recoverable if the SLP filed by the Petitioner before

the Hon'ble Supreme Court is allowed. The Petitioner should be first directed to file an affidavit as to what amounts would become recoverable by it assuming its SLP is allowed.

35. *The Respondent stated that the amounts relating to fixed charges in fact relate to a period after the validity of the LOI itself. Even the Petitioner has not explained as to how these amounts relating fixed charges, would become recoverable if the SLP is allowed. Therefore, the Petitioner has filed a vague Petition without any pleadings as to how it would be entitled to recover the amount of fixed charges to be paid by it to the Respondent even assuming the SLP filed by the Petitioner is allowed by the Hon'ble Supreme Court.*
36. *The further contention that the security is required in view of the Respondent becoming an NPA is factually incorrect. The Respondent was on the verge of NPA status, but with great difficulty, the Respondents' promoters infused funds from their other businesses to ensure that the project does not become NPA.*

All contentions and averments to the contrary are stated to be wrong and are denied.

RE: FORM OF SECURITY (IF AT ALL)

37. *Without prejudice to the above submission, the demand by the Petitioner for a bank guarantee issued by a scheduled National Bank to the extent of fixed cost to be paid by the Petitioner to the Respondent is illogical, extremely burdensome and also unjust in the facts of the case.*
38. *The Respondent has been pushed to a corner and its plant was forcibly shut down by the Petitioner applying MoD from 17/01/2017 onwards. There has been no cash flow to the Respondent from 17/01/2017. Further, even for the prior period, the Petitioner is denying the payment of just tariff to the Respondent.*
39. *Therefore, there is no question of the Petitioner demanding a bank guarantee from the Respondent. The security if at all to be given, can be in the following forms:*

- i. **ALTERNATIVE No.1** – Since substantial amounts are due from the Petitioner to the Respondent, and the plant has already been scheduled to start operations, the running bills of the Respondent would have to be paid by the Petitioner. Any amount which the Petitioner may by some figment of its imagination be entitled to against the Respondent by the order of the Hon'ble Supreme Court, in SLP No. 29262/2018 can be adjusted against the running bills.
 - ii. **ALTERNATIVE No.2** - Corporate Guarantee will be given by the directors of the Respondent to the Petitioner. There is already a precedent on this aspect for payment to a generating company by a distribution company under a long term PPA. The Hon'ble Supreme Court in its order dated 29/10/2018 in Civil Appeal No. 10188/2018, had directed payment of amounts to the generating company for an interim period, subject to furnishing of a Corporate Guarantee. A copy of the order dated 29/10/2018 passed by the hon'ble Supreme Court is attached hereto and marked as **Annexure E**.
 - iii. **ALTERNATIVE No.3** - A charge can be created in favour of the Petitioner by the Respondent on its 12 MW biomass based plant. This is a valid security and in case it is somehow held that the Petitioner needs to recover any amounts from the Respondents, the Petitioner can take over the plant of the Respondent.
40. It is reiterated that under no circumstances, would the Petitioner be entitled to recover any amounts from the Respondent. Even if the SLP of the Petitioner is allowed, no monetary recovery will flow to the Petitioner. It is only the Respondent, which has to recover huge amounts from the Petitioner. No security in the circumstances can be directed to be given by the Respondent to the Petitioner.
41. The SLP No. 29262/2018 is also listed before the Hon'ble Supreme Court on 20/03/2020 and is likely to be decided very soon. The Petitioner should in fact be directed to proceed with the SLP and press for final disposal instead of taking advantage of its pendency, to squeeze the Respondent.

42. *In the circumstances, it is stated that there is no merit in the Petition. All contentions and averments to the contrary are stated to be wrong and are denied.*

11. The petitioner (MPPMCL) submitted the following in its rejoinder dated 05.06.2020:

- “1. It is most respectfully submitted that the respondent through the instant reply sought to confuse and obfuscate the issues pending before this Hon’ble Commission in Petition No.5/2020. The respondent assumed that there is a valid and existing power purchase agreement existing between the parties and it is on this premise that the respondent has proceeded in its reply.*
- 2. It is submitted at the outset that there is no existing or valid power purchase agreement dated 18.01.2017 existing between the petitioner and the respondent.*
- 3. It is submitted that the entire dispute before the Hon’ble Supreme Court in SLP No.29262/2018 is whether the termination of the LOI was valid and it has been specifically submitted in the replies by the petitioner before the Hon’ble High Court that there is no executed or existing or valid power purchase agreement between the parties.*
- 4. It is submitted that the SLP No.29262/2018 was admitted by the Hon’ble Supreme Court on 02.12.2019 when leave was granted and now the entire record and dispute pertaining to the legality of the termination of LOI and the submission of the petitioner (MPPMCL) with respect to non-existence of valid executed PPA is pending before the Hon’ble Apex Court therefore, the issue is sub-judice and pending before the Hon’ble Supreme Court and it is absolutely incorrect on the part of the Respondent to aver or allege that there is a valid and existing PPA.*
- 5. It is submitted that therefore this Hon’ble Commission is not required to extend the scope of its query in the matters which is pending and sub-judice before the Supreme Court. The copy of the entire SLP No.29262/2018 along with annexures and the Replies and Additional submissions made by the petitioner before the*

High Court in the Writ Petition is attached as **Annexure RJ-1**.

6. *It is submitted that the only issue before this Hon'ble Commission in terms of order dated 02.12.2019 is the security which is to be provided by the respondent for the payment of tariff which shall be made to the respondent.*
7. *It is submitted that the issue with respect to the validity of the termination of the LOI is pending before the Hon'ble Supreme Court and, therefore, if the Hon'ble Supreme Court allows the Civil Appeal of the petitioner then in that eventuality there shall be no alleged contract (LOI) between the parties as the termination of LOI by MPPMCL would have been held to be valid. It was, therefore, in this eventuality that the Hon'ble Supreme Court directed that till the pendency of the Civil Appeal the respondent should provide security for the payments to be received as the issue of validity of termination of LOI is still to be adjudicated. It is submitted that with respect to another generator namely M/s Orient Green, there is no pendency in the Hon'ble Supreme Court with respect to termination of LOI or PPA and therefore there is no issue of seeking security from Orient Green.*
8. *It is submitted that a perusal of the reply of the Respondent and its averment that there is a valid and existing PPA between the respondent and the Petitioner, it appears that the Respondent has not fully appreciated and understood the order dated 2.12.2019 of the Hon'ble Apex Court. It is submitted that the Hon'ble Apex vide the order dated 2.12.2019 has given an interim arrangement for the payments to be made and this Hon'ble Commission has to adjudicate the issue of appropriate security and its requirement in terms of order dated 02.12.2019.*
9. *Therefore, the only issue which has to be adjudicated by this Hon'ble Commission is the appropriate security and its need, which is to be provided by the Respondent and this Hon'ble Commission in the instant petition is not required to go into any other incidental or ancillary issue and litigation history and order between the parties as is being raised by the Respondent.*

10. *In this regard, it is submitted that it has been submitted by the respondent in Petition No. 35 of 2018 before this Hon'ble Commission and also in Written Submission filed by the Respondent (Appellant in appeal) in Appeal no. 396/2018 that it is a non-performing asset and is facing proceedings from the Banks. This is a clear admission of being an NPA by the Respondent itself and therefore it cannot be denied by the Respondent. It is therefore submitted that there is a clear requirement for the financial security to be provided by the Respondent. A copy of the Petition no. 35 of 2018 and Written Submission filed in Appeal no. 396 of 2018 by the Respondent are attached as **Annexure-RJ-2**.*
11. *It is submitted that in this view of the matter as the respondent is an NPA it is extremely important that a financial security is given by the respondent which is a bank guarantee of a nationalized bank and is enforceable on demand without demur and is irrevocable till the pendency of the matter before the Hon'ble Apex Court.."*

Written Submissions on Arguments by the Parties:

12. The Respondent vide its letter dated 31.10.2020 submitted the following in its written submission on arguments:

- "1. *The present petition has been purportedly filed under section 86 (1)(b) and (f) of the Electricity Act, 2003 read with the order dated 02/12/2019 passed by the Hon'ble Supreme Court in civil appeal No. 8860/2019. The petition is an abuse of the process of this Hon'ble Commission and only another attempt on the part of the Petitioner to deny the valid claims of fixed charges to be paid by the Petitioner to the Respondent when MOD had been applied on the Respondent's 12 MW biomass plant.*
2. *The limited issue before this Hon'ble Commission raised by the Petitioner is that some amount of security needs to be paid by the Respondent in return for payment of fixed costs by the Petitioner to the Respondent.*

3. *The Petitioner till date has not demonstrated as to what purpose the security is needed for. While it is the Respondents' specific stand on affidavit, that in no circumstances, would any amounts become recoverable by the Petitioner from the Respondent, the Petitioner has been unable to demonstrate as to how the fixed charges paid by the Petitioner to the Respondent would have to be recovered back by it, for which security is being sought for.*
4. *While the Petition has simply been filed relying on the order of the Hon'ble Supreme Court dated 02/12/2019, the said order needs to be read in the context of the matters which were before the Hon'ble Supreme Court. While Civil Appeal No. 8860/2019 had been filed by the Petitioner against the Judgement dated 26/08/2019 passed by the Hon'ble Appellate Tribunal, connected SLP No. 29262/2018 filed by the Petitioner was also listed on the very same date. The SLP has been filed by the Petitioner against the order dated 15/05/2017 passed by the Hon'ble High Court of Madhya Pradesh. The only issue raised in the SLP is whether the High Court could have decided on the viability of a termination notice dated 28/02/2017 issued by the Petitioner to the Respondent when such functions are to be performed by this Hon'ble Commission under Section 86(1)(f) of the Electricity Act, 2003.*
5. *It was the submission of the counsel for the Petitioner before the Hon'ble Supreme Court that since the SLP would remain pending but the civil appeal would be dismissed, any amounts in excess of Rs. 80 Crores would have to be paid to the Respondent as well as one Orient Green Power Limited, some security would be required. The submissions were made in open court in the presence of the counsel for the Respondent.*
6. *Since there was no SLP pending against Orient Green Power Limited, and the only dispute was with respect to the wrongful termination of the LOI dated 11/10/2013 with the Respondent, the Petitioner had insisted on security being given.*

7. *Even though, in the respectful submission of the Respondent, the issue in the SLP would have no bearing on the payment of fixed charges to be made by the Petitioner to the Respondent in terms of the Judgement dated 26/08/2019 of the Hon'ble Tribunal as confirmed by the Hon'ble Supreme Court, since the Petitioner went on insisting, the Hon'ble Supreme Court gave the liberty to the Petitioner to approach this Hon'ble Commission insofar as the issue of security is concerned.*
8. *The Hon'ble Supreme Court without expressing any opinion had directed that the matter of security "**if any**" may be decided by the Hon'ble Commission.*
9. *The Petitioner however, is seeking to project the order of the Hon'ble Supreme Court as a mandamus to this Hon'ble commission to decide that security should be given by the Respondent for payment of fixed charges by the Petitioner to it.*
10. *It is respectfully submitted that there is no such direction/mandamus by the Hon'ble Supreme Court and it is for this Hon'ble commission to decide whether at all any security should be given against the payment of fixed costs and if the security is to be given, what should be the form of the security.*
11. *It is submitted that as on date, the LOI dated 11/10/2013 has been held to be valid under which power was supplied till 17/01/2017, and thereafter from 18/01/2017, there is a validly executed PPA between the Petitioner and the Respondent for the balance life of the plant. The Hon'ble Tribunal vide judgment dated 26/08/2019 has confirmed this position, and while the Hon'ble Commission has also rejected the request for a new PPA as had been proposed by the Petitioner in Petition No. 7 of 2020, the Petitioner today is barred from contending that there is no valid PPA.*
12. ***Thus, the respondent is making its submissions on the about to aspects, namely –***

- (i) In the facts and circumstances of the case, no security at all should be given by the Respondent to the Petitioner for the payment of the Fixed charges;**
- (ii) Without prejudice to the above, and in case this Hon'ble commission comes to the conclusion that security needs to be given, bank guarantee cannot be the form of the security but such an alternative would be proposed by the Petitioner;**

RE: NO SECURITY AT ALL TO BE GIVEN

13. *This Hon'ble Commission is aware of the long list of litigation between the Petitioner and the Respondent on several issues primarily relating to the tariff to be paid for the electricity supplied from the 12 MW biomass-based power project of the Respondent to the Petitioner. The plant was commissioned on 13/05/2013, and since then, the entire electricity generated has been supplied to the Petitioner. The Petitioner also took the electricity without any demur or protest till 17/01/2017. The only dispute which is pending between the Petitioner and the Respondent for the power supplied till 17/01/2017 is with respect to payment of arrears arising due to the difference between the tariff paid by the Petitioner and the tariff determined by this Hon'ble Commission in its Order dated 30/11/2016 along with interest thereon. This issue is subject matter of dispute in PetitionNo.35 of 2018 pending before this Hon'ble Commission.*
14. *For the period after 17/01/2017, the Petitioner had imposed the Merit Order Dispatch principal (MOD) on the Respondent and stop scheduling the electricity from the plant without any notice whatsoever. Even though, the Respondent initially got must run status by a Judgement dated 20/03/2017 passed by the Hon'ble Tribunal in Appeal No. 338 of 2016, the Hon'ble Supreme Court reversed the said judgement only on the issue of applicability of merit order dispatch vide its Order dated 26/04/2018.*
15. *In the circumstances, the biomass plant of the Respondent has remained shut from 17/01/2017 onwards. However, the Hon'ble Tribunal vide Judgement*

dated 26/08/2019 has directed the Petitioner to pay fixed charges/fixed cost component to the Respondent subject to verification by this Hon'ble commission. The said order has now been confirmed by the Hon'ble Supreme Court vide Order dated 02/11/2019 while dismissing the appeal filed by the Petitioner.

16. *The Petitioner had thereafter filed another Petition being Petition No. 8 of 2020, before this Hon'ble Commission for determination of fixed charges to be paid to the Respondent. The Petitioner is simply getting the matter adjourned and the matter is currently pending adjudication before the Hon'ble Commission.*
17. *In addition to the above, the Petitioner had also filed a Petition No. 7 of 2020 before this Hon'ble Commission seeking approval of the new power purchase agreement to be entered into between the Petitioner and the Respondent in purported compliance of the Judgement dated 26/08/2019 passed by the Hon'ble Tribunal. Fortunately, this Hon'ble Commission has dismissed the said petition with its order dated 27/01/2020. Therefore, the Petitioner today is barred from contending that there is no valid PPA between the parties.*
18. *By placing the above facts on record, the Respondent is only seeking to point out the conduct of the Petitioner, which has filed numerous unnecessary proceedings before this Hon'ble Commission simply to avoid and delay the payment of legitimate dues to the Respondent.*
19. *In the above background, the following points stand settled –*
 - i. *There is a PPA dated 18/01/2017 validly executed between the Petitioner and the Respondent, which governs the legal relationship between the parties.*
 - ii. *The PPA is for a period of 20 years from the date of commissioning i.e. 30/05/2013 to 29/05/2033;*

- iii. *There is a finality to the tariff to be paid by the Petitioner to the Respondent for the sale of electricity under the PPA. This tariff is contained in the Order dated 30/11/2016 of the Hon'ble Commission.*
- iv. *The termination/non-termination/manner of termination of the LoI dated 19/09/2013 pending in SLP No. 29262/2018 is irrelevant since till 17/01/2017, the electricity has already been purchased by the Petitioner and the only dispute is with regard to the tariff to be paid. From 18/01/2017, a PPA has already been signed between the parties but the plant is shut due to application of merit order dispatch principles.*
- 20. *In terms of the above, it does not stand to any reason that the Respondent should be directed to furnish any security in lieu of the fixed charges to be paid by the Petitioner to it. The Petitioner has already received the electricity till 17/01/2017. From 18/01/2017, the Petitioner has applied MoD and kept the biomass plant shut till recently.*
- 21. *Since the MPPMCL has started scheduling respondents plant from 13/02/2020 and taking electricity, the Petitioner would have to pay monthly tariff to the Respondent and the payment security would have to be given by the Petitioner to the Respondent.*
- 22. *Therefore, the question of security only arises between 17/01/2019 till 12/02/2019, when the fixed charge component needs to be paid by the Petitioner to the Respondent.*
- 23. *The issue in the pending SLP No. 29262/2018, is only on the power of the Hon'ble High Court, to adjudicate the termination of the LoI. Even if the SLP is allowed, there would be no question of the Petitioner recovering any amounts from the Respondents since the electricity was already supplied by the Respondent to the Petitioner till 17/01/2017 and from 18/01/2017, there is a validly executed PPA between the parties.*

24. *In the circumstances, it is completely incorrect on the part of the Petitioner to contend that it would have to recover any amounts from the Respondent if its SLP is allowed. It is only the Respondent which has to recover substantial amounts from the Petitioner which according to the Respondent works out as under:*
- i. *Rs.23.5 Crores towards arrears arising due to difference in tariff paid by the Petitioner and the tariff determined by this Hon'ble Commission vide order dated 30/11/2016 (pending in Petition No. 35 of 2018);*
 - ii. *Rs. 21.5 Crores towards interest on the above arrears (interest calculated till today and issue pending in Petition No. 35 of 2018);*
 - iii. *Approx Rs. 45 Crores towards fixed charge component from 17/01/2017 till 12/02/2020 along with surcharge as per the provisional determination by the Hon'ble Tribunal i.e.1.99/unit at 80% PLF;*
 - iv. *The above amounts would also increase since this Hon'ble Commission has been directed to verify the fixed charge component in terms of the order dated 30/11/2016.*
25. *In view of the conduct of the Petitioner being so perverse, there is no question of any security to be given by the Respondent to the Petitioner.*

RE: FORM OF SECURITY (IF AT ALL)

26. *Without prejudice to the above submissions, the Respondent in its reply had given the following alternatives in place of a Bank Guarantee as being demanded by the Petitioner:*

- i. **ALTERNATIVE No.1** – Since substantial amounts are due from the Petitioner to the Respondent, and the plant has started operations, the running bills of the Respondent would have to be paid by the Petitioner. Any amount which the Petitioner may somehow be entitled to against the Respondent by the order of the Hon’ble Supreme Court, in SLP No. 29262/2018 can be adjusted against the running bills. Total time of contract pending is more than 13 years
 - ii. **ALTERNATIVE No.2** - Corporate Guarantee will be given by the directors of the Respondent to the Petitioner. There is already a precedent on this aspect for payment to a generating company by a distribution company under a long term PPA. The Hon’ble Supreme Court in its order dated 29/10/2018 in Civil Appeal No. 10188/2018, had directed payment of amounts to the generating company for an interim period, subject to furnishing of a Corporate Guarantee. The Petitioner is hereby attaching a draft of the corporate guarantee for the Hon’ble Commissions’ ready perusal. The draft corporate guarantee is attached hereto and marked as **Annexure A**.
 - iii. **ALTERNATIVE No.3** - A charge can be created in favour of the Petitioner by the Respondent on its 12 MW biomass based plant. This is a valid security and in case it is somehow held that the Petitioner needs to recover any amounts from the Respondents, the Petitioner can take over the plant of the Respondent.
27. One of the contentions raised by the Petitioner on the aspect of the above alternatives suggested by the Respondent, was that the Respondent is an NPA, or on the verge of being an NPA, and therefore no guarantee would suffice for the purpose of security. This is factually incorrect.
28. In order to bring clarity on the aspect of the financial health of the Petitioner to provide such guarantee, the Petitioner is placing on record certificates/letters from its banks, expressly stating that there are no dues from the Respondent. This being the position, there can be no argument from the Petitioner that the Respondent is an NPA, when the banks themselves are certifying the financial

*health of the Respondent. Copies of the letters from the Banks of the Respondent is attached hereto and marked as **Annexure B**.*

29. *In any case, it is reiterated that under no circumstances, would the Petitioner be entitled to recover any amounts from the Respondent. Even if the SLP of the Petitioner is allowed, there will be no monetary recovery will flow to the Petitioner. It is only the Respondent, which has to recover huge amounts from the Petitioner. No security in the circumstances can be directed to be given by the Respondent to the Petitioner."*

13. The petitioner (MPPMCL) vide letter dated 02.12.2020 submitted the following in its written submission on arguments:

- “1. *It is most respectfully submitted that the petitioner herein had filed an appeal before the Hon’ble Apex Court challenging the order dated 26.08.2019 passed by the Hon’ble APTEL, being Civil Appeal No.8860/2019.*
2. *It is submitted that by virtue of the order dated 26.08.2019 the Hon’ble Appellate Tribunal for Electricity at New Delhi had interalia directed the petitioner to make payments of fixed costs to the respondent No.1 (M/s Arya Energy Limited). It is submitted at the outset that the instant petition is not on the merits or interpretation of the order passed by the Hon’ble APTEL on 26.08.2019 and is only limited to the direction passed by the Hon’ble Supreme Court on 2.12.2019 in C.A 8860/2019 with respect to the issue of security to be submitted by Respondent for taking payment of fixed costs. A copy of the order dated 2.12.2019 passed in CA. No. 8860/2019 is attached as **ANNEXURE-1** along-with the petition.*
3. *It is submitted that the petitioner had also challenged the order dated 15.05.2017 passed in W.P. No.3819/2017 by the Hon’ble High Court of M.P. Principal Seat at Jabalpur by virtue of which the Hon’ble High Court of M.P. was pleased to allow the petition filed by M/s Arya Energy Limited against the termination of Letter of Intent undertaken by the petitioner herein.*

4. *It is submitted that the matters (SLP 29262/18 and CA 8860/19) were clubbed and heard by the Hon'ble Supreme Court on 02.12.2019 and while the Hon'ble Supreme Court was pleased to dismiss Civil Appeal No.8860/2019 it was also pleased pass certain directions in the order with respect to payment of fixed cost to be made to the respondent herein. It is at this stage also pertinent to note that the Hon'ble Supreme Court has been pleased vide the order dated 2.12.2019, to grant leave and admit SLP No.29262/2018 filed by the petitioner herein challenging the High Court's order dated 15.05.2017.*
5. *It is submitted herein that the Hon'ble Supreme Court in its order dated 2nd December, 2019 has specifically directed as under: -*

"The payment of fixed costs that is made will be subject to orders that may be passed by the Madhya Pradesh Electricity Regulatory Commission, insofar as security, if any, is to be given."
6. *A perusal of the instant direction of the Hon'ble Supreme Court clearly highlights that the payment of fixed costs to be made to M/s Arya Energy Limited shall be subject to security to be given by M/s Arya Energy Limited. In other words, the Hon'ble Apex Court has been pleased to secure the interest of the Petitioner herein during the pendency of the SLP 29262/18.*
7. *In this regard, it is submitted that it has been submitted by the respondent (Arya) in Petition No. 35 of 2018 before this Hon'ble Commission And also in Written Submission filed by the Respondent (Appellant in appeal) in Appeal no. 396/2018 before APTEL, that it is a non-performing asset and is facing proceedings from the Banks. This is a clear admission of being an NPA by the Respondent itself and therefore it cannot be denied by the Respondent. It is therefore submitted that there is a clear need and requirement for the financial security to be provided by the Respondent. A copy of the Petition no. 35 of 2018 and Written Submission filed in Appeal no. 396 of 2018 by the Respondent are attached as **Annexure-RJ-2** with the rejoinder filed by the Petitioner.*

8. *It is submitted that the issue of security to be submitted by M/s Arya Energy Limited for the payment of fixed costs to be received by it assumes significance in view of the fact that Hon'ble Supreme Court has granted leave and admitted SLP No. 29262/2018 vide order dated 2.12.2019, which is on the most fundamental issue pertaining to termination of Letter of Intent. In other words, if the payment of fixed costs is made without any financial security to M/s Arya Energy Limited and at a later date the SLP filed by the petitioner is allowed by the Hon'ble Supreme Court and the termination of LOI is upheld and held valid by the Hon'ble Supreme Court then it shall be impossible for the petitioner herein to recover these amounts from the respondents herein, without there being any sufficient, appropriate and solvent security. It is submitted that public interest also requires that a financial security from a Nationalized Bank be provided to the Petitioner.*
9. *It was, therefore, in this view of the facts that the Hon'ble Supreme Court after granting due hearing to all the parties passed the said direction wherein it directed that the payment of fixed costs shall be subject to the orders on the issue of security to be passed by this Hon'ble Commission. In other words, this Hon'ble Commission has to decide the nature, type and details of the security to be furnished by the Respondent for receiving payment of fixed costs. It is submitted that the security to be furnished by the Respondent should be capable of being enforced at a later date and therefore should be itself solvent and payable on demand. In other words, the security should be a Bank Guarantee which should be issued by a Scheduled Nationalized Bank. It is submitted that in this view of the matter as the respondent is an NPA it is extremely important that a financial security is given by the respondent which is a bank guarantee of a nationalized bank and is enforceable on demand without demur and is irrevocable till the pendency of the matter before the Hon'ble Apex Court.*
10. *In this view of the fact it is most respectfully submitted that the respondents herein may be directed to provide bank guarantee of an equal amount of fixed costs to be paid to it and it may also be directed that the respondents herein*

should keep such bank guarantee alive till the final disposal of SLP No.29262/2018 by the Hon'ble Supreme Court.

11. *It is submitted that the bank guarantee to be issued by the respondent should be unconditional bank guarantee from scheduled nationalized bank to be paid on demand and without demur by the surety bank.*
12. *It is submitted that the need for the bank guarantee is more so necessitated in view of the fact and as stated hereinabove, that to the best of knowledge of the petitioner company the respondent herein is a NPA and, therefore, there is a greater need for securitizing and protecting the interest of the Petitioner herein with respect to the payment of fixed costs to be made to the respondents herein.*
13. *It is, therefore, submitted that only a bank guarantee from a nationalized bank is the appropriate financial security which ought to be acceptable as a valid security in the facts of the matter as public money and interest is involved and therefore this Hon'ble Commission ought to direct the respondent to the same.*
14. *It is submitted that the proposal of the respondent that it shall submit a corporate guarantee is of no help and avail as it has been submitted that the respondent is an NPA and, therefore, insolvent in nature and is facing financial distress from the Bank and, therefore, a corporate guarantee is not an appropriate security in the facts and circumstances of the case. Further the proposal of the respondent that the payments to be made by petitioner can be adjusted as a security amount defeats the entire purpose of security as directed to be submitted by the Hon'ble Supreme Court.*
15. *It is, therefore, submitted that this Hon'ble Commission may please direct the respondent to submit a bank guarantee from a Nationalized Bank which is unconditional, irrevocable and payable on demand without demur.*

Commission's Observation and Findings:

14. On perusal of the contents in subject petition and submissions of both the parties in this matter, the Commission has observed the following:

- (i) The subject petition has been filed by the M.P. Power Management Co. Ltd. under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 read with the Order dated 02.12.2019 passed by the Hon'ble Supreme Court in Civil Appeal No. 8860/2019. The petitioner had filed an appeal being Civil Appeal No.8860/2019 before the Hon'ble Apex Court challenging the order dated 26.08.2019 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 396 of 2018.
- (ii) In the aforesaid order dated 26.08.2019 the Hon'ble Appellate Tribunal for Electricity had directed the petitioner to make payments of fixed costs to the Respondent No. (M/s Arya Energy Limited) from 17.01.2017 from which the MOD has been applied by the petitioner and power not scheduled from the Respondent.
- (iii) The petitioner has submitted that the instant petition is not on the merits or interpretation of the aforesaid order passed by the Hon'ble APTEL and the subject petition is only limited to the direction passed by the Hon'ble Supreme Court on 2.12.2019 in C.A 8860/2019 with respect to the issue of security to be submitted by the Respondent for taking payment of fixed costs.
- (iv) Hon'ble Supreme Court in abovementioned Order dated 2nd December, 2019 in CA 8860 of 2019 has directed as under: -

"Heard the learned Senior Counsel appearing for the parties. We do not find any reason to interfere with the impugned order dated 26.08.2019 passed by the Appellate Tribunal for Electricity at New Delhi.

Accordingly, the appeal is dismissed.

However, the signing and handing over of the PPA will be subject to the result of the decision in Special Leave Petition (C) No. 29262/2018.

The payment of fixed costs that is made will be subject to orders that may be passed by the Madhya Pradesh Electricity Regulatory Commission, insofar as security, if any, is to be given.”

- (v) In terms of the above order, the petitioner has approached the Commission on the issue of security to be given by the Respondent for payment of fixed costs as per directions of Hon’ble APTEL vide order dated 26.08.2019 in Appeal No.396 of 2018. In view of aforesaid background and the aforesaid order of Hon’ble Apex Court, the Commission has examined the subject petition and subsequent submissions of both the parties on the issue whether any security is required to be given by the Respondent for payment of fixed costs. If so, what will be the mode of security to be given by the Respondent.
- (vi) The Commission has already decided and disposed of the petitions namely Petition No.35 of 2018 and Petition No. 08 of 2020 which were filed by the Respondent and the petitioner respectively and are mentioned by the parties in their submissions in this subject matter.

15. The petitioner has broadly submitted the following in the petition and its additional submissions:

- (i) It is submitted that the matters (SLP 29262/18 and CA 8860/19) were clubbed and heard by the Hon’ble Supreme Court on 02.12.2019 and while the Hon’ble Supreme Court was pleased to dismiss Civil Appeal No.8860/2019 and it was also pleased to pass certain directions in the order with respect to payment of fixed cost to be made to the respondent herein. It is at this stage also pertinent to note that the Hon’ble Supreme Court has been pleased vide the order dated 2.12.2019, to grant leave and admit SLP No.29262/2018 filed by the petitioner herein challenging the High Court’s order dated 15.05.2017.
- (ii) A perusal of the instant direction of the Hon’ble Supreme Court clearly highlights that the payment of fixed costs to be made to M/s Arya Energy Limited shall be subject to security to be given by M/s Arya Energy Limited. In other words, the Hon’ble Apex

Court has been pleased to secure the interest of the Petitioner herein during the pendency of the SLP 29262/18.

- (iii) It is submitted at the outset that there is no existing or valid power purchase agreement dated 18.01.2017 existing between the petitioner and the Respondent.
- (iv) It is submitted that the entire dispute before the Hon'ble Supreme Court in SLP No.29262/2018 is whether the termination of the LOI was valid and it has been specifically submitted in the replies by the petitioner before the Hon'ble High Court that there is no executed or existing or valid power purchase agreement between the parties.
- (v) It is submitted at this stage and also pertinent to note that the Petitioner has also learnt that, as per the information in the commercial circles, the Respondent 'M/s Arya Energy Limited' is today a non-performing asset or its power plant is today in shut down mode. It is submitted that the issue of security to be submitted by M/s Arya Energy Limited for the payment of fixed costs to be received by it assumes significance in view of the fact that Hon'ble Supreme Court has granted leave and admitted SLP No. 29262/2018 vide order dated 2.12.2019, which is on the most fundamental issue pertaining to termination of Letter of Intent. In other words, if the payment of fixed costs is made without any financial security to M/s Arya Energy Limited and at a later date the SLP filed by the petitioner is allowed by the Hon'ble Supreme Court and the termination of LOI is upheld and held valid by the Hon'ble Supreme Court then it shall be impossible for the petitioner herein to recover these amounts from the Respondent without there being any sufficient, appropriate and solvent security.
- (vi) It is submitted that the need for the bank guarantee is more so necessitated in view of the fact that to the best of knowledge of the petitioner company the Respondent is a NPA and, therefore, there is a greater need for securitizing and protecting the interest of the Petitioner herein with respect to the payment of fixed costs to be made to the Respondents.

- (vii) It is submitted that it has been submitted by the Respondent in Petition No. 35 of 2018 and also in written submission filed by the Respondent (Appellant in appeal) in Appeal no. 396/2018 before APTEL, that it is a non-performing asset and is facing proceedings from the Banks. This is a clear admission of being an NPA by the Respondent itself and therefore it cannot be denied by the Respondent. It is therefore submitted that there is a clear need and requirement for the financial security to be provided by the Respondent.
- (viii) It is submitted that the need for the bank guarantee is more so necessitated in view of the fact and as stated hereinabove, that to the best of knowledge of the petitioner company the respondent herein is a NPA and, therefore, there is a greater need for securitizing and protecting the interest of the Petitioner herein with respect to the payment of fixed costs to be made to the respondents herein.
- (ix) The proposal of the Respondent that it shall submit a corporate guarantee is of no help and avail as it has been submitted that the respondent is an NPA and, therefore, insolvent in nature and is facing financial distress from the Bank and, therefore, a corporate guarantee is not an appropriate security in the facts and circumstances of the case.
- (x) It is therefore, submitted that the Commission may please direct the respondent to submit a bank guarantee from a Nationalized Bank which is unconditional, irrevocable and payable on demand without demur.

16. In response, the Respondent has submitted the following in its reply and other submissions in this matter:

- (i) The petition is an abuse of the process of this Hon'ble Commission and only another attempt on the part of the Petitioner to deny the valid claims of fixed charges to be paid by the Petitioner to the Respondent when MOD had been applied on the Respondent's 12 MW biomass plant.

- (ii) The Petitioner till date has not demonstrated as to what purpose the security is needed for. While it is the Respondents' specific stand on affidavit, that in no circumstances, would any amounts become recoverable by the Petitioner from the Respondent, the Petitioner has been unable to demonstrate as to how the fixed charges paid by the Petitioner to the Respondent would have to be recovered back by it, for which security is being sought for.
- (iii) Even though, in the respectful submission of the Respondent, the issue in the SLP would have no bearing on the payment of fixed charges to be made by the Petitioner to the Respondent in terms of the Judgement dated 26/08/2019 of the Hon'ble Tribunal as confirmed by the Hon'ble Supreme Court, since the Petitioner went on insisting, the Hon'ble Supreme Court gave the liberty to the Petitioner to approach this Hon'ble Commission insofar as the issue of security is concerned. The Hon'ble Supreme Court without expressing any opinion had directed that the matter of security "if any" may be decided by the Hon'ble Commission.
- (iv) It is submitted that as on date, the LOI dated 11/10/2013 has been held to be valid under which power was supplied till 17/01/2017, and thereafter from 18/01/2017, there is a validly executed PPA between the Petitioner and the Respondent for the balance life of the plant. The Hon'ble Tribunal vide judgment dated 26/08/2019 has confirmed this position, and while the Hon'ble Commission has also rejected the request for a new PPA as had been proposed by the Petitioner in Petition No. 7 of 2020 vide its order dated 27/01/2020, the Petitioner today is barred from contending that there is no valid PPA.
- (v) There is a PPA dated 18/01/2017 signed between the Petitioner and the Respondent, which governs the legal relationship between the parties. The PPA is for a period of 20 years from the date of Commissioning i.e. 30/05/2013 to 29/05/2033. There is a finality to the tariff to be paid by the Petitioner to the Respondent for the sale of electricity under the PPA. This tariff is contained in the order dated 30/11/2016 of the Hon'ble Commission. The termination/non-termination/manner of termination of the LoI dated 19/09/2013 and 10/11/2013 pending in SLP No. 29262/2018 is irrelevant

since till 17/01/2017, the electricity has already been purchased by the Petitioner and the only dispute is with regard to the tariff to be paid. From 18/01/2017, a PPA has already been signed between the parties but the plant has not received schedule due to application of merit order dispatch principles.

(vi) *There is no question of the Petitioner demanding a bank guarantee from the Respondent. The security if at all to be given, can be in the following forms:*

- (a) **ALTERNATIVE No.1** – *Since substantial amounts are due from the Petitioner to the Respondent, and the plant has already been scheduled to start operations, the running bills of the Respondent would have to be paid by the Petitioner. Any amount which the Petitioner may by some figment of its imagination be entitled to against the Respondent by the order of the Hon'ble Supreme Court, in SLP No. 29262/2018 can be adjusted against the running bills.*
- (b) **ALTERNATIVE No.2** - *Corporate Guarantee will be given by the directors of the Respondent to the Petitioner. There is already a precedent on this aspect for payment to a generating company by a distribution company under a long term PPA. The Hon'ble Supreme Court in its order dated 29/10/2018 in Civil Appeal No. 10188/2018, had directed payment of amounts to the generating company for an interim period, subject to furnishing of a Corporate Guarantee. A copy of the order dated 29/10/2018 passed by the hon'ble Supreme Court is attached hereto and marked as **Annexure E**.*
- (c) **ALTERNATIVE No.3** - *A charge can be created in favour of the Petitioner by the Respondent on its 12 MW biomass-based plant. This is a valid security and in case it is somehow held that the Petitioner needs to recover any amounts from the Respondents, the Petitioner can take over the plant of the Respondent.*

(vii) One of the contentions raised by the Petitioner on the aspect of the above alternatives suggested by the Respondent, was that the Respondent is an NPA, or on the verge of being an NPA, and therefore no guarantee would suffice for the purpose of security. This is factually incorrect. In order to bring clarity on the aspect of the financial health of the petitioner to provide such guarantee, **the Petitioner is placing on record certificates/letters from its banks, expressly stating that there are no dues from the Respondent.** This being the position, there can be no argument from the

petitioner that the Respondent is an NPA, when the banks themselves are certifying the financial health of the Respondent.

- (viii) In any case, it is reiterated that under no circumstances, would the Petitioner be entitled to recover any amounts from the Respondent. Even if the SLP of the Petitioner is allowed, there will be no monetary recovery will flow to the Petitioner. It is only the Respondent, which has to recover huge amounts from the Petitioner. No security in the circumstances can be directed to be given by the Respondent to the Petitioner.

17. With the above observations and submissions made by the petitioner and Respondent on record, the findings of Commission are as under:

- (a) Hon'ble Supreme Court vide Order dated 2nd December, 2019 in CA 8860 of 2019 dismissed the Appeal filed by the petitioner against the order dated 26.08.2019 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 396 of 2018. It is mentioned in the aforesaid order passed by the Hon'ble Supreme Court that ***"However, the signing and handing over of the PPA will be subject to the result of the decision in Special Leave Petition (C) No. 29262/2018."*** The termination/existence of the Letter of Intent (LoI) is under consideration before the Hon'ble Supreme Court in SLP No. 29262/2018 and the signing and handing over of the PPA shall be subject to the outcome in the aforesaid SLP. In view of the foregoing and in the light of submissions by the parties, the Commission has examined the matter in detail and is of the considered view that it will be appropriate to direct the Respondent to provide security against fixed costs to be paid by the petitioner.
- (b) Having decided the requirement of security to be furnished by the Respondent, the Commission has examined the submissions of both the parties with regard to the form of security to be given by the Respondent towards payment of the fixed cost by the petitioner. While the petitioner in its submission has requested for security in form of Bank Guarantee based on its apprehension that assets of the Respondent are Non-Performing Assets (NPA) however, the petitioner has not filed any document in this regard. On the other hand, the Respondent has filed on record by way of an affidavit that the aforesaid contention of the petitioner is factually incorrect and the Respondent has filed the certificates/letters from

its banks also, stating that there are no dues from the Respondent. In its submissions, the Respondent has suggested following three options for the security to be given:

- (i) Adjustment in running bills.
- (ii) Furnishing Corporate Guarantee to the petitioner by the Directors of the Respondent Company.
- (iii) Creating a charge in favor of the petitioner by the Respondent on its 12 MW biomass-based plant.

The Commission has examined all the options and finds that the Bank Guarantee for an outstanding amount of Rs 46.52 crores may not be a feasible option to exercise in a situation where LOI itself is under adjudication and it is not clear as to what view do banks/financial institutions may take in such cases. As regards personal guarantee of Directors, given the outstanding amount of Rs 46.52 Crore, guarantee of this nature does not appear adequate to cover the risk of procurer. Therefore, we are inclined to consider the next option namely, creating charge on assets of the power plant of the Respondent Company in favor of the petitioner and think it appropriate that personal corporate guarantee of Directors of the Company along with creation of charge on assets would suffice to cover the risk in payment of fixed cost by the petitioner. Accordingly, it is hereby directed that the Respondent shall create charge on assets of power plant of the Respondent Company in favor of the petitioner and also furnish Corporate Guarantee in the nature of personal guarantee of Directors within a period of 30 days from the date of this order. It is however made abundantly clear that the corporate guarantee and charge on assets of power plant of the Respondent Company should fully cover the risk associated with payment of fixed cost amount.

With the aforesaid directions, this petition stands disposed of.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S. P. S. Parihar)
Chairman