

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Petition No.80/2012

Subject: In the matter of petition 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 read with Section 10(1)(f) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 seeking a review of the Order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 and 12 of 2012.

ORDER

(Date of Order: 1st February, 2013)

M/s D. B. Power (Madhya Pradesh) Ltd., Bhopal

Petitioner

V/s

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

Respondents

Shri Arijit Maitra, Advocate and Shri Devendra P. Khandelwal, Sr. GM (Finance) and Shri Nilesh Gode 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.4.

Shri Anant Chaure, Law Officer appeared on behalf of Respondent No.2.

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

The petitioner has filed the subject petition seeking review of the order passed by the Commission on 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012 under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 40 of Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and read with Section 10(1)(f) of Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000.

2. The petitioner broadly submitted the following :

(i) *The present Review Petitioner is a generating company within the meaning of Section 2(31) of the Electricity Act, 2003. Pursuant to a Memorandum of Understanding dated 15th February, 2008 executed between the Government of Madhya Pradesh and the present Review Petitioner, and based on the assurances and representations contained therein for facilitating private investment in power generation projects in the State of Madhya Pradesh and for providing assistance for the development of power generation projects, the present Review Petitioner agreed to establish in the State of Madhya Pradesh a 2x660 MW aggregating to 1320 MW thermal power station with a proposed investment of approximately Rs.8000 crore. An Implementation Agreement was executed between Government of Madhya Pradesh and the present Review Petitioner on 11th February, 2010. Accordingly, thereafter, a Model Power Purchase Agreement prepared by the Government of Madhya Pradesh was forwarded by M. P. Power Management Co. Ltd. (formerly known as M. P. Power Trading Co. Ltd.) to the present Review Petitioner. Subsequently, the M. P. Power Management Co. Ltd. and the Review Petitioner came to execute a Power Purchase Agreement dated 5th January, 2011. This PPA dated 5th January, 2011 came to be submitted by M. P. Power Management Co. Ltd., for seeking approval of this Hon'ble Commission thereon. This Hon'ble Commission accorded approval to the said PPA filed by the M. P. Power Management Co. Ltd., subject to the incorporation of certain conditions/modifications in various clauses. The Review Petitioner herein respectfully submits that two of the findings given by this Hon'ble Commission in its Order dated 7th September, 2012 requires a review as expressed below, the order dated 7th September, 2012 in Petition No.11 of 2012 is annexed herewith and marked as Annexure-I. :*

(a) *Concurrence of procurer to the Fuel Supply Agreement*

The Hon'ble Commission directed as follows :

iii) *Sub-Article 3.1.1.2 be added in Article 3 of the PPAs :*

“Within 15 days of this amendment or before commencement of supply of power, whichever is later, the company shall have obtained the concurrence of Procurer to the fuel supply agreement entered into by it with its fuel supplier for long term fuel supply including the rates, terms and conditions thereof.”

v) *Sub-Article 4.1.1(iii) be modified as given below :*

“The Company shall enter into appropriate arrangements for long term supply of Fuel for all or part of the capacity of the Unit(s) upon prudent terms and conditions materially consistent with the extant policy of the Government of India, if any. The Company shall have obtained the concurrence of the Procurer, as required under Section 3.1.1.2, for such fuel supply arrangements.”

(ii) *Procurer to ensure the availability of necessary evacuation infrastructure*

The Hon’ble Commission directed as follows :

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

“The Procurer shall have ensured the availability of necessary evacuation infrastructure beyond the Delivery Point required for evacuation of the Scheduled Energy at least 210 days prior to Commissioning of the first Unit.”

(iii) *The direction of this Hon’ble Commission in the impugned Order dated 7th September, 2012 to add Article 3.1.1.2 and to modify Article 4.1.1(iii) mandating the Review Petitioner to obtain concurrence of the Procurer to the Fuel Supply Agreement, contains an error apparent on the fact of the record inasmuch as the legally untenable position that entitled the Madhya Pradesh Procurer to negate the Fuel Supply Agreement meant for the power plant as a whole which could supply to States other than Madhya Pradesh. This issue may be seen in another perspective and that is that the Procurer M. P. Power Management Company could, but not giving concurrence to the Fuel Supply Agreement including the rate, terms and conditions thereof, possibly put the entire power plant of 1320 MW into jeopardy. If the concurrence of the Procurer Madhya Pradesh Power Management Company cannot be availed on the Fuel Supply Agreement then possibly the Review Petitioner may default towards its supply commitments to other buyers in other States or competitively bid basis to other States or under other bilateral arrangements.*

(iv) *A substantial question would arise as to what power in law would M. P. Power Management Co. Ltd. have to override the notified price of coal by the Coal India Ltd. In the respectfully submission of the present Review Petitioner, the Impugned Order dated 7th September, 2012 of this Hon’ble Commission to the extent it requires the Power Purchase Agreement dated 5th January, 2011 to be amended to provide for concurrence to be taken from the Procurer on the Fuel Supply Agreement including the rates, terms and conditions thereof, is vitiated on the ground of an error apparent on the face of record. The aforesaid letter of*

assurance dated 19th July, 2010 specifically records that the present Review Petitioner has already provided to Northern Coalfields Ltd. a commitment guarantee in the form of bank guarantee for a sum of Rs.26,94,14,400/- equivalent to 10% base price of the coal prevalent on the date of issue of the letter of assurance multiplied by the quantity of coal. This commitment guarantee in the form of bank guarantee will be encashed by Northern Coalfields Ltd. in the event of failure by the present Review Petitioner to sign the Fuel Purchase Agreement within the time stipulated therein. Annexed herewith and marked as Annexure V is a copy of letter dated 7th August, 2012 issued by the present Review Petitioner to Northern Coalfields Ltd. seeking execution of the Fuel Supply Agreement. Hence, in the event the Procurer Madhya Pradesh Power Management Company were to exercise its right to give or not to given concurrence under the PPA as directed to be amended by this Hon'ble Commission, then in that event not only would the bank guarantee as aforesaid would be amenable to the encashed by Northern Coalfields Ltd., but would also make the additional commitment guarantee of Rs.8,08,24,320/- submitted vide dated 20th December, 2012 also amenable to be encashed.

- (v) *It can be quite clearly seen that M/s Bina Power Supply Co. Ltd., did not require the Procurer to establish necessary evacuation infrastructure beyond the Delivery Point, because clause 4.8 of the Power Purchase Agreement executed by M/s Bina Power Supply Co. Ltd., mentioned of a dedicated transmission line of 400 KV having already been constructed and completed by M/s Bina Power Supply Co. Ltd., beyond the Delivery Point i.e. Delivery Point to 400 KV S/s of MP Transco at Bina. Accordingly, having already constructed the dedicated transmission line, there was no question of the obligation on the Procurer to establish the necessary evacuation infrastructure beyond the Delivery Point for M/s Bina Power Supply Co. Ltd. Consequently, the direction of this Hon'ble Commission to 'ensure' the availability of necessary evacuation infrastructure beyond the Delivery Point, is only to be applicable to M/s Bina Power Supply Co. Ltd., and not to the present Review Petitioner i.e. D. B. Power Company Ltd. In this view of the matter, the general direction contained in para 12 of the impugned order dated 7th September, 2012 in Petition Nos.7, 8, 9, 10 and 12/2012 amending article 3.2 of the Power Purchase Agreements, is an error apparent on the face of the records, in view of all the facts stated above. In effect, the impugned order dated 7th September, 2012 has, on the basis of the fact applicable only to one of the Respondents viz. M/s Bina Power Supply Co. Ltd., given directions to amend article 3.2 of all the Power Purchase Agreements executed of other Respondents, including the present Review Petitioner. This is clearly within the scope of review on account of the patent and glaring error in the impugned order.*

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. MP Power Management Co. Ltd., Jabalpur, Respondent No.1 in the matter, filed its response with the Commission on 17th 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) Regarding evacuation infrastructure beyond the delivery point, MPPMCL has submitted that *the expression “ensured” used in the impugned order is a broader term and captures the expressions “shall have established” as used in the PPA or “responsibility” as proposed by the review petitioner. Therefore, the impugned order to this extent does not suffer from any error apparent on face of record and the same has been passed in all consciousness after considering the facts and circumstances of the case.*
- (v) *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.4 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 17th December, 2012.

7. By affidavit dated 28th December, 2012, the petitioner filed a rejoinder to the reply filed by Respondent No.1. The petitioner submitted the following in the aforesaid rejoinder :

- a) *“The Respondent assumes that the decision requiring the Generator to obtain prior concurrence of the Procurer on the Fuel Supply Agreement cannot be said to be erroneous, much less “an error apparent on the face of the record” because the decision in the impugned order dated 7th September, 2012, in particular paragraph 12(iii)(b) thereof, had been taken consciously in the circumstances that fuel constitutes significant part of the cost of power generation and sale of electricity and higher fuel cost will be against the interest of the consumer. It is respectfully submitted that these contentions are not only factually incorrect, but have been made on a fanciful assumption that the impugned order has given reasons on the lines as aforestated by the Respondent. In fact, on the other hand, there is neither any discussion nor any reason in the impugned order mandating the review petitioner generator from obtaining concurrence from the procurer on the fuel supply agreement including the rates and other terms and conditions thereto. The fact that under law the impugned order cannot entitle the Procurer to negate, veto or override the rates notified by Coal India Limited for the purposes of the Fuel Supply Agreement, is a good enough ground to grant a review of the impugned order that stipulates amongst other things that the scope of the concurrence would be even on the rates in the Fuel Supply Agreement. It is respectfully*

submitted that this ground is within the scope of review as per settled law laid down by the Hon'ble Supreme Court on the scope and ambit of review proceedings, particularly where a glaring and patent error could be pointed out. It is the respectful submission of the Petitioner that requiring the concurrence of the Procurer to the Fuel Supply Agreement entered into by the generator with its fuel supplier for long term fuel supply, including the rates, terms and conditions thereof, is an inadvertent and a striking error apparent on the face of the records. The Petitioner also relies upon its other grounds made in the Review Petition in relation to the conditionally to take prior concurrence of the Procurer on the Fuel Supply Agreement.

- b) It is incorrect for the Respondent to contend that the only contention of the Review Petitioner is that the conditionality to take prior concurrence on the fuel supply agreement is that the same was not envisaged in the PPA earlier entered into. There are various other grounds that have been taken by the Review Petitioner to point out the error which is apparent on the face of records in the direction in the impugned order that the generator should have obtained the prior concurrence of the procurer on the fuel supply agreement. It is respectfully submitted that the Respondent has glossed over all these grounds that the present Review Petitioner has made out in its Review Petition.*
- c) The Respondent contends that because in clause 3.2(iii) of the PPA which provides that the parties have agreed to implement the PPA with such modifications to the terms thereof as may be decided by the Appropriate Commission, as if the Review Petitioner cannot seek a review of the impugned order dated 7th September, 2012. It is respectfully submitted that this contention suffers from a fundamental fallacy that as if the Review Petitioner generator has forfeited or forgone its rights to apply for a review of the impugned order dated 7th September, 2012 when it signed the PPA in which the parties have agreed to implement the PPA with such modifications to the terms thereof as may be decided by the Appropriate Commission. There is no law that bars the Petitioner from applying for a review or from preferring an Appeal, in view of clause 3.2(iii) of the PPA. It is respectfully submitted that these contentions have been made to be rejected.*
- d) The Respondent has admitted that the word 'ensure' in article 3.2(ii) of the PPA is a broader term and captures the expression 'shall have established' as used in the PPA or 'responsibility'. Hence, Respondent has clearly accepted responsibility to establish the necessary evacuation infrastructure beyond the delivery point as it had earlier also expressly assumed as an obligation on itself at paragraph 1G of its submissions filed in pursuance to the record of proceedings of this Hon'ble Commission dated 30th June, 2012. In the respectful submission of the petitioner, as long as this Hon'ble Commission clarifies the impugned order based on the express admission made by the Respondent in its present reply, the purpose would be served. This would however be without prejudice to the contention*

raised in the Review Petition that on account of deletion of clause 4.2(ii) of the PPA and furthermore changing article 3.2(ii) to insert the words 'ensure the availability' in the place of 'shall have established', there is an error apparent on the face of the records necessitating the review of the impugned order dated 7th September, 2012.

e) The Respondent has in a mechanical manner denied several things in paragraph 6 of its reply without giving any reasons for its denial. This may kindly be rejected."

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.

10. The petitioner in its rejoinder filed on 16th January, 2013 broadly submitted the following :

a) The Review Petitioner has a letter of allotment of long-term coal linkage from the Ministry of Coal. According to the terms of the said letter of allotment, the rates of the coal as supplied shall be notified by Coal India Limited. Accordingly, it is not legally tenable to entitle the Procurer to give a concurrence or not to give concurrence on the rates, terms and conditions of the Fuel Supply Agreement.

b) The provisions of Section 86(1)(b) empower this Hon'ble Commission to regulate Electricity purchase and procurement process of Distribution Licensees and not the fuel supply and procurement process of the generating company. Accordingly, this Hon'ble Commission will have no jurisdiction to regulate the fuel supply and procurement process of a generating company. The Supreme Court of DLF Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana reported in (2003) 5 SCC 622 held that a regulatory Act must be construed having regard to the purpose it seeks to achieve and a statutory authority cannot ask for something which is not contemplated under the statute.

- c) *A Model Power Purchase Agreement prepared by the Government of Madhya Pradesh was forwarded to the present Review Petitioner. Article 4.1.(iii) of the said Model Power Purchase Agreement reads as follows :*

“4.1.1(iii) The Company shall enter into appropriate arrangements for supply of Fuel for all or part of the capacity of the Unit(s) upon prudent terms and conditions materially consistent with the extant policy of the Government of India, if any. The Company shall provide a copy of the duly executed Fuel Supply Agreement to the Procurer.”

It can quite clearly be seen from the above quoted Model Power Purchase Agreement that no concurrence pertaining to the execution of Fuel Supply Agreement by the Review Petitioner was expressly or impliedly stipulated therein.

- d) *Subsequently, the Respondents and the Review Petitioner came to execute a Power Purchase Agreement dated 5th January, 2011, wherein an identical provision with that of the aforesaid Clause 4.1.1(iii) of the Model Power Purchase Agreement was inserted at Article 4.1(iii). Hence, no prior concurrence from the Procurer in regard to execution of the Fuel Supply Agreement was even stipulated in the executed version of the Power Purchase Agreement.*
- e) *The factum of existence of a dedicated transmission line of Bina Power Supply Ltd., was taken into account to pass the aforesaid directions pertaining to sub-article 3.2(ii) and sub-article 4.2(ii) even for this Review Petitioner, who did not represent that it has put into place any dedicated transmission line.*
- f) *Even in the statement showing the evacuation infrastructure beyond the delivery point at Annexure-III of the “Submission of MP Power Management Company Ltd., in pursuance to the Record of Proceedings dated 30.6.2012 relating to the hearing on 25.06.2012”, it has been stated therein that the Central Transmission Unit (“CTU”) shall construct dedicated transmission line from the power plant to its Vindhychal Pooling Station and MP Power Management Company Ltd., shall draw its power from the network of the CTU.*

11. Having heard the parties and in view of the Commission's observation in para 3.0 of this Order, the Commission reviewed its order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012 in light of all possible consequential effects (as agitated by the petitioner in this review petition) which may occur on implementation of certain modifications approved in the aforesaid Order. On review, the Commission has decided to amend the following sub- paragraphs in Para 12 of the Commission's order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012 :

a) **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."

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

c) **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."

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

e) **Sub-para (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."

12. 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.

13. With the above directions, this petition stands disposed of.

sd/-
(Alok Gupta)
Member

sd/-
(A. B. Bajpai)
Member

sd/-
(Rakesh Sahni)
Chairman