

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
5th Floor, "Metro Plaza", Bittan Market, Bhopal - 462 016



Petition No. 64 of 2015

PRESENT:

Dev Raj Birdi, Chairman

A.B. Bajpai, Member

Alok Gupta, Member

IN THE MATTER OF:

Application under Section 86(1)(b) & (f) of the Electricity Act, 2003 to direct the Respondent No. 1 to procure the "Contracted capacity of Applicant's 1320 MW(2x660MW) coal based Super Thermal Power Project at Nigrie, District Singrauli (M.P.) as per the Power Purchase Agreement dated January 5th 2011 entered into between the Petitioner & Respondent No. 1

M/s Jaiprakash Power Ventures Limited

Petitioner

V/s

- 1. M.P. Power Management Company Ltd., Jabalpur**
- 2. M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd Jabalpur**
- 3. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd Bhopal**
- 4. M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd Indore**
- 5. State Load Despatch Centre Nayagaon Jabalpur**
- 6. Energy Department, Government of Madhya Pradesh**

Respondents

ORDER
(Date of Order: 8th July, 2016)

Shri Sakya Singha Choudhari, Advocate and Shri Ashok Shukla Authorized Representative appeared on behalf of the petitioner.

Shri Alok Shankar, Advocate appeared on behalf of Respondents No. 1 to 4.

Shri R.V. Saxena, DGM and Shri Gagan Diwan, AO appeared on behalf of M.P. Power Management Co. Ltd. (MPPMCL), Jabalpur

Shri Ashish Bernad, Advocate and Shri R.A. Sharma, SE appeared on behalf of SLDC, MPPTCL, Jabalpur

Shri Shailendra Jain, Dy. Director (Tariff) appeared on behalf of MP Paschim Kshetra V.V.Co. Ltd, Indore

Shri N.K. Upadhyay, E.E. appeared on behalf of Energy Department, Govt. of Madhya Pradesh, Bhopal.

M/s Jaiprakash Power Ventures Ltd. filed the subject petition under Section 86(1)(b)&(f) of the Electricity Act, 2003 for adjudication of dispute between the petitioner and M.P. Power Management Co. Ltd (MPPMCL), Jabalpur on the issues related to “Declared Capacity” and “Contracted Capacity of its 2x660 MW coal based Super Thermal Power Project as per Power Purchase Agreement (PPA) entered into by the parties on 5th January, 2011.

2. The background of subject petition is as given below:

- (i) M/s. Jaiprakash Power Ventures Ltd.(petitioner) is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003. It is having a power plant with installed capacity of 2x660 MW Jaypee Nigrie Super Thermal Power Plant at Nigrie District Singrauli (M.P).
- (ii) Government of Madhya Pradesh ("GoMP") and the petitioner had entered into a Memorandum of Understanding for setting up a 500 MW thermal power station, which was subsequently amended from time to time for setting up a plant of 1320 MW. The Power Project under the MoU was to be set up by the petitioner. Accordingly, the petitioner signed an Implementation Agreement dated 12 December, 2007 with GoMP, which was subsequently amended on 27 March, 2008 (“I.A.”). Under the terms of the I.A., GoMP or its nominated agency has the first right to purchase power from the Power Project, upto thirty percent (30%) of the installed capacity over a period of twenty (20) years at a tariff to be determined by the Commission, and a further 7.5% of the net power (i.e. the gross power generated less the permitted auxiliary consumption) at a price equivalent to the variable charge/cost to be determined by the Commission.

- (iii) Pursuant to above I.A., the Madhya Pradesh Power Trading Co. Ltd. (“MP Tradeco”) as the nominee of the GoMP (now renamed as Madhya Pradesh Power Management Company Ltd.-“MPPMCL”) entered into a Power Purchase Agreement (PPA) with the petitioner on 5 January, 2011. Under the PPA, MPPMCL will be supplied 30% of the installed capacity of the Power Project at a tariff determined by the Commission. Further, GoMP and the petitioner entered into a PPA on 6 September, 2011 for supply of 7.5% of the net power to GoMP or its nominated agency (MPPMCL) at variable charges/ cost.
- (iv) The petitioner’s power plant consists of two units having capacity of 660 MW each. Unit No. 1 (660 MW) and Unit No. 2 (660 MW) of the petitioner’s power plant were declared under commercial operation on 3rd September, 2014 and 21st February, 2015, respectively. On the petitions filed by the petitioner, the Commission provisionally determined the tariff for Unit No. 1 on 26th September’ 2014 and Unit No. 2 on 31st March’ 2015.
- (v) Vide Commission’s order dated 31st March’ 2015 in IA No. 1 of P-3 of 2015, the Annual capacity (fixed) charges were provisionally determined for each unit from the respective CoD of each unit on pro-rata basis for the number of operational days in FY 2014-15 and thereafter for both the units, considering the capital cost and funding separately for each unit duly certified by the statutory auditor of the petitioner’s company as given below:

Capital Cost and Funding for each unit as on 31.07.2014:

Sr. No.	Particular	Unit	Unit No. 1	Unit No. 2
1	Capital expenditure as on 31/07/2014 certified by CA	₹ Cr.	5036.55	4908.32
2	Less expenditure on start-up fuel of Unit No. 1	₹ Cr.	128.23	0.00
3	Net capital expenditure considered in this order	₹ Cr.	4908.32	4908.32
4	Opening Loan	₹ Cr.	3377.41	3377.41
5	Opening Equity	₹ Cr.	1530.91	1530.91
6	Normative Equity	₹ Cr.	1472.50	1472.50
7	Excess Equity	₹ Cr.	58.41	58.41
8	Debt : equity	ratio	(68.81 : 31.19)	

*Considering debt : equity ratio of 68.81 : 31.19

Annual Capacity (fixed) charges:

Sr. No.	Particular	Unit	Unit No. 1	Unit 1 and 2	
			COD of Unit 1 to 20.02.2015	COD of Unit 2 to 31.03.2015	FY2015-16
1	Return on equity	₹ Cr.	288.76	577.52	577.52
2	Interest charges on loan	₹ Cr.	427.23	851.25	817.92
3	Depreciation	₹ Cr.	238.22	476.44	476.44

4	Operation & Maintenance expenses	₹ Cr.	92.27	184.54	199.19
5	Secondary fuel oil expenses	₹ Cr.	29.68	59.36	59.36
6	Interest on working capital	₹ Cr.	53.88	107.69	107.83
7	Annual Capacity (fixed) charges	₹ Cr.	1130.04	2256.80	2238.27
8	AFC prorated for No. of days during FY2014-15	₹ Cr.	529.42	241.14	2238.27
9	AFC for contracted capacity (30 %)	₹ Cr.	158.83	72.34	671.48
10	95% of the above Annual Capacity Charges	₹ Cr.	150.88	68.72	637.91

Petitioner's Submission in the Petition

3. The petitioner broadly submitted the following in the subject petition:

- (i) *The Project consists of two units of 660 MW each both of which have achieved COD and are therefore fully operational. However, in order to operate the Project in an economic and optimal manner, the Petitioner plans for the time being, to schedule the entire Contracted Capacity of 30% of the Installed Capacity of the Power Station from either or from both units, as found economically more prudent. It is respectfully submitted that this is being done merely from an operational stand point, and does not in any manner contractually tie down the Contracted Capacity to any particular unit of the Power Station to the exclusion of the other unit. (Emphasis Supplied)*
- (ii) *It is relevant to note that the Petitioner, subsequent to attainment of COD of Unit II on February 21st, 2015, has been filing applications (since Long Term Open Access for Unit II was operationalized w.e.f. May 7th, 2015) for scheduling Power from Unit II on a regular basis and the same have been consistently denied by State Transmission Utility (STU)/State Load Despatch Centre (SLDC) based on refusal of Respondent No.1 to draw the power. Copies of the correspondence between the Petitioner and the STU/SLDC for scheduling of power from Unit II is annexed herewith.*
- (iii) *In view of refusal of MPPCL to draw the power from the Project, the Petitioner, in its letter dated March 25th, 2015 requested the Principal Secretary (Energy), Government of Madhya Pradesh, to advise the Respondent No.1 to start scheduling its share of the Contracted Capacity from the Power Station.*
- (iv) *The Respondent No.1, in response to the aforesaid letter vide their letter dated 19-05-2015, categorically refused to schedule its 30% share (Contracted Capacity) of installed capacity from the Petitioner's Project, **on the ground that the supply of contracted power of both the units from any one unit has not been envisaged under the PPA.** It cited the provisions of the PPA relating to COD and*

Declared Capacity to contend that the same were defined unit-wise under the PPA. Further, Clause 4.3.7 and 4.5 of the PPA were also referred to by the Respondent No.1 in the said letter. (Emphasis supplied)

- (v) *The Petitioner, in response to the Respondent No.1's letter dated 19.05.2015, vide letter dated May 20th, 2015 explained the definition of "Contracted Capacity" as per PPA, and clarified the position, that the Contracted Capacity is defined as 30% of the Power Station's Installed Capacity and not unit wise. In the said letter, the Petitioner also cited the definition of "Declared Capacity" as per PPA to clarify that it did not mean Unit wise declaration. This letter also highlighted that the Hon'ble Commission in its order dated 31.03.2015 approved a blended tariff for both Units i. e. of its total Installed Capacity of 1320 MW.*
- (vi) *The fact that 30% of Power Station's installed capacity can be supplied from any or both units or any combination thereof without any prejudice to the Respondents, is further supported by Hon'ble Commission's grant of blended or station wise provisional tariff vide Order dated March 31st, 2015. In view of the blended tariff, there is no financial implication on the distribution companies on supply of the Contracted Capacity from any of the units of the Power Station. Petitioner clarified its position on the treatment of Contracted Capacity to the Respondent No.1 vide letter dated May 27th, 2015.*
- (vii) *However, on 29.05.2015, the Petitioner received a Letter No. 07-05/CR/ dated 29/05/2015 from SLDC, Jabalpur addressed to Shift Incharge, WRLDC/ JP Nigrie. The letter read as under :-*

"MPPMCL has clarified that entitlement from jp NIGRI shall be separately given for each unit and only on bar units shall be considered. Therefore, from one on bar unit mp entitlement shall be limited to our contracted ex bus capacity from that on bar unit only. Therefore, the entitlement of 402 mw given is not acceptable and the max entitlement may be restricted to on bar unit only, i.e. 201 mw, during ramping half of the given entitlement may be considered. Mp will accept the on bar dc only. Therefore, DC given by JP NIGRI as 1240 MW is not acceptable and only On Bar DC shall be considered during real time."

From such letter, it is clear that the SLDC, Jabalpur has relied on the intimation given by MPPMCL, that its entitlement from the Power Station is unit wise and not from the Station. Further, the SLDC has concurred with the MPPCL, without

giving any opportunity to the Petitioner to clarify and/or explain the correct position as per the PPA. Moreover, the SLDC, Jabalpur has gone one step further to intimate to the WRLDC that only “On Bar Units” shall be considered. In other words, even if any unit is available and ready to generate, SLDC would not consider the capacity of that unit in the Declared Capacity or in other words, “Off Bar Unit”, though being ready to generate, depending on the demand supply scenario, is not to be included in the declared capacity. (Emphasis Supplied)

- (viii) Aggrieved by the action of the SLDC and the refusal of the MPPCL to schedule its share of energy, the Petitioner herein approached this Commission by way of Petition No. 30 of 2015 seeking declaration that the Petitioner herein is entitled under the PPA to supply the Contracted Capacity under the PPA to the Procurers from any single Unit, both Units and combination thereof, and further direct the Procurers /Respondents to procure the Contracted Capacity from Petitioner’s Power Station whether from any single Unit, both Units and combination thereof. The Petitioner further sought quashing of Letter No. 07-05/CR/ dated 29/05/2015 issued by SLDC, Jabalpur. The Commission vide its order dated 23.07.2015 in Petition No. 30 of 2015, opined that the issues for consideration were premature and directed the parties to follow the Dispute Resolution Process under the PPA.*
- (ix) Accordingly, the parties held a joint meeting on 28.07.2015 to resolve the disputes per the directions of this Commission, and the provisions of the PPA under clause 13.5 relating to Resolution of Disputes. In such meeting the dispute on the issue of Contracted Capacity remained unresolved and parties agreed that the Petitioner was free to approach the Commission. This position was also recorded in the Minutes of the Meeting which was sent by the Respondent No. 1 to the Petitioner in its email dated 29.07.2015. Confirming the contents of the Minutes of the Meeting, the Petitioner signed sets of the Minutes and dispatched the same to the Respondent No. 1 by courier and also mailed the same to the Respondent No.1.*
- (x) Thereafter the power of the Off bar unit from the On bar unit was scheduled by Respondent No.1’s offices with effect from 00:00 hrs of 30.07.2015. The Petitioner had raised an invoice of Rs.51.18 crores for the month of July 2015. However, the Petitioner on 26.08.2015 received a credit of Rs. 37.99 crores in its revenue account which was not reconciling with any of the invoices raised. Accordingly, the Petitioner sought clarification from the Respondent No. 1 in its email dated 26.08.2015.*

- (xi) *Surprisingly, on 28.08.2015, the Petitioner received an email from the Respondent No.1 containing an amended Minutes of Meeting wherein the conduct of business of the actual joint meeting of the parties was completely altered and the Respondent No. 1 had inserted issues for the first time relating to amended PAFM. Further the Respondent in its letter dated 04.09.2015 to the Petitioner made reference to the revised Minutes sent on 29.08.2015 and attempted to link the same to the minutes circulated on 28.07.2015.*
- (xii) *Aggrieved by the unilateral and erroneous revision of the Minutes of the Meeting, the Petitioner in its letter dated 10.10.2015, clearly objected to the Respondent No.1's conduct in raising a new issue of amended PAFM as the same had never been discussed by the parties and was thus never cited in the Minutes circulated on 29.07.2015. The Petitioner reserving its right in law to object to such issue of amended PAFM, highlighted that there was no definition of amended PAFM either under the PPA or regulations of the MPERC.*
- (xiii) ***Finally on 12.10.2015, the Petitioner under clause 13.5.2 of the PPA issued a formal Notice of Dispute to the Respondent No. 1, on the issues of definition and interpretation of Contracted Capacity as contained in the PPA. It is submitted that the notice has been sent as a matter of abundant precaution to avoid any objection regarding maintainability of the present petition. It is nonetheless pointed out that it is an admitted position between the parties that the formalities under Article 13.5.2 of the PPA have been complied with. Therefore, the said notice is a matter of formality. (Emphasis supplied)***
- (xiv) ***The Petitioner meanwhile raised an invoice of Rs.72.44 crores for the month of August 2015. However, the Petitioner received a total amount of Rs. 58.20 crores against such invoice by way of two instalments on 30.09.2015 and 03.10.2015. This was not reconciling with the invoice raised. It is submitted that the Procurers/ Respondents have failed to pay the full amount of the invoices raised for July and August 2015. Therefore, the Petitioner is entitled to the balance amount of the invoices that have not been paid in view of the justification provided in the letter dated 04.09.2015 along with applicable interest/ surcharge.(Emphasis supplied)***
- (xv) *The Petitioner humbly submits that in accordance with the terms and conditions of the PPA, the grid code and approved provisional blended tariff by this Commission, the Petitioner has been declaring its capacity for the Power Station as 1240.80 MW (1320 MW less auxiliary consumption) and whenever any of the*

unit is not available due to breakdown or shortage / unavailability of coal, the declared capacity is reduced / changed accordingly. The most recent example is the Declared Capacity submitted by the Petitioner for delivery on 1st May 2015 for 333.33 MW because of very low fuel stock and the DC for delivery on 30th April, 2015 was 1240.80 MW. Further, the Petitioner declared Nil capacity with effect from 10th May 2015 onwards as the plant was shut down due to non-availability of coal. Since the Petitioner is declaring the DC for the Station, the Contracted Capacity is to be reckoned with this capacity.

- (xvi) *It is submitted that section 32 of the Electricity Act, 2003 provides that the State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State and to such extent shall inter alia “be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State”.*
- (xvii) *Therefore, the SLDC while scheduling power from the Petitioner’s Power Station was required to proceed in accordance with the PPA signed between the parties. However, it has proceeded to act in a manner inconsistent with the express terms of the PPA and has denied scheduling of power to the Petitioner merely on the basis of “clarification” issued by MPPMCL without reverting to the Petitioner. SLDC, Jabalpur has acted arbitrarily and in contravention of the Act, by communicating the above mentioned issue to WRLDC without giving any chance to the Petitioner to explain the correct legal position in terms of the PPA and has not acted in a judicious and neutral manner which is the bedrock for the formation of SLDCs/WRLDCs.*
- (xviii) *It is further submitted that the concept of an amended PAFM that has been sought to be introduced by the Procurers/ Respondents in the revised MoM is nothing but an afterthought, and contrary to the express provisions of the PPA. Therefore, the non-payment of the capacity charges on the pretext of amended PAFM is wrongful and illegal.*

4. With the above contention, the petitioner prayed the following in its petition:

- “a. *Declare that the Petitioner is entitled under the PPA to supply the Contracted Capacity under the PPA to the Procurers from any single Unit, both Units and combination thereof.*

- b. *Direct the Procurers /Respondents to procure the Contracted Capacity from Petitioner's Power Station whether from any single Unit, both Units and combination thereof.*
- c. *Quash and/ or set aside Letter No. 07-05/CR/ dated 29/05/2015 issued by SLDC, Jabalpur to inform WRLDC that power from the Power Station should be scheduled on unit wise basis.*
- d. *Direct the Procurers / Respondents to pay the amount of Rs. 274,252,776.00 deducted from the Monthly Bills for July and August 2015 along with the applicable Surcharge from the bill date till the date of actual payment;*
- e. *Direct the Procurers / Respondents to pay the future Capacity Charges as per provisions of the PPA;*
- f. *Declare that the reasoning of the Amended PAFM raised by the Procurers / Respondents, is bad in Law;*
- g. *Pass such orders as the Hon'ble MPERC may deem fit and proper and necessary in the facts and circumstances of the case."*

Details of proceedings before the Commission

5. The petition was admitted 15th December'2015 and the petitioner was directed to serve copies of the petition on all respondents in the matter. On the request of the petitioner, notice was issued to Energy Department, Govt. of Madhya Pradesh also seeking their views/ comments on the petition. All respondents including the Energy Department, Govt. of M.P. were directed to file their response on the petition by 11th January' 2016. The petitioner confirmed the service of the copies of its petition alongwith all details/ documents on all Respondents in the subject matter.

6. On preliminary examination of the subject petition, the Commission noted that the petitioner has again approached the Commission under Section 86(1)(f) of the Electricity Act 2003 with only one document i.e. minutes of meeting held between the officers of M.P. Power Management Co. Ltd., Jabalpur and the petitioner. It was noted by the Commission that the aforesaid minutes of meeting were signed by the petitioner only and no one signed on behalf of Respondent No.1.

7. In view of the above status, Respondent No. 1 (MPPMCL, Jabalpur) was directed to file its response on the petition by 10th February' 2016 and also clarifying its position on the minutes of meeting filed by the petitioner. Energy Department, Government of M.P. was also directed to file its reply to petition by 15th February' 2016.

8. M.P. Power Management Co. Ltd., Jabalpur and State Load Desptach Centre, Jabalpur

had initially sought time extension to file their reply to the petition. Subsequently, in compliance with the above directives, by affidavit dated 22nd January' 2016 (letter no. 05-01/1977 dated 04.02.2016 received in the office of the Commission on 11th February' 2016) MPPMCL filed its reply to the petition. Besides its detailed submissions on the petition,, MPPMCL submitted the following in Para 13 of its preliminary submission and at Para 6 of its para-wise reply, clarifying its position on the Minutes of meeting filed with the petition:

“It is humbly submitted that in order to resolve this issue till the time Petitioner is able to submit ‘Certified’ PAFM along with the monthly bills, and in the meanwhile to protect the financial interest of R-1, a meeting was held with the representative of the Petitioner in Jabalpur on 28th July, 2015. It was proposed by R-1 that the ‘Non escalable’ portion of Fixed charge may be withheld provisionally, by way of amending the PAFM, as a matter of precaution, until the Petitioner is able to get the PAFM certified from concerned authorities. However, the proposal could not be worded properly in the first draft Minutes of Meeting. Following the principle of fair practice and as requested by him, an e-mail attaching a copy of first draft MoM was sent to the mail address of representative of the Petitioner on 29.07.2015 so that he can get the approval from his Management. Meanwhile, the draft MoM was discussed within the Company by R-1, wherein it was pointed out that the proposal made in the meeting has not been worded properly to safeguard the financial interest of R-1, specially, in light of observations of CAG in its reply (Commercial) for the year 2012-13 namely “Review on ‘Power Purchase Agreements entered into by MP Power Management Co. Ltd./ Board/ Government of MP with Private Power Producers for purchase of Power and its operationalization’ during the period from 2008-09 to 2012-13”. Therefore, MoM was redrafted and sent again to the representative of the Petitioner for acceptance on 28.08.2015. Meanwhile, the representative of the Petitioner signed the first draft MoM, sent only for approval of his Management, and sent it on 29.07.2015. However, as the draft MoM was under discussion within the Company, officers of R-1 did not sign the first draft Minutes signed and sent by the Petitioner on 29.07.2015. The redrafted second draft MoM was sent on 28.08.2015 to the Petitioner which was not agreed by the representative of Petitioner and they did not sign it.”

*“With regard to the averments made in para 12, it is not disputed that a joint meeting was held on 28.07.2015. **The minutes of meeting relied upon by the Petitioner was a draft MoM and not signed by all the parties and, therefore, it remains only a draft MoM and cannot be acted upon. The Petitioner cannot rely upon unsigned Minutes of Meeting and make out a case for consideration by this Hon’ble Commission.**”*
(Emphasis supplied)

9. In view of the above status of the Minutes of meeting filed with the petitioner and Respondent No. 1 were clear directives by the Commission to convene a fresh meeting in terms of Clause 13.5.2 (c) of the PPA to settle the dispute on the issues raised by the petitioner in the subject petition. The following directives were issued by the Commission to both the parties to avoid any shortcoming/infirmity in the document to be placed before the Commission :

- (i) The views of the parties on the issues be recorded in the minutes of meeting to be signed by both the parties.
- (ii) In the event, the parties do not agree with each other in the meeting, the reasons of disagreement be clearly recorded in the “Minutes of Meeting”. Thereafter, the Minutes of Meeting be filed with the Commission by 26th March’ 2016.

10. In the next hearing held on 29th March’ 2016, Counsel for the petitioner informed that the meeting has been convened with MPPMCL on 19th March’ 2016 and the minutes of the same have been now signed by both the parties. He filed a copy of the aforesaid Minutes of Meeting with the Commission. The petitioner and Respondent No. 1 (MPPMCL) filed their final written submission with the Commission on 18th April’ 2016 and 13th April’ 2016, respectively. Energy Department, GoMP and the State Load Despatch Centre,MP Jabalpur also filed their reply with the Commission in this matter.

11. During the course of hearing held on 26th April’ 2016, Counsels on behalf of the petitioner and Respondents placed their oral arguments and counter arguments also on the issues under dispute in the subject petition. On the request of the petitioner, it was allowed to file additional written submission with the Commission after serving a copy of the same to all Respondents in the matter by 7th May’ 2016. The respondents were also at liberty to file their rejoinders by 18th May’ 2016. The matter was then fixed on 24th May’ 2016 for reporting the compliance.

12. During the course of hearing held on 24th May’ 2016, it was observed by the Commission that the petitioner filed its additional written submission and the Respondent No. 1 also filed its rejoinder on the same with the Commission. Having hearing the parties and taking on record the submissions and documents filed by the parties, the case was reserved for orders by the Commission.

Arguments/Submissions made by the Petitioner and Respondent No.1 in the matter:

13. **M/s. Jaiprakash Power Ventures Ltd** (the petitioner). filed rejoinders against the averments filed by MPPMCL during the complete proceeding in the matter. Its contention on the disputed issue is summarized as given below:

“The limited issue that arises for consideration in the present proceedings is:

Whether the Petitioner is entitled under the PPA dated 5th January, 2011 to supply power to the Respondents from any unit or a combination of both units of their 2x660 MW thermal power plant at Nigrie to meet the requirement of contracted capacity under the PPA, based on the definition of Contracted Capacity in the PPA which clearly specifies that the contracted capacity is 30% of the Power Station's Installed Capacity?

The definition, as contained in the PPA is as under:

“Contracted Capacity”, shall mean the capacity equivalent to 30% of the Power Station's Installed Capacity contracted with the Procurer as per terms of this Agreement.

- (i) It is clear on combined reading of the various clauses of the PPA that the Petitioner is required to set up a Power Plant of 2x660 MW. Therefore, the obligations under the PPA related to the Power Plant as a whole and not unit-wise. The provisions relating to unit-wise commissioning, scheduling, capacity, etc will be relevant only till the Power Plant is commissioned.*
- (ii) Article 4.3.1 of the PPA imposes an obligation on the Petitioner to make the Contracted Capacity available to the Procurer. Similarly, it obliges the Procurer to purchase the Scheduled Energy at the defined Tariff.*
- (iii) The obligation under Article 4.3.1 of the PPA relates to Contracted Capacity. It does not require supply of power specifically from the units of the Power Station.*
- (iv) On a plain reading of the expression “Contracted Capacity” along with the related expressions “Power Station” and “Installed Capacity”, it become clear that Contracted Capacity means **capacity equivalent to** 30% of the maximum capacity rating achieved by the 1320 MW plant. The Contracted Capacity does not relate to any specific unit. It does not require supply of specific quantum of power from any particular unit.*
- (v) The word “capacity equivalent to” in the definition of Contracted Capacity is significant as it indicates only the capacity to be supplied, and does not necessarily relate to the source of supply. Otherwise, the words would typically be: “Contracted Capacity means 30% of the power generated from each unit of the Power Station...”*
- (vi) Similarly, the definition of Scheduled Energy r/w the definition of Available Capacity makes it clear that it relates back to Contracted Capacity.*
- (vii) Further, Article 4.5.1 of the PPA provides for levy of liquidated damages for not making available the Contracted Capacity for dispatch by the SCoD or Revised SCoD. In this regard, Article 4.5.3 clarifies that the Petitioner shall be entitled to make available the Contracted Capacity from any Unit or combination thereof. Therefore, the PPA clearly provides for supply of power from any Unit or combination thereof for meeting the requirement of Contracted Capacity.*

- (viii) *In this regard, the contention of GoMP that Article 4.5.3 relates to the period prior to commissioning of the Power Station, is clearly misconceived. It has been the clear contemplation of the parties that the Power Station would consist of two units. Therefore, the clarification in Article 4.5.3 can be given effect to only on commissioning of both the Units.*
- (ix) *Apart from the contractual clauses discussed herein above, the requirement to schedule the Contracted Capacity under the PPA from any one unit becomes necessary in view of technical constraints of running the Power Station below the technical minimum. It is the endeavor of any regulatory exercise to ensure optimization of resources and cost. In the absence of any other firm tie up of power from the Power Station, running both the Units to generate 30% of the Installed Capacity would not only be sub-optimal and wasteful operation, but will also cause severe stress to the plant.*
- (x) *There is no prohibition in the PPA against supply of Contracted Capacity from any one unit or combination thereof. In fact, the PPA expressly provides for such a situation. There is no loss caused to the Procurers on supply of Contracted Capacity if the energy is supplied from one Unit and the other Unit is under reserved shutdown to avoid technical losses.*
- (xi) *The main objection raised by the Procurers and the MPSLDC is with regard to scheduling of power from one Unit. Respondents (including MPSLDC) have referred to certain instances to aver that the Petitioner has not been declaring availability, thereby suggesting foul play in terms of declaration in the event Contracted Capacity is supplied from any one unit of the Power Station.*
- (xii) *It is pointed out that the instances of mis-declaration alleged against the Petitioner by the Respondents, especially MPSLDC, are clearly incorrect and misleading and not based on incorrect facts as has been clearly explained by the Petitioner in this rejoinder affidavits. The Respondents have not put the entire facts/ documents on record while raising allegations against the Petitioner.”*

14. Vide letter No. 05-01/1977 dated 04.02.2016 and No. 05.01/460 dated 13th April’ 2016 **M.P. Power Management Co. Ltd., Jabalpur (Respondent no. 1)** broadly submitted the following in response to the petition and additional submission filed by the petitioner:

- “(i) *Madhya Pradesh Power Management Co. Ltd. is the holding company of the three Distribution Licensee arrayed as Respondent No. 2-4 in the present petition and has been authorized by them to represent them in the present proceedings before this Hon’ble Commission. Accordingly the submission on behalf of MPPMCL must be read as being submitted on behalf of Respondent No. 1 to 4 i.e. MPPMCL and the three Distribution Companies in the State of M.P.*

- (ii) *It is submitted that the Petitioner has approached this Hon'ble Commission inter alia praying for declaration that it is entitled to supply the entire contracted capacity even from single unit of the generating station and/ or any combination thereof as deemed appropriate by the Petitioner.*
- (iii) *While it might be practically feasible to supply 30% of the Installed Capacity of the Power Station, i.e., 396 MW entirely from one unit in case Petitioner has not been able to enter into any long or medium Term Agreements for sale and purchase of power from the generating station, the same would not be the case when the remaining capacity is also tied-up. For example, in the month of March, 2016, when one of the Units was under forced outage, the Petitioner did not offer to supply the corresponding share of power of Unit under forced outage from the other 'on-bar' Unit.*
- (iv) *The real question therefore that needs to be considered is whether the interpretation as suggested by the Petitioner would continue to hold true even after substantial part of the installed capacity of the generating station is tied-up to other beneficiaries.*
- (v) *It is settled law that interpretation of a contract must be consistent. Since, the proposed interpretation that the Petitioner can supply from any one unit or in any combination would not hold good when bulk of the capacity of the generating station is tied-up, therefore there can be no doubt that the interpretation offered by the Petitioner was not the true intention of the parties at the time of entering into the PPA.*
- (vi) *An agreement must be given an interpretation which would hold good not just in the present facts but even also in all likely scenarios. An agreement cannot be interpreted in light of the circumstances existing at the time of the lis. Other likely eventualities have to be not just considered but also tested along with the interpretation offered.*
- (vii) *It is submitted that some of the provisions relied on by the Petitioner to claim or argue that the intention of the Parties was to enable supply of contracted capacity from any unit or any combination, in fact, demonstrate the contrary. In this regard, reference may be had to Clause 4.5 of the PPA. Clause 4.5 of the PPA deals with the rights and obligations of the Parties in the event of delay in making available the Contracted Capacity. In the context of delay in commissioning of*

any particular unit of the generating Station, the Petitioner is required to supply power from alternate source and/ or unit which has been commissioned. In the event, supply is made from alternate source and/ or commissioned unit then the liquidated damages is to be computed only on the basis of actual shortfall from the contracted capacity.

(viii) *It is submitted in light of the fact that supply from one unit is contemplated only in the event of delay in commissioning of the generating station and, therefore, the benefit available to the petitioner cannot be extended to normal operating period of the generating station.*

(ix) *Clause 4.5 of the PPA extends benefit to the Petitioner to supply power from a single unit in certain circumstance, the same cannot entitle the Petitioner to shut-down one unit of the generating station and to supply entire contracted capacity from the operational unit.*

(x) *The Supreme Court in a catena of cases has relied on the maxim “expressum facit cessare tacitum” (“when there is express mention of certain things, then anything not mentioned is excluded”) to arrive at the true intention of a provision (See: Union of India v. Tulsiram Patel, (1985) 3 SCC 398) and the principle applies squarely to the present case. The Petitioner is not permitted to supply the contracted capacity from only one unit after the commissioning of the generating station.*

(xi) *It is submitted that other provisions of the PPA also make it abundantly clear that both the units have to be operated to make available the contracted capacity. Some of these provisions are extracted hereunder for ready reference:*

*“**Power Station**” shall mean the coal based Jaypee Nigrie Super Thermal Power Station having the proposed capacity of (2 x 660) =1320 MW, to be established in Village Nigri, Tehsil Deosar, District: Sidhi in the State of Madhya Pradesh.*

*“**Declared Capacity**” in relation to a Unit or Power Station **at any time** means the Net Capacity of the Unit or Power Station **at the relevant time** (expressed in MW at the delivery point) as declared by the Company in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff.’ [Emphasis added]*

“Contracted Capacity” shall mean the capacity equivalent to 30% of the Power Station's Installed Capacity contracted with the Procurer as per terms of this Agreement;

“Installed Capacity” shall mean the sum of MCR capacities of the Unit(s) of the Power Station, as confirmed by the respective Performance Test;

“Scheduled Energy” shall mean the energy corresponding to the Available Capacity, to be scheduled in accordance with ABT;

“Available Capacity” shall mean such of the Contracted Capacity as declared available by the Company in accordance with ABT;

“Tariff” shall mean the tariff payable by the Procurer to the Company for making available the Contracted Capacity and for supply Electrical Output corresponding to the Contracted Capacity at Normative Availability, as may be determined by the Appropriate Commission under Law.

- (xii) **Thus, the definition prescribed that a unit should have the capability to deliver ex-bus electricity in MW in any time block of the day. It is stated that in the definition of ‘Declared Capacity’ in PPA, the DC of the Power Station at any time means the net capacity of the Power Station declared at the relevant time. For example, if Unit-2 is ‘off-bar’, then the Generator cannot declare the capacity of Unit-2. At any point of time, the procurer is not privy to the reasons whether and why any Unit is off-bar. It is stated that neither the PPA nor the Regulations provide for Procurer to pay fixed charges for off-bar Unit. (Emphasis supplied)**
- (xiii) **There can be no doubt that the liability of a beneficiary to pay capacity charge cannot relate to any capacity which is not available. In the event a unit is off-bar; there is no question of the same be declared to be available. In the event the argument of the Petitioner in relation to supply from only one unit is accepted, it will tantamount to shifting of Available Capacity of one Unit, which is off-bar, to other Unit. This was not envisaged in the PPA. (Emphasis supplied)**
- (xiv) **It is stated that the Procurer is liable to pay fixed charges in case of only On-bar Units because it provides back-up in case of tripping of any one Unit. If the claim made in the present case by the petitioner is hypothetically accepted, and the entire quantum of power (60% in the instant case) is being scheduled from U#1**

while U#2 is off-bar and in case of tripping of U#1, the Procurer will be left without power from the Power station as U#2 will take at least 8-12 hrs for cold start. However, if both Units are on-bar, then in case of tripping of any one Unit, the Procurer will be affected only to the extent of 30% power of that Unit, and scheduling of 30% power from other Unit may continue unabated. Thus it is required that both the Units should be on-bar and Fixed charge for only on-bar Units shall be paid in lieu of back-up or a cushion in case of tripping of any one Unit.

- (xv) *Admittedly, Monthly Tariff invoice has to include availability and energy account, which are required to be prepared by WRLDC. Since the same has not been provided the monthly invoice is not in accordance with the provisions of the PPA.*
- (xvi) ***It is stated that as per Clause 10.2(i) of the PPA, PAFM has to be certified by WRLDC which is not being done. The monthly bills being submitted by the petitioner does not contain the PAFM duly certified by REA prepared by WRLDC since September' 2014, i.e. CoD of Unit-1. As per PPA, it is the responsibility of the Generator to get the duly certified PAFM from WRLDC and submit it with the bill. Hence, the monthly bills being sent are not as per provision of the PPA. (Emphasis supplied)***
- (xvii) *It is pertinent to mention here that although it is the responsibility of the Generator to get the duly certified PAFM from WRLDC and submit it with the bill, R-1 is also helping the Petitioner in getting the PAFM certified so that the issue of payment of monthly bill gets resolved. The matter was brought to the notice of WRPC and WRLDC officials by both parties. In the 68th Commercial Committee Meeting in the Office of the WRPC held on 28.10.2014, the issue of PAFM was discussed. The representatives of WRPC and WRLDC expressed their inability to include PAFM in the REA. The matter was again brought up in the 69th Commercial Committee Meeting held on 23rd January 2015. Further, in reply to 1st respondent's letter dated 20.05.2015, the POSOCO Limited vide its letter dated 01.06.2015 replied as below:*
- “As per definition of ISGS by IEGC, ISGS means as central generating stations or other generating stations in which two or more states have share. Further DC can only be accepted in case there is 100% allocation from the plant is allocated to more than one state. Therefore declaration of partial capacity can neither be checked for faithfulness nor be certified. It is also clarified that WRLDC is not doing any DC certification of any of the stations in Western Region but only submitting the DC submitted by ISGS stations having 100%***

allocation to WRPC secretariat for preparation of Regional Energy Accounting (REA).”

*The issue of non-certification of DC was also discussed in the meeting held on 23rd July 2015 with POSOCO at Bhopal, wherein the above request was made to resolve such matter of Nigrie TPS, and it was assured to take action in the matter. The copies of the correspondence exchanged in this regard are annexed herewith and marked as **Annexure I (Colly)***

- (xviii) *It is humbly submitted that in order to resolve this issue till the time Petitioner is able to submit ‘Certified’ PAFM along with the monthly bills, and in the meanwhile to protect the financial interest of R-1, a meeting was held with the representative of the Petitioner in Jabalpur on 28th July, 2015. It was proposed by R-1 that the ‘Non escalable’ portion of Fixed charge may be withheld provisionally, by way of amending the PAFM, as a matter of precaution, until the Petitioner is able to get the PAFM certified from concerned authorities. However, the proposal could not be worded properly in the first draft Minutes of Meeting. Following the principle of fair practice and as requested by him, an e-mail attaching a copy of first draft MoM was sent to the mail address of representative of the Petitioner on 29.07.2015 so that he can get the approval from his Management. Meanwhile, the draft MoM was discussed within the Company by R-1, wherein it was pointed out that the proposal made in the meeting has not been worded properly to safeguard the financial interest of R-1, specially, in light of observations of CAG in its report (Commercial) for the year 2012-13 namely “Review on ‘Power Purchase Agreements entered into by MP Power Management co. Ltd./ Board/ Government of MP with Private Power Producers for purchase of Power and its operationalization during the period from 2008-09 to 2012-13”. Therefore, MoM was redraft and sent again to the representative of the Petitioner for acceptance on 28.08.2015. Meanwhile, the representative of the Petitioner signed the first draft MoM, sent only for approval of his Management, and sent it on 29.07.2015. However, as the draft MoM was under discussion within the Company, officers of R-1 did not sign the first draft Minutes signed and sent by the Petitioner on 29.07.2015. The redrafted second draft MoM was sent on 28.08.2015 to the Petitioner which was not agreed by the representative of Petitioner and they did not sign it.*

It is submitted that as per Balancing and Settlement Code issued by MPERC, R-1 can schedule power for the base Units, for which DC has been furnished by the petitioner.

- (xix) *It is submitted that MPPMCL and the distribution licensees are regulated entities, not just by this Hon'ble Commission but also by the Statutory and other auditors. Any expense incurred which is not strictly in accordance with the terms of the PPA results in extended scrutiny.*
- (xx) *In light of the above, MPPMCL has been requesting the Petitioner to resolve the issue with the WRLDC. MPPMCL has been making best efforts to resolve the issue. On the other hand, the Petitioner has not made any effort to escalate the issue to appropriate resolution in accordance with the provision of the Act. The Petitioner should have approached the CERC under Section 29, 79(1) (c) to seek direction to WRLDC.*
- (xxi) *It is submitted that MPPMCL has also sought from WRLDC, Unitwise, blockwise details of Declared Capacity and power scheduled by the Petitioner during March, 2016.*
- (xxii) *The Petitioner has submitted that since the default is at the end of WRLDC, the Petitioner should not be held responsible for the same. It is submitted that in the event the argument is accepted then there would not be any third party scrutiny to the declaration and consequently the tariff invoices raised by the Petitioner.*
- (xxiii) *It is submitted that in the situation when one Unit is kept 'off-bar', which in the words of the Petitioner is addressed as 'Elective shut down', if the Generator supplies full share of power to MPPMCL corresponding to both Units from one Unit, then (i) Fixed charge, as decided by Hon. Commission for 'on-bar' Unit, and (ii) only the escalable portion of fixed charge for the Unit under 'Elective shut down' shall be payable. However, if in such case full share of power is not supplied by the Generator, then the Generator shall be liable to pay to this Respondent the financial burden, which this Respondent had to bear, i.e., the differential amount, which shall be calculated as product of (i) difference of Variable charge claimed by the Petitioner during that month & the highest rate (Variable charge) at which power was purchased during the period of 'Elective shut down', and (ii) less units supplied during the month.*
- (xxiv) *It is submitted that there is no question of bill dispute notice being raised by MPPMCL in the instant case as the Monthly Bills have not been raised as per the express requirements of the PPA.*

- (xxv) *A Power Purchase Agreement was entered into between the Petitioner and Respondent No.1 to 4 on 05.01.2011 pursuant to and in terms of the Memorandum of Understanding (“MOU”) and Implementation Agreement (“IA”) executed between State of Madhya Pradesh and the Petitioner. As per the MOU and IA, GOMP has the first right to purchase 30% power at tariff determined by Appropriate commission and the said right was in addition to the right to buy 7.5% of the net power generation.*
- (xxvi) *The PPA thus is not a standalone document, but has been entered into on basis of the earlier agreements between GOMP and the Petitioner. Though the PPA is only between the Petitioner and Respondent Nos 1 to 4, the submissions of GOMP in relation to the actual intention of the Parties at the time of execution of MOU and IA in relation to off-take of 30% installed capacity are the most important guide to the interpretation of the provisions of the PPA.*
- (xxvii) *MPPMCL shall at all times comply with the obligations under the PPA and all applicable regulations. However, certain obligations under the PPA are reciprocal in nature. The Petitioner must raise bills in accordance with the provisions of the PPA, only then the reciprocal obligation of payment of invoice as per the due date in the PPA can be prayed for.*
- (xxviii) *The Petitioner can require payment of capacity charge only from units on bar and any unit which is under shut-down for planned outage or forced outage or shut-down for economic reasons cannot be declared as available and capacity charge thereof cannot be claimed. (Emphasis supplied)***
- (xxix) *Petitioner must supply 30% power proportionately from both the units of the generating stations as per the provisions of the PPA.*

15. M/s. Jaiprakash Power Ventures Ltd. had made additional submission on 07.05.2016 related to the submissions filed by Respondent (MPPMCL).The same are reproduced as given below:

- “(i) *The present written submissions is being filed for the limited purpose of addressing some of the submissions raised by the Respondents in the course of hearing of the matter on 26.04.2016. It is pertinent to point out at the very outset that the SLDC in the course of its arguments had indicated its understanding of contracted capacity as being the equivalent of 30% of 1320 MW.*
- (ii) *The Petitioner had also placed before the Hon’ble Commission the draft PPA forming part of the standard bidding documents notified by the central*

government, where contracted capacity was defined in terms of the capacity to be made available from each unit of the power plant, to demonstrate that the PPA clearly provides for unit-wise contracted capacity whereas it is the intent of parties to define contracted capacity in terms of each unit.

- (iii) The Petitioner had further pointed out that if the units are run at 30% capacity at the insistence of the Respondents, the same would require continuous oil support, which will ultimately result in higher energy charges for the consumers of the state.
- (iv) Now, the Petitioner proceeds to deal with the specific arguments raised by the Respondents (as set out in bold hereunder):

- **On feasibility of supply of 396 MW from one unit once the entire capacity is tied up”**

The PPA only allows an option to the Petitioner to supply the contracted capacity from either of the units or a combination of both. The option has been provided to tide over situations like the present one where running the plant at 30% capacity will result in sub-optimal operations and increased fuel charges. It is neither an obligation nor a mandate to continue the same configuration of supply for the entire period of the PPA. Once the entire capacity of the Project is tied up, there will neither be any requirement nor an occasion to supply the contracted capacity from one unit.

The instance quoted in para 4 of MPPMCL’s response highlights the fact that the Petitioner is scrupulously following the rules and has not scheduled 30% of 1320 MW when one of the units was under forced outage.

- **Clause 4.5.3 only applies to a situation prior to commissioning:**

- (a) Clause 4.5.1 provides for two contingencies: (i) delay in commissioning of any of the units; and (ii) delay in making the contracted capacity (i.e. 396 MW) available by SCoD. The second situation may arise from various situations e.g. MCR being lower than 660 MW for any unit. The clarification in clause 4.5.3 applies to such situations and allows the Petitioner to supply the contracted capacity from either or both units.
- (b) Further, it may be noted from the recitals and the definition of “Power Station” under the PPA that the Project consists of two units. Therefore the words used in clause 4.5.3 “from any unit or combination thereof” would have no relevance and would be otiose and redundant if the clause only applied to a period prior to commissioning as suggested by the Respondents.
- (c) In any case, once such an option is clearly allowed under the PPA, the terms of the PPA have to be construed in this light while ascertaining the

nature of obligation to supply contracted capacity.

- ***There can be no DC for off bar units and only availability of on bar units have to be considered:***

This contention is completely misconceived as there is hardly any correlation between the availability of a unit and its status of being off bar. Declared capacity (DC) is the declared availability of a plant having regard to its technical and operational readiness to generate power at any particular time based on available fuel. Once the DC is given, the Project may stay off bar even due to lack of scheduling by the beneficiaries. This would not mean that the DC of the Project would be reduced to zero.

Therefore, the ability and manner of supply of contracted capacity has nothing to do with off/ on bar status of the Petitioner's Project or any of the units. It would be relevant only in event that a particular unit is under shutdown. In fact, MPPMCL in para 4 of its WS admits that the Petitioner had not scheduled capacity for a unit that was under forced outage.

- ***Supply of entire contracted capacity from one unit will cause uncertainty and power deficit if the unit has an outage – time lag of 8-12 hours before the other unit can be ramped up:***

This is again an operational issue and cannot guide the interpretation of the expression "Contracted Capacity" which has been defined in clear terms as only being equivalent of 396 MW.

If there is a shutdown of the operating unit, it is the obligation of the Petitioner to arrange of the contracted capacity either from the other unit or from alternate sources (till the other unit is ramped up). Further, the PPA specifies the damages to be paid by the Petitioner to the Discoms in the event of failure to provide the whole or any part of Contracted Capacity. Therefore, such a situation is already contemplated under the PPA.

- ***On the formula for damages suggested in para 21 of MPPMCL WS for non-supply of power:***

The PPA already specifies the liquidated damages for non-supply of contracted capacity. The parties will have to be guided by the same.

- ***Availability of availability and energy account from WRLDC not submitted along with invoice:***

Petitioner has been consistently following up with WRLDC for this along with the cooperation of MPPMCL. Having said so, once the contracted capacity is being supplied by the Petitioner, the Respondents should pay the entire charges in good faith. If any amount is found to be overpaid, the same can be adjusted at a subsequent period. In any case, the fact that the Respondents have been able to point out specific instances and nature of the outage faced by the Project clearly shows that they have full information about the availability of the Project.”

16. In response to the above, MPPMCL submitted the following on 18.05.2016:

- “(i). The Petitioner is relying upon the submission made by SLDC that the Contracted Capacity in the instant PPA is 30% of 1320 MW. It is submitted that the issue in the instant petition is whether the contracted capacity can be supplied entirely from one unit or any combination thereof. It is submitted that quantum of contracted capacity was never an issue before the Hon’ble Commission and the arguments have been addressed only on the issue of supply of such contracted capacity. Reliance on submission of SLDC is misplaced and out of context. It is submitted that SLDC only addressed the Hon’ble Commission against specific allegations against it and in any event has no locus to control the interpretation of the PPA.*
- (ii) Reliance of the Petitioner on the draft PPA forming part of the Standard bidding Documents notified by the Central Government is akin to relying on unrelated document to understand the intention of the Parties in PPA entered into between the Parties.*
- (iii) Provisions of the PPA entered into between the Parties have to be gone into to understand the intention of the Parties. Reliance on documents which form part of the whole chain may be possible, however reliance on unrelated draft agreement is contrary to the settled principles of interpretation of a contract.*
- (iv) The Petitioner has submitted that after the bulk of the capacity of the Plant is tied-up there would be no question of supply from one unit. Clearly, the interpretation that is being proposed today is not to be applied consistently over the life of the Plant. Clearly what is being proposed could never have been the intention of the Parties at the time of entering into the PPA.*
- (v) As submitted during the hearing, in the event it is technically not feasible to operate at low loads, the petitioner may enter into a discussion with MPPMCL*

and agree on a mutually agreeable solution. However, as per the PPA, the Petitioner is obliged to supply 30% capacity from each unit of the generating station.

(vi) *The Petitioner is relying on Clause 4.5.3 of the PPA to suggest that the petitioner is free to supply the contracted capacity from any unit or any combination of units. It is submitted, Clause 4.5.3 of the PPA cannot be read in isolation. Clause 4.5.3 of the PPA is to be read together with Clause 4.5.1. The option to supply from one unit is limited to delay in commissioning or making available the contracted capacity by the Scheduled COD. Since the exemption is limited to a specified event, the scope thereof cannot be expanded.*

(vii) *Scheduling from a unit and the unit being on-bar are completely different things. In this regard it is pertinent to refer to Article 6 of the PPA.*

6.1 Availability, Scheduling and Despatch

6.1.1. The Company shall comply with the provisions of the applicable Law regarding Availability, scheduling and Despatch including, in particular, to the provisions of the ABT and Grid Code relating to declaration of Availability and the matters incidental thereto.

6.1.2 The Contracted Capacity being a part of the Power Station's Net Capacity; in the event of Declared Capacity being less than the Power Station's Net Capacity, the Available Capacity to the Procurer for despatch out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity is reduced in proportion to the Power Station's Net Capacity.

6.1.3 The Company agrees that the Availability entitlement of the Procurer for despatch over any Settlement Period is the exclusive right of the Procurer and it cannot be offered to any third party other than for conditions under Article 4.3.3.

(viii) *It is submitted that entitlement of the Discoms is proportionate to Declared Capacity of the Petitioner and, therefore, the Petitioner cannot supply entire entitlement of the Discoms from one unit in terms of the PPA.*

(ix) *Ramp-up during outage is a very realistic situation which is required to be kept in mind while interpreting a PPA. The petitioner cannot be allowed to brush the same aside as "operational issue" and this not relevant for interpretation of "Contracted Capacity" and the provisions of the PPA. It is submitted that the Petitioner has approached this Hon'ble Commission inter alia praying for declaration that it is entitled to supply the entire contracted capacity even from*

single unit of the generating station and/ or any combination thereof as deemed appropriate by the Petitioner.

- (x) *While the Petitioner notes various provisions of the PPA, it has overlooked the fact that the Monthly Tariff Invoice has to be supported with independent certifications, i.e., REA. In the event WRLDC has failed to discharge its duties despite best efforts of the Petitioner, the petitioner must take steps under the Act to enforce its rights. MPPMCL being a regulated entity cannot process and pay, invoices which have not been raised as per the PPA.*
- (xi) *In light of the above it is submitted that the petitioner must supply 30% power proportionately from both the units of the generating stations as per the provisions of the PPA.*

Submission of Energy Department, Government of Madhya Pradesh (Respondent No. 6)

17. By affidavit dated 15th February' 2016, Energy Department, Government of Madhya Pradesh has submitted the following:

- “(i) *That, the petitioner has entered into a Power Purchase Agreement (PPA) dated 05-01-2011 with the Respondent No. 1 for sale of power to the tune of 30% of the installed capacity of its generating station comprising of Unit-1 and Unit-2, each of installed capacity of 660 MW and which achieved their respective CoD's on different dates, viz., 30-09-2014 and 21-02-2015.*
- (ii) *That, the petitioner has founded its petition on totally misconceived facts and grounds that in order to operate the project in an economic and optimal manner, the respondent no. 1 be directed to schedule the entire contracted capacity of 30% of the installed capacity of the power station from either or from both the units, as found economically and more prudent to the petitioner. In this pursuit, the petitioner is keen at its own financial advantage in total disregard to the provisions of law as applicable and even to the provisions of the PPA.*
- (iii) *That, Regulations 8.2 and 8.3, inter-alia, dealing with methodology for determination of tariff and true-up in presently applicable MPERC (Terms & Conditions for Determination of Generation Tariff) (Revision-II) Regulations, 2012 provide as under:*
 - “**8.2. Tariff in respect of a Generating Company under these Regulations shall be determined Unit-wise or for a group of Units. However, when a new generating Unit is added after 1-4-2013, the**

Commission shall determine separate Tariff for such new Unit(s). The Generating Company shall submit separate calculations in respect of each generating station giving break-up for Units prior to 2013 and Units added thereafter.

8.3. For the purpose of Tariff the capital cost of the Project shall be segregated into stages and by distinct Units forming part of the Project. *Where the Stage-wise, Unit-wise break-up of the capital cost of the project is not available and in case of on-going Projects, the common facilities shall be apportioned on the basis of the capacity of the Units In relation to Hydroelectricdetermination of Tariff.*

Explanation: "Project" includes a generating station."

[Emphasis supplied]

(iv) *That, similar position of determination of tariff, Unit-wise, Phase-Wise or Generating Station-wise is found in CERC Tariff Regulations, which provide guide-lines in tariff matters. Even the tariff regulations of Hon'ble Commission for the past periods provide similar methodology. Therefore, the legal position is very clear that tariff will be determined Unit-wise, where the generating station is commissioned Unit-wise, as in the case of the petitioner herein.*

(v) *That, the aforesaid legal position will prevail over and above the provisions of the PPA between the parties in this respect. It is celebrated legal principle that the provisions of law prevail over the contracts between the parties. In Appeal No. 114 of 2012 vide judgement dated 9th October, 2012 the Hon'ble Appellate Tribunal for Electricity has been pleased to hold as under:*

"The State Commission has given the findings according to its Regulations. The Regulations are subordinate legislation and their provision will prevail over the provisions of the existing PPA and the PPA will have to be aligned with the Regulations."

[Emphasis supplied]

(vi) *That, without prejudice to the legal position as mentioned above, it is submitted that the PPA provides that Contracted Capacity shall mean the capacity equivalent to 30% of the Power Station's Installed Capacity contracted with the procurer as per terms of the agreement (emphasis added). Thus, the Contracted Capacity is dependent on the terms of the agreement, i.e., the PPA and not as inferred by the Petitioner. Under the PPA, Unit-wise Commercial Operation dates and Declared Capacity in relation to a unit etc., have been clearly*

indicated. It is emphasized that supply of contracted power from the Power Station from any one unit or combination thereof, has not at all been envisaged in the PPA.

- (vii) That, the PPA provides for only one emergent situation, under article 4.5.3, in which the petitioner is entitled to or permitted to make available power from any one of the Units or combination thereof. Article 4.5.3 of the PPA provides as under:

“Petitioner is entitled to make available contracted capacity from any Unit or combination thereof and in such an event LD shall be determined only for the contracted capacity not made available.”

Thus, it is clearly evident from the above that the Petitioner has been specifically permitted under PPA to supply power from any one Unit or combination thereof, only in the event of applicability of LD for non-supply of power due to delay in achieving Scheduled/ Revised Scheduled CoD. Since the units are under Commercial Operation since 30.09.2014 and 21.02.2015 respectively, provisions under clause 4.5.3 are no more applicable in the present context.

- (viii) That, the Article 6.1.2 of the PPA clearly provides that “the Contracted capacity being a part of the Power Station’s Net Capacity, the Available Capacity to the Procurer out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity is reduced in proportion to the Power Station’s Net Capacity.” (Emphasis added) In view of this provision, when the Declared Capacity gets reduced in absence of any one of the Units, then the Contracted Capacity automatically gets reduced in that proportion. Therefore, the plea of the petitioner that they are entitled under PPA to supply contracted capacity from any single unit and combination thereof is not in line with the provisions of the PPA.

- (ix) That, from the legal position and contractual position between the parties to the PPA, as set out above, it is abundantly clear that the Procurer/ respondent No. 1 is not liable to procure the Contracted Capacity from any one Unit or Combination of units, of the the petitioner’s Power Station, as prayed by the petitioner. If the Respondent No. 1 is made to procure power from the petitioner, in a manner as prayed by the Petitioner, then it will defeat the provisions of Regulations-8 of the MPERC (Terms & Conditions for Determination of Generation Tariff) (Revision-II) Regulations, 2012 and also the provisions under PPA executed by the Petitioner with the Respondent No. 1 and will unnecessary put adverse financial burden on consumers of Madhya Pradesh.

- (x) *That, in view of the factual and legal matrix, as set out above, all the adverse averments made are specifically denied. The answering respondent supports the reply, in similar tune that may separately be preferred by MPPMCL. The petition, as instituted is sans-merit and is prayed that the same may be dismissed outright.”*

Submission by State Load Despatch Centre, MP (Respondent No. 5)

18. State Load Despatch Centre, MP broadly submitted the following:

- (i) *The functions of State Load Despatch Centre have been clearly defined in the Electricity Act 2003 which mentions that the State Load Despatch Centre shall be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in the State. The Grid management activities including scheduling are being discharged by SLDC in accordance with the responsibility assigned to it under Electricity Act 2003 and various regulations notified by CEA/ CERC/ MPERC.*
- (ii) *The Petitioner has objected to not giving consent by SLDC for Short Term Open Access applications submitted by them for dated 27.02.2015, 28.02.2015, 02.03.2015, 28.03.2015, 09.04.2015 and 18.04.2015. The STOA applications received were forwarded to MPPMCL for their consent which was not granted. Therefore the application was not consented by SLDC and returned to petitioner recording the reason “Not consented by MPPMCL”. The STOA applications are processed in this manner only and SLDC is responsible for obtaining the consent of state utilities/ entities for scheduling of power under Short Term Open Access. For granting Short Term Open Access in bilateral mode, mutual agreement between buyer and seller is the prerequisite for processing of the applications. If state utility/ entity do not give their consent, the application is returned to the applicant recording comments of the state entity.*
- (iii) *Therefore, MP SLDC has acted as per the regulatory procedures and not violated any regulatory provisions. It is therefore incorrect on the part to allege against the answering Respondent with respect to the STOA applications. It is submitted that the Petitioner is making incorrect statements with no basis in law or facts.*
- (iv) *The SLDC has fulfilled its responsibility in the scheduling process. This was also necessary to avoid wrong scheduling by WRLDC and resulting commercial*

complications. The letter to WRLDC was emailed by MP SLDC following the standard procedures of scheduling. SLDC agrees that if the unit under outage is planned for taking on-bar, the generator has the option to give DC considering the estimated time of its synchronization. The petitioner's both the units were under forced outage on 29th May 2015 and they have lighted up only one unit on 29.05.2015 with synchronization plan at 02.00 Hrs on 30.05.2015. The second unit (Unit No. 1) was synchronized on 08.06.2015 by the petitioner. This clearly shows intentional mis-declaration of DC by the petitioner. Therefore, it is evident that the petitioner himself violated the principles of declaration of generating capacity by giving DC for the unit which was under forced outage. Copy of mis-declaration of DC for dated 30.05.2015 is annexed as Annexure-III. It is submitted that it is the Petitioner who is guilty of mis-declaration/ gaming and this Hon'ble Commission should take note of this fact and proceed against the Petitioner for this grave violation of the regulations.

- (v) *The petitioner's allegation that SLDC relied on the intimation given by MPPMCL without giving any opportunity to the petitioner is not accepted as the procurer had already intimated the petitioner its stand in the matter through letter dated 19.05.2015 (Annexure-2). It was the responsibility of the petitioner to sort out the issues if any MPPMCL and intimate the same to SLDC. However, the same was not done by the petitioner. SLDC has never said that even if the unit is available and ready to generate the DC will not be accepted. The DC from the off-bar unit is accepted only if the unit is kept under Reserve Shutdown by the procurer(s). This is as per the standard procedure as adopted at regional forum. The DC from the Unit No. 1 which was under forced outage from 23.03.2015 and synchronized on 08.06.2015, was given by the petitioner for 30.05.2015 without light-up and hence comes under gaming and mis-declaration of DC.*
- (vi) *From the above, it is evident that the petitioner has not only mis-declared its capacity but also mis-led the SLDC regarding agreement which do not exist till date.*
- (vii) *As mentioned in reply to para 10 above, the petitioner on many occasions has resorted to mis-declaration of its generation capacity and gave DC for the unit which is under forced outage. On many occasions in the event of tripping of any unit, the petitioner has revised the Long Term entitlement of MPPMCL but not curtailed bilateral STOA transaction. Clause 6.5(19) of the IEGC 2010 allows the generator with 100 MW or above capacity, to revise its bilateral transaction in the event of unit tripping. On 20.08.2015, petitioner's on-bar unit got tripped*

and entitlement of MPPMCL was made to zero from 18th time block. The unit was got synchronized at 26th time block. The entitlement of MPPMCL was ramped from 35 MW to 414.82 MW giving less entitlement to MPPMCL from 26th to 44th time block whereas the petitioner has not reduced the bilateral transaction from 33rd to 44th time block which remained same as 152.36 MW. The SLDC through letter No. 07-05/RPC-53/JPNigrie/2886 dated 22.08.2015 intimating that there is a provision in IEGC and Intrastate Short Term Open Access regulations for revising the DC in case of tripping of the unit (forced outage) and as per PPA whenever unit tripping occurs JNSTPP has to revise the DC such that when the unit comes on bar, the first right should be given to the Long Term Customer and when full power is given to long term customer then only the short term power should be scheduled. It was also brought to the notice of the petitioner that they are not following the same despite taking up repeatedly by MP SLDC.

The clause-4.3.2 of the PPA signed between MPPMCL and M/s. Jaiprakash Power Ventures Ltd. mandates as under:

“Subject to the provisions of this Agreement, the entire Contracted Capacity shall at all times be for the exclusive benefit of the Procurer (through the Procurer to meet the Discoms requirements) who shall have the exclusive right to purchase the Scheduled Energy. The Company shall not grant to any third party or allow any third party to obtain any entitlement to the Contracted Capacity and/ or Scheduled Energy.”

From the above provision, it is clear that it is mandatory and binding for the Petitioner to make Contracted Capacity of the procurer first following the other transactions. However the Petitioner has failed to comply the same. The copies of Declared Capacity, entitlements of MPPMCL and Short-term Bilateral transactions given by the petitioner for dated 01.06.2015 to 04.06.2015 are annexed as Annexure-VI.

- (viii) *The control Area demarcated of Load Despatch Centres is defined under Regulation 6.4 of CERC (Indian Electricity Grid Code), Regulations 2010. The JNSTPP Generating Station of Jaiprakash Power Ventures Limited (“JPVL”) is connected only to the Interstate Transmission System (ISTS) and hence as per Regulation 6.4(2)(c), this Generating Stations falls within the Control Area jurisdiction of Western Regional Load Despatch Centre (WRLDC). The scheduling activities of the Generator i.e. Petitioner, therefore is within the control area jurisdiction of WRLDC. The Generator declares its day ahead capacity as well as real time revisions clearly indicating the entitlement of Respondent No. 1, to WRLDC and simultaneously conveys the same to MP SLDC*

also. After receiving the requisition from the procurer, i.e. Respondent No. 1, MP SLDC sends the same to WRLDC and accordingly WRLDC issues the injection schedule to the Generating Station of the Petitioner.

(ix) *The contention of the Petitioner that the action of SLDC was on the basis of clarification issued by MPPMCL without reverting to the Petitioner is not correct as the letter was also addressed to Jaypee Nigrie Thermal Power Plant. The requisitions as received from MPPMCL are emailed/ faxed to WRLDC as well as petitioner's Generating station hence allegation that SLDC has acted arbitrarily and in contravention of the Act is not true. If the buyer and procurer have any dispute, they should sort out the same mutually. The SLDC as Apex body always discharge its functions and duties as per provisions of the Act and regulations."*

19. In its reply, SLDC, M.P. submitted the following also:

(a) Issuing the letter No. 07-05/CR/ dated 29.05.2015 by SLDC to WRLDC, Mumbai and Jaypee Nigrie Thermal Power Plant is a correct action and request of the Petitioner to quash and/ or set aside should not be considered by the Hon'ble Commission.

(b) The petition filed by M/s. Jaiprakash Power Ventures Ltd. is not maintainable and should be disposed off.

20. Besides the aforementioned submission of the parties in the subject petition in support of their contention, some arguments of the petitioner and the counter arguments placed by Respondent No. 1 in their final written submissions on the core issue in the matter under dispute are precipitated as given below:

(A) **Petitioner's submission:**

The Petitioner had also placed before the Hon'ble Commission the draft PPA forming part of the standard bidding documents notified by the central government, where contracted capacity was defined in terms of the capacity to be made available from each unit of the power plant, to demonstrate that the PPA clearly provides for unit-wise contracted capacity whereas it is the intent of parties to define contracted capacity in terms of each unit.

The Petitioner had further pointed out that if the units are run at 30% capacity at the insistence of the Respondents, the same would require continuous oil support, which will ultimately result in higher energy charges for the consumers of the state.

Response of Respondent No. 1 (MPPMCL):

Reliance of the Petitioner on the draft PPA forming part of the Standard bidding Documents notified by the Central Government is akin to relying on unrelated document to understand the intention of the Parties in PPA entered into between the Parties.

Provisions of the PPA entered into between the Parties have to be gone into to understand the intention of the Parties. Reliance on documents which form part of the whole chain may be possible, however reliance on unrelated draft agreement is contrary to the settled principles of interpretation of a contract.

(B) Petitioner's submission:

The PPA only allows an option to the Petitioner to supply the contracted capacity from either of the units or a combination of both. The option has been provided to tide over situations like the present one where running the plant at 30% capacity will result in sub-optimal operations and increased fuel charges. It is neither an obligation nor a mandate to continue the same configuration of supply for the entire period of the PPA. Once the entire capacity of the Project is tied up, there will neither be any requirement nor an occasion to supply the contracted capacity from one unit.

The instance quoted in para 4 of MPPMCL's response highlights the fact that the Petitioner is scrupulously following the rules and has not scheduled 30% of 1320 MW when one of the units was under forced outage.

Response of Respondent No. 1 (MPPMCL):

The Petitioner has submitted that after the bulk of the capacity of the Plant is tied-up there would be no question of supply from one unit. Clearly, the interpretation that is being proposed today is not to be applied consistently over the life of the Plant. Clearly what is being proposed could never have been the intention of the Parties at the time of entering into the PPA.

As submitted during the hearing, in the event it is technically not feasible to operate at low loads, the petitioner may enter into a discussion with MPPMCL and agree on a mutually agreeable solution. However, as per the PPA, the Petitioner is obliged to supply 30% capacity from each unit of the generating station.

(C) Petitioner's submission:

Clause 4.5.1 provides for two contingencies: (i) delay in commissioning of any of the units; and (ii) delay in making the contracted capacity (i.e. 396 MW) available by SCoD. The second situation may arise from various situations e.g. MCR being lower than 660

MW for any unit. The clarification in clause 4.5.3 applies to such situations and allows the Petitioner to supply the contracted capacity from either or both units.

Further, it may be noted from the recitals and the definition of “Power Station” under the PPA that the Project consists of two units. Therefore the words used in clause 4.5.3 “from any unit or combination thereof” would have no relevance and would be otiose and redundant if the clause only applied to a period prior to commissioning as suggested by the Respondents. In any case, once such an option is clearly allowed under the PPA, the terms of the PPA have to be construed in this light while ascertaining the nature of obligation to supply contracted capacity.

Response of Respondent No. 1 (MPPMCL):

The Petitioner is relying on Clause 4.5.3 of the PPA to suggest that the petitioner is free to supply the contracted capacity from any unit or any combination of units. It is submitted, Clause 4.5.3 of the PPA cannot be read in isolation. Clause 4.5.3 of the PPA is to be read together with Clause 4.5.1. The option to supply from one unit is limited to delay in commissioning or making available the contracted capacity by the Scheduled COD. Since the exemption is limited to a specified event, the scope thereof cannot be expanded.

(D) Petitioner’s submission:

This contention is completely misconceived as there is hardly any correlation between the availability of a unit and its status of being off bar. Declared capacity (DC) is the declared availability of a plant having regard to its technical and operational readiness to generate power at any particular time based on available fuel. Once the DC is given, the Project may stay off bar even due to lack of scheduling by the beneficiaries. This would not mean that the DC of the Project would be reduced to zero.

Therefore, the ability and manner of supply of contracted capacity has nothing to do with off/ on bar status of the Petitioner’s Project or any of the units. It would be relevant only in event that a particular unit is under shutdown. In fact, MPPMCL in para 4 of its WS admits that the Petitioner had not scheduled capacity for a unit that was under forced outage.

Response of Respondent No. 1 (MPPMCL):

Scheduling from a unit and the unit being on-bar are completely different things. In this regard it is pertinent to refer to Article 6 of the PPA.

6.1 Availability, Scheduling and Despatch

- 6.1.1. *The Company shall comply with the provisions of the applicable Law regarding Availability, scheduling and Despatch including, in particular, to the provisions of the ABT and Grid Code relating to declaration of Availability and the matters incidental thereto.*
- 6.1.2 *The Contracted Capacity being a part of the Power Station's Net Capacity; in the event of Declared Capacity being less than the Power Station's Net Capacity, the Available Capacity to the Procurer for despatch out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity is reduced in proportion to the Power Station's Net Capacity.*
- 6.1.3 *The Company agrees that the Availability entitlement of the Procurer for despatch over any Settlement Period is the exclusive right of the Procurer and it cannot be offered to any third party other than for conditions under Article 4.3.3.*

It is submitted that entitlement of the Discoms is proportionate to Declared Capacity of the Petitioner and, therefore, the Petitioner cannot supply entire entitlement of the Discoms from one unit in terms of the PPA.

(E) Petitioner's submission:

This issue of "Supply of entire contracted capacity from one unit will cause uncertainty and power deficit if the unit has an outage – time lag of 8-12 hours before the other unit can be ramped up" is again an operational issue and cannot guide the interpretation of the expression "Contracted Capacity" which has been defined in clear terms as only being equivalent of 396 MW.

If there is a shutdown of the operating unit, it is the obligation of the Petitioner to arrange of the contracted capacity either from the other unit or from alternate sources (till the other unit is ramped up). Further, the PPA specifies the damages to be paid by the Petitioner to the Discoms in the event of failure to provide the whole or any part of Contracted Capacity. Therefore, such a situation is already contemplated under the PPA.

Response of Respondent No. 1 (MPPMCL):

Ramp-up during outage is a very realistic situation which is required to be kept in mind while interpreting a PPA. The petitioner cannot be allowed to brush the same aside as "operational issue" and this not relevant for interpretation of "Contracted Capacity" and the provisions of the PPA. It is submitted that the Petitioner has approached this Hon'ble Commission inter alia praying for declaration that it is entitled to supply the entire contracted capacity even from single unit of the generating station and/ or any

combination thereof as deemed appropriate by the Petitioner.

(F) Petitioner's submission:

The PPA already specifies the liquidated damages for non-supply of contracted capacity. The parties will have to be guided by the same. Petitioner has been consistently following up with WRLDC for this along with the cooperation of MPPMCL. Having said so, once the contracted capacity is being supplied by the Petitioner, the Respondents should pay the entire charges in good faith. If any amount is found to be overpaid, the same can be adjusted at a subsequent period.

In any case, the fact that the Respondents have been able to point out specific instances and nature of the outage faced by the Project clearly shows that they have fall information about the availability of the Project.

Response of Respondent No. 1 (MPPMCL):

While the Petitioner notes various provisions of the PPA, it has overlooked the fact that the Monthly Tariff Invoice has to be supported with independent certifications, i.e., REA. In the event WRLDC has failed to discharge its duties despite best efforts of the Petitioner, the petitioner must take steps under the Act to enforce its rights. MPPMCL being a regulated entity cannot process and pay, invoices which have not been raised as per the PPA.

In light of the above it is submitted that the petitioner must supply 30% power proportionately from both the units of the generating stations as per the provisions of the PPA.

Commission's Findings:

21. On examination of the issues raised in the petition and the reply submitted by all the respondents in this matter, the Commission has primarily observed the following:

- (i) It is evident from the contention of parties in the matter that the original dispute in this petition pertains to the recovery of Capacity (fixed) Charges corresponding to the Availability/Declared Capacity in the events when the petitioner keeps its one unit "off-bar" and supply power to Respondent No.1 from the other unit of its power plant in order to meet the requirement of Contracted Capacity under PPA. It is understood from the contention of Respondents in this matter that the generating unit which is not under operation and stays "off-bar", do not have entitlement for recovery of Capacity (fixed) Charges since the Capacity of such unit is not considered as Declared and Available.
- (ii) The petitioner has tried to focus on the limited issue regarding its entitlement to supply power to the Respondent (MPPMCL) from any one unit or a combination of both units of its 2x660 MW Thermal Power Plant at Nigrie for the "Contracted Capacity" in terms of provisions under the Power Purchase Agreement (PPA) entered into by the petitioner and

Respondent No. 1 to 4 on 5th January' 2011. On the other hand, the petitioner has mentioned about **“the deduction of some amount by MPPMCL in the bills raised by petitioner to MPPMCL”**. As per letter No. 05-01/1612 dated 04.09.2015 written by MPPMCL to the petitioner, **“the deduction was done after correct calculation of bills on amended PAFM considering supply of off-bar unit from on-bar unit”**.

- (iii) In view of the above observations, the issue raised by the petitioner needs detailed examination in light of relevant provisions under PPA, the correct status/interpretation of “Declared Capacity” and “Availability” as contended by the parties in the matter. The aforesaid issues need to be examined in light of the Codes/Regulations applicable in the instant matter.
- (iv) It is not contested by any party in this matter including State Load Despatch Centre, Jabalpur, that the generating station of the petitioner falls within the control area jurisdiction of Western Regional Load Despatch Centre (WRLDC) as per Regulation 6.4 of CERC (Indian Electricity Grid Code) Regulations, 2010. The scheduling activities of the petitioner’s generating station are within the control area justification of WRLDC. The petitioner’s generating station declared its day ahead capacity as well as the real time revisions clearly indicating the entitlement of MPPMCL to WRLDC and simultaneously conveys the same to M.P. SLDC also. After receiving the requisition from MPPMCL, M.P.SLDC sends the same to WRLDC and thereafter, WRLDC issues the injection schedule to the generating station of the petitioner.
- (v) M.P. SLDC (Respondent No.5) in its reply has quoted one incidence occurred on 29.05.2015 mentioning that the petitioner had intentionally mis-declared the capacity with both the units. Both the units were under forced outage on 29th May’ 2015 and the petitioner had lighted up only one unit on 29th May’ 2015 whereas the second unit was synchronized on 8th June’ 2015 by the petitioner.
- (vi) It is contended by Respondent No. 1 (MPPMCL) that the monthly bills being submitted by the petitioner do not contain PAFM (Plant availability factor for the month) duly certified by REA (Regional Energy Accounting) prepared by WRLDC since CoD of Unit No. 1. In terms of Clause 10.2(i), it is the responsibility of the Generator to get a duly certified PAFM from WRLDC and submit the same with the bill. Therefore, the monthly bills are not being sent by the petitioner as per provisions under PPA. Respondent No. 1 has stated that the power was presumed to be scheduled from one unit to protect the financial interest of MPPMCL till the certified PAFM is sent by the petitioner. However, the petitioner has preferred to receive the payment of fixed charges on the basis of uncertified PAFM calculated by the petitioner itself.

(vii) The issue of certified PAFM from WRLDC was brought to the notice of WRPC and WRLDC officials by the petitioner and Respondent No. 1 both. However, the representatives of WRPC and WRLDC expressed their inability to include PAFM in the REA.

(viii) POSOCO Ltd. vide its letter dated 1st June' 2015 responded the following on the issue of certification of DC:

“As per definition of ISGS by IEGC, ISGS means a central generating stations or other generating stations in which two or more states have share. Further DC can only be accepted in case there is 100% allocation from the plant is allocated to more than one state. Therefore declaration of partial capacity can neither be checked for faithfulness nor be certified. It is also certified that WRLDC is not doing any DC certification of any of the stations in Western Region but only submitting the DC submitted by ISGS stations having 100% allocation to WRPC secretariat for preparation of Regional Energy Accounting (REA)”

(ix) On perusal of all the submissions made till date by the parties in the matter, the issue related to certification of Declared Capacity (DC) is appearing unresolved till date however, the petitioner is raising monthly bills and Respondent No.1 is making payments on the basis of their own understanding of Declared Capacity/Availability. In order to resolve this issue, meeting has been convened between the representatives of the petitioner and Respondent No. 1 on 28th July' 2015 but the parties could not arrive at any agreement in this issue and thus the monthly bills being submitted by petitioner are based on the PAFM calculated by the petitioner whereas Respondent No. 1 is making payments on the basis of so called amended PAFM considered by it. **The aforesaid difference in the understanding of the Declared Capacity and Availability being calculated by the petitioner and considered by Respondent No. 1 is the core issue/ reason of dispute in this matter.**

22. The following provisions in the PPA quoted by the parties in this matter are reproduced below :

a. *“Aggregate Capacity” shall mean, in relation to a Unit the proposed nameplate capacity of the Unit and in relation to the Power Station the total proposed nameplate capacity of the Power Station. Such proposed capacity of the Power Station in mega watt shall be the sum total of proposed nameplate capacities of each of the Units as mentioned below:*

Unit 1: 660 MW

Unit 2: 660 MW

- b. *“Available Capacity” shall mean such of the Contracted Capacity as declared available by the Company in accordance with ABT;*
- c. *“Contracted Capacity” shall mean the capacity equivalent to 30% of the Power Station's Installed Capacity contracted with the Procurer as per terms of this Agreement;*
- d. *“Declared Capacity” in relation to a Unit or Power Station at any time means the Net Capacity of the Unit or Power Station at the relevant time (expressed in MW at the delivery point) as declared by the Company in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff.’ [Emphasis added]*
- e. *“Installed Capacity” shall mean the sum of MCR capacities of the Unit(s) of the Power Station, as confirmed by the respective Performance Test;*
- f. *“Power Station” shall mean the coal based Jaypee Nigrie Super Thermal Power Station having the proposed capacity of (2 x 660) =1320 MW, to be established in Village Nigri, Tehsil Deosar, District: Sidhi in the State of Madhya Pradesh.*
- g. *“Scheduled Energy” shall mean the energy corresponding to the Available Capacity, to be scheduled in accordance with ABT;*
- h. *“Tariff” shall mean the tariff payable by the Procurer to the Company for making available the Contracted Capacity and for supply Electrical Output corresponding to the Contracted Capacity at Normative Availability, as may be determined by the Appropriate Commission under Law.*

23. It is observed that the PPA provides that the “Contracted Capacity” shall mean the capacity equivalent to 30% of the power station’s installed capacity contracted with the procurer as per **“terms of agreement”** (Emphasis supplied). Therefore, the first part of the definition of “Contracted Capacity” cannot be read in isolation for its correct interpretation. It needs to be read with the other part also i.e, “ as per the terms of agreement” to understand and apply the correct meaning and spirit of this definition. The **“terms of agreement”** provide adequate field for correct interpretation of the Contracted Capacity.

24. Further, it is very important to go through the definition of “Declared Capacity” which plays a crucial role to understand and resolve the issue under dispute. The definition prescribed

that a unit should have the capability to deliver ex-bus electricity in MW in any time block of the day. As defined in the PPA, “Declared Capacity” in relation to a **unit** or power stations at any time means the energy capacity of **Unit** or **Power Station** at the relevant time. It means that if any of the units of petitioner’s power plant is “off-bar” as contended by the petitioner, then the capacity of such unit cannot be considered as Declared available at any time during the Time-Blocks of the day because the off-bar unit will take atleast 8-12 hours for cold start. Therefore, the off-bar unit cannot be considered as Declared and available at any time in terms of the meaning of Declared Capacity in the PPA. The “Declared Capacity” is the base term for the other definitions like Available Capacity and Scheduled Energy in the PPA. Accordingly, the capacity of off-bar unit cannot be considered as available in terms of meaning of Available Capacity in the PPA.

25. Article 4.3.7 of PPA as quoted by the petitioner in support of its contention to make available the contracted capacity from one unit or from both the units is found misplaced because the provisions under this Article are applicable for exigencies particularly for inability of the Generator to make available the contracted capacity from the **power station** and to mitigate the damages payable by the generator to the procurer on account of its inability to make available the contracted capacity from the **power station**. The generator is free to make available the contracted capacity from an alternative generation source. The provisions of this Article are not applicable for the operational scenario in the instant matter.

26. Article 4.5 of the PPA is for the Liquidated Damages payable by the Generating Company to the procurer for delay in Commission of any unit of the power station by the scheduled COD or the revised scheduled COD as the case may be. This provision is applicable for each unit and upto COD of units whereas the issue in the subject petition pertains to post CoD of each generating unit of petitioner’s generating station.

27. Regarding Availability, Scheduling and Despatch, Article 6.1 of the PPA provides that the Generating Company shall comply with the provisions of the applicable Law regarding Availability, scheduling and Despatch. Article 6.1.2 further provides that *“In the event of Declared Capacity being less than the Power Station’s Net Capacity, the Available Capacity to the Procurer for despatch out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity is reduced in proportion to the Power Station’s Net Capacity.*(Emphasis Supplied). In view of the aforesaid provision in PPA, the Availability (PAFM) of the petitioner’s generating station is required to be worked out in terms of appropriate provisions under applicable MPERC (Terms and Conditions for determination of Generation Tariff) Regulations and also considering the contracted capacity in terms of provisions under Article 6.1.2 of PPA in case of supplying contracted capacity from one generating unit only and keeping other unit “off bar” on account shut-down for economic reasons

as mentioned by the petitioner. Such generating unit cannot be declared as available and capacity charge thereof are payable accordingly.

28. The generation tariff for both the units of petitioner's power plant was provisionally determined by the Commission in accordance with amended Regulation 8.2 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations'2012 notified on 13th December'2013. Neither the aforesaid Regulation nor the contents in the order passed by the Commission for determination of provisional tariff for the petitioner's power plant support/provide for recovery of Capacity Charges for the generating unit whose Capacity is not declared being its "off-bar status.

29. Further, in terms of Article 7.1.1 of the PPA, the petitioner is made responsible at its own expenses to ensuring the operation of power station in an efficient, coordinated and economical manner so as to meet its obligation under the PPA and also to avoid any adverse effect on the grid operation. Any unscheduled available capacity within the contracted capacity is compensated by way of fixed cost/capacity charges paid by the Respondent No.2 in terms of PPA. Therefore, the contention of the petitioner that "the requirement to schedule the Contracted Capacity under the PPA from any one unit becomes necessary in view of technical constraints of running the Power Station below the technical minimum" has no merit in light of Article 7.1.1 read with Article 4.3.3 of the PPA. The Commission has already decided this issue regarding Technical Minimum in Petition No. 54 of 2015 filed by the petitioner in respect of other power plant.

30. Clause 7(3) of M.P. Electricity Balancing and Settlement Code, 2015 provides that the Respondent No. 1 (MPPMCL) shall pay to the petitioner Capacity (fixed) charges corresponding to Plant Availability and Energy Charges for the Scheduled Despatch as per relevant notification and orders of MPERC. Accordingly, the Capacity (fixed) Charges are payable corresponding to the Plant Availability which depends on the average Declared Capacity and Installed Capacity of the generating station. There is no dispute in the Installed Capacity of petitioner's generating station. The other parameter in the formula specified for PAFM in MPERC (Terms and Conditions of Generation Tariff) Regulations is "Declared Capacity" which shall be for only one unit in the event when the other unit of the petitioners generating station is "off bar". The arguments placed by the petitioner for considering "Declared Capacity" for calculating Availability of its plant when its one unit is 'off bar' and supplying contracted capacity from its one unit only are arbitrary and misplaced in terms of the provisions under PPA, Grid Code, M.P. Electricity Balancing and Settlement Code and the applicable MPERC (Terms and Conditions for determination of generation tariff) Regulations, 2012 and its subsequent amendments/revisions.

31. In view of the observations and findings of the Commission in the preceding paragraphs, the subject petition being devoid of merits is dismissed and disposed of. The petitioner and Respondent No. 1 are directed to resolve the issue regarding certification of Declared Capacity by the competent authority as per the provisions of applicable Laws/Regulations and to ensure billing and payment in accordance with the provisions of PPA and the applicable Code / Regulations notified by the appropriate Commission.

(Alok Gupta)
Member

(A.B.Bajpai)
Member

(Dr. Dev Raj Birdi)
Chairman