

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub : In the matter of approval of Power Purchase Agreement.

Petition No.11 of 2012

ORDER

(Date of Order : 7th September, 2012)

1. MP Power Management Co. Ltd., Jabalpur
2. MP Paschim Kshetra Vidyut Vitaran Co. Ltd. Indore
3. MP Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur
4. MP Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal

} **Petitioners**

Vs.

1. M/s. Bina Power Supply Co. Ltd., Mumbai
2. Energy Department, Government of Madhya Pradesh, Bhopal

} **Respondents**

Shri Manoj Dubey, Advisor (Law), Shri P. Pachori, DGM and Shri M. Chincholkar, AGM appeared on behalf of MP Power Management Co. Ltd., Jabalpur.

Shri Kailash Shiva, CE (Comm.), Shri S. S. Tripathi, SE (Comm.) and Shri Anant Chaure, Law Officer appeared on behalf of M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore.

Shri V. Ramesh Iyer, DGM appeared on behalf of MP Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal.

None appeared on behalf of MP Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur.

Shri Ashok Shukla, Sr. General Manager, Shri Venkatesh, Advocate and Shri S. K. Thakral appeared on behalf of Respondent No.1.

Shri Kafeel Ahmed, Dy. Secretary, Energy Department, GoMP appeared on behalf of Respondent No.2.

Sub : In the matter of approval of Power Purchase Agreement.

The petitioners, M.P. Power Management Co. Ltd. and the three Distribution Companies of the State have jointly filed the power purchase agreement executed with M/s Bina Power Supply Co. Ltd. (IPP) as per the details given below:

S. No.	Private Power Developers	Unit No.	Installed capacity of each unit (MW)	Location	Quantum of power procured by MP Management Co. Ltd. (MW)
1	M/s Bina Power Supply Co. Ltd.	5	250	Sagar Distt.	602.50

2. The subject petition was clubbed with the petition Nos.7, 8, 9, 10 & 12 of 2012 since the petitioner stated that the PPA is in line with the model PPA approved by the State Government.

3. The Energy Department, GoMP was also noticed as respondent in the matter and case was heard on 25th June, 2012 when the representatives of the petitioner and respondents were informed about the following observations of the Commission while going through various provisions in PPAs filed with the Commission :

- a) The name of the Distribution Companies in the preamble is not correct. Senior Counsel appearing on behalf of the petitioner submitted that a supplementary agreement shall be filed with the Commission with all necessary corrections.
- b) The provisions in PPA signed with M/s Bina Power Supply Co. Ltd. are at variance with provisions contained in the model PPA approved by the State Government. Some of such provisions are as stated below :
 - (i) The agreement is for supply of **70%** (inclusive of 5% net generated power at variable cost only) of the installed capacity of proposed Ph-1 (2 x 250 MW) and there is no provision for revised scheduled CoD in the PPA.
 - (ii) There is no provision for establishing the necessary evacuation infrastructure beyond the delivery point under Article 4.2.
 - (iii) Clause for initial contract performance guarantee and contract performance guarantee are not provided.
 - (iv) An additional provision regarding interconnection and transmission facilities is provided in Sub-Article 4.8.
 - (v) Provision for escrow mechanism in future as provided at Para 10.5.8 of model document and other PPAs is missing.
 - (vi) The provisions for rebate in billing and payment and third party sale on default under Article-10 are also different.

Sub : In the matter of approval of Power Purchase Agreement.

4. The Commission further observed that the following provisions under various Articles/Sub-Articles in the PPAs need a review by the parties to the PPA :

a) Conditions Subsequent and Development of the Project

- (i) Provision regarding satisfaction of conditions by the procurer under sub-article 3.2.(i), 3.2.(ii) and procurer's obligation for evacuation infrastructure beyond the delivery point under sub-article 4.2.
- (ii) Modalities for operation of provision regarding making available contracted capacity from an alternative source of power supply to mitigate and damages payable by the company to the procurer under sub-article 4.3.7.

b) Capacity, Availability and Despatch

Provision regarding conditions for Available Capacity of the procurer in the event of Declared Capacity being less than the net power under article 6.1.2.

c) Tariff, Billing and Payment

Clarity for implementation of conditions under sub-article 10.1.1 and what tariff rate will be applicable for power and energy consumed for construction and start up and commissioning of the power station under sub-article 10.10.1.

d) Force Majeure

Force Majeure Conditions under sub-article 11.2.4.

e) Certain blanks are found in Sub-Article 10.3.3.

5. In view of the above observations, the Commission vide order-sheet dated 30th June, 2012 issued following directives :

- (i) The petitioners and the respondents were directed to review the articles/sub-articles referred to by the Commission in Paras 5 & 6 of the aforesaid order-sheet and confirm whether these provisions are appropriate and adequate. It was also mentioned in the same order-sheet that the modification, if any, required be submitted to the Commission in terms of provision in PPA itself.
- (ii) Energy Department, GoMP was asked to confirm whether they were in agreement with the provisions referred to in Para 5 & 6 of the aforesaid order-sheet and whether their rights are correctly mentioned in PPAs in terms of the prevailing policy.
- (iii) All respondents (IPPs) in the matter were directed to confirm on affidavit that no PPA had been executed as on date by them with any party other than the petitioners in the matter for sale of power from the project under Section 62 of the Electricity Act, 2003.

Sub : In the matter of approval of Power Purchase Agreement.

- (iv) The Commission decided to delink petition No.11/2012 in respect of PPA executed with M/s Bina Power Supply Co. Ltd. from common hearing as that PPA is found to be distinctly different from other PPAs.

6. The petitioners and the respondents were directed to file their response with the Commission on the above-mentioned issues by 20th July, 2012. The Commission received their responses on the dates as mentioned below :

- (i) Energy Department, GoMP on 23rd July, 2012
(ii) All three Distribution Companies on 23rd July, 2012
(iii) MP Power Management Co. Ltd., Jabalpur on 19th July, 2012
(iv) M/s. Bina Power Supply Co. Ltd., Mumbai on 27th July, 2012

7. The petitioners and the respondent broadly stated the following in their above-mentioned submissions :

(i) Energy Department, GoMP

Energy Department, GoMP confirmed that the PPAs entered into with M/s Bina Power Supply Co. Ltd., Mumbai for their Bina Thermal Power Project has been as per the prevailing policy of the Govt. of Madhya Pradesh and have necessary approval of the Government.

(ii) Distribution Companies

The East Discom, Jabalpur authorized MP Power Management Co. Ltd. for submission on their behalf. However, Central Discom, Bhopal and West Discom, Indore submitted the same response as filed by MP Power Management Co. Ltd.

(iii) MP Power Management Co. Ltd., Jabalpur

MP Power Management Co. Ltd. filed its issue-wise response to observations at Para 5 & 6 in the Commission's order-sheet dated 30th June, 2012. Besides aforesaid response, MP Power Management Co. Ltd. submitted that the Initial Contract Performance Guarantee and the Contract Performance Guarantee as were required from the respective IPPs have now been produced by them. The company enclosed the details of Bank Guarantees and the Contract Performance Guarantees with its submission.

With regard to the issues related to M/s Bina Power Supply Co. Ltd. mentioned in Para 5 (b) of the Commission's order dated 30th June, 2012, MP Power Management Co. Ltd. submitted the following :

Sub : In the matter of approval of Power Purchase Agreement.

- a) *“As regards the Power Purchase Agreement dated 05-01-2011 signed with Messrs Bina Power Supply Company Limited is concerned, it is submitted that the Memorandum of Understanding and matters relating to the development of the Project of Bina Power Supply Company Ltd. and procurement of power from the said Company have been in vogue since the year 2008. The principal terms with the Bina Power Supply Company Ltd. was deliberated and finalized much earlier to the other Companies dealt in the Record of Proceedings dated 30.06.2012 and much before the Notification of the Standard Bid Documents. The Govt. of Madhya Pradesh vide its letter No.3517/13/2011, Bhopal Dated 18th April, 2011 (Annexure-II) had approved the PPA for 70% instead of 42% of the installed capacity of 2x250 MW of Phase-1 of Bina Power Supply Co. Ltd. The quantum of supply from the Bina Power Supply Company Ltd. at 70% of the installed capacity inclusive of 5% to the State Government share at variable cost was pursuant to these earlier discussions and is, therefore, at variance with the other projects wherein 30% of the quantum of the installed capacity inclusive of 5% to the State Government share at variable cost have been finalized. The project being in advanced stage and as assured by developer, provision for change in Scheduled CoD was not considered. The first unit is expected to get commissioned by 31st July, 2012.*
- b) *As regards the provision for establishing the necessary evacuation infrastructure beyond the delivery point, reference is invited to Clause 4.8 of the PPA, which mentions of a dedicated transmission line of 400 KV to be constructed by the Company from the Delivery Point to 400 KV S/s of M P Transco at Bina, 400 KV line for evacuation has since been completed.*
- c) *In view of the fact that the contract with Bina Power Supply Company Ltd. was a continuation of the past and further that there was substantial progress in the construction of the power plant as compared to the other projects, the provisions of the clauses relating to the contract, performance guarantee and escrow mechanism are different. Similarly, the commercial terms relating to rebate in billing payment and third party sales provisions are different. It is pertinent to note that M/s Bina Power Supply Co. Ltd. has already invested considerable amount on its revival as mentioned in Clause No.3.3.1 of the PPA. Further in a meeting held on 17.06.2008 (Annexure-I) M/s Bina Power Supply Co. Ltd. has dispensed away with requirement of escrow but insisted for establishment of Letter of Credit upto for an amount equivalent to 1.05 times payment towards monthly bills on normative availability.”*

(iv)M/s Bina Power Supply Co. Ltd., Mumbai

M/s Bina Power Supply Co. Ltd. submitted the following:

1. *“At the outset, it is humbly submitted that the Project is a revival Project and the Answering Respondent originally was a wholly subsidiary Company of Jaiprakash Power Ventures Limited (herein referred to as “JPVL”). As both the Answering Respondent Company and JPVL were in the business of generation of Power the*

Sub : In the matter of approval of Power Purchase Agreement.

companies decided to consolidate their business through amalgamation. Subsequently, both the Answering Respondent and JPVL filed a Petition for Amalgamation before the Hon'ble High Court of Himachal Pradesh at Shimla through Company Petition No.2 of 2011. Thereafter, the Hon'ble High Court vide Order dated 14.06.2011 passed a final Order in the Petition No.2 of 2011 and merged the Answering Respondent into JPVL. Copy of the Order dated 14.06.2011 has been filed along with our reply filed on 13th February, 2012 as Annexure R-I.

2. *It is further imperative to mention herein that the Answering Respondent is in the process of developing a coal based thermal power plant in two phases. The first Phase of the Project shall have the installed capacity of 500 MW i.e. (2x250) and the second phase having a proposed installed capacity of (3x250) is to be developed subject to the availability of coal. It is submitted that above stated has been mentioned in the PPA under the definition of Contracted Capacity and the relevant extracts are reiterated as follows :*

“Contracted Capacity shall mean the capacity equivalent to 65% of the Phase-I (2x250 MW) and 37% of Phase-II (3x250 MW) (subject to availability of coal for Phase-II 3x250 MW) of Power Station's installed Capacity Contracted with the Procurer as per terms of this Agreement:”

3. *It is submitted that the Answering Respondent has perused the Record of Proceedings dated 30.6.2012 and in view of the same, the Answering Respondent would like to submit as under:*
 - A. *The Answering Respondent humbly submits that the Respondent's name at serial No.5 in paragraph 2 of this Hon'ble Commission's Order may be amended as Jaiprakash Power Ventures Limited – Unit: Jaypee Bina Thermal Power Plant and the number of units be changed to 2 vice 5 and quantum of power procured by petitioner as 325 MW vice 602.5 MW.*
 - B. *Further this Hon'ble Commission in paragraph 5 of its Order dated 30.6.2012 has sought clarifications from the Respondents and the response to the same is herein below:*
 - i. *It is submitted that the clarification sought by this Hon'ble Commission in paragraph 5 (b) (ii) does not pertain to the Answering Respondent and hence needs to response.*

Sub : In the matter of approval of Power Purchase Agreement.

ii. *It is submitted that in response to clarification sought by this Hon'ble Commission in paragraph 5 (b) (i), the Answering Respondent humbly submits that the PPA is for supply of 70% (inclusive of 5% net generated power at variable cost only) if the installed capacity of proposed Phase-I 2x250 MW, while there is no provision for revised Schedule of CoD, such a provision exists in the PPA dated 20th July, 2011 executed with Government of Madhya Pradesh vide Clause 4.1.6. Additionally, due to excessive rains during June to September, 2011, it has been mutually agreed by parties to revise the CoD for Unit-1 as July, 2012 vice March, 2012 vide petitioner's letter dated 1st March, 2012.*

It is humbly submitted that Clause 4.1.6 of PPA dated 20th July, 2011 be suitably incorporated in the PPA dated 5th January, 2011, reading as under :

“Revised Scheduled Commercial Operation Date

The parties may mutually agree to revise the scheduled CoD for commissioning of any Unit or the Power Station (hereinafter referred to as Revised Schedule Commercial Operation Date or revised Schedule CoD) and such Revised Scheduled CoD shall thereafter be the Scheduled CoD.

(Provided that where the company has separately entered into an agreement with the GoMP or its nominee for sale of energy at non-concessional tariffs from the project, then the Revised Scheduled CoD under that agreement shall be in the Revised Scheduled CoD for this Agreement too).”

iii. *It is submitted that the clarification sought by this Hon'ble Commission in paragraph 5 (b) (iii) to 5 (b) (vi) do not pertain to the Answering Respondent and hence needs to response.*

iv. *It is submitted that the clarification sought by this Hon'ble Commission in paragraph 5 (c) does not pertain to the Answering Respondent and hence needs to response.*

C. *It is further submitted that in paragraph 6 of this Hon'ble Commission's Order, the Hon'ble Commission has observed that various Articles/Sub-Articles in the PPA such as Conditions Subsequent and Development of the project; Capacity, Availability and Dispatch; Tariff, Billing and Payment; Force Majeure; and certain blanks observed in few places, need to be reviewed. In view of the same, the Answering Respondent submits that a response to be said observation can only be provided by the Answering Respondent upon receipt of submissions by the petitioner, if any.*

Sub : In the matter of approval of Power Purchase Agreement.

D. It is submitted that in paragraph 7 of this Hon'ble Commission's Order, the Hon'ble Commission has directed the petitioner and the respondents to review the articles and sub-articles in the PPA. It is submitted that the Answering Respondent would only be in a position to comply with such directions of this Hon'ble Commission upon receipt of submissions on behalf of the petitioner.

E. It is submitted that in paragraph 9 of this Hon'ble Commission's Order, the Hon'ble Commission has directed the respondents that no PPA has been executed as on date by the respondent with any party other than the petitioner for sale of power from the project. In view of the same, Answering Respondent confirms that it has not executed any PPA with any other party other than the petitioner for sale of power from the project, as on date.

4. It is humbly submitted that Answering Respondent be given an opportunity to provide its response on the submissions of the petitioner and the delay in submission of reply be condoned."

5. In the facts and circumstances mentioned herein above, it is respectfully submitted that this Hon'ble Commission may be please to take on record the above particulars and approve the Power Purchase Agreement and procurement of power."

8. It was brought to the notice of the Commission that the written submissions filed by the petitioners and the respondent, as mentioned above were not served to each other. The Commission directed the petitioners and the respondent to serve a copy of their submissions to each other. The Respondent was directed to file its response to the petitioner's submission by 20th August, 2012. Similarly, the petitioner was also asked to file its response to the submission made by Respondent by 20th August, 2012.

9. In response to the above directions, MPPMCL on affidavit dated 16th August, 2012 submitted the following in response to the submission filed with the Commission by M/s Bina Power Supply Co. Ltd. on the date mentioned at Para 6 of this order :

- (i) "That, the contents of para 1 and para 3 (A) are accepted.*
- (ii) That, with regard to contents of para 2, para 3 (B)(i), (ii), (iii) and (iv) and para 3 (C), it is submitted before the Hon'ble Commission that the petitioner No.1 had already submitted detailed written submission dated 19/07/2012 and it needs no further reply.*
- (iii) That, in reply to para 3 (D), it is submitted that all Articles and sub-articles in the PPA have been finalized after taking due consent of the Respondent and therefore, no modification is required.*
- (iv) That, the contents of para 3(E) and para 4 & 5 need no comments from the petitioner."*

Sub : In the matter of approval of Power Purchase Agreement.

10. In compliance to the directions issued in Para 5 of the Commission's order dated 4th August, 2012, M/s Bina Power Supply Co. Ltd. filed their response on 27th August, 2012. M/s Bina Power Supply Co. Ltd. in its aforesaid submission offered no comments on the contention of the petitioner.

11. The Commission observed that the procurer's obligation under sub-article 3.2 and 4.2 of the PPA to establish the necessary evacuation infrastructure/facilities beyond the interconnection point for evacuation of the contracted capacity is inconsistent with sub-article 4.8 of the PPA. It has been confirmed that dedicated transmission line for necessary evacuation infrastructure beyond the delivery point is being erected/got erected by the respondent.

12. In view of the above and the written submissions filed by the petitioners and the respondent during the proceedings held in the matter, the Commission hereby accords approval to the Power Purchase Agreement filed by the petitioners subject to incorporation of the following additions/modifications in various clauses being ordered on strength of provisions in Sub-Article 3.2(iii) of the PPA :

- i) The name of Distribution Companies in the preamble of PPA be corrected.
- ii) Definition of "Scheduled Connection Date" in Sub-Article 1.1 be amended in Article 1 of the PPA:

"Scheduled Connection Date shall mean the date on or before which the availability of evacuation facilities for the Contracted Capacity beyond the Delivery Point shall be ensured by the Procurer, which shall be the date falling two hundred and ten (210) days before the Scheduled COD, of the first Unit."

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

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

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

"The Procurer shall have ensured the availability of necessary evacuation infrastructure beyond the Interconnection Point, necessary for evacuation of the Contracted Capacity at least 210 days prior to COD."

Sub : In the matter of approval of Power Purchase Agreement.

v) Following be added to the Sub-Article 4.1.1 (ii) :

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

vi) Sub-Article 10.10.1 be amended in Article 10 of the PPA:

“The Company shall be liable to pay, for the power and energy consumed for construction and start-up and Commissioning of the Power Station, to the distribution Licensee(s) in whose area the Power Station is located, if such power is sourced from them at the rates as may be specified by the Commission.”

vii) Sub-Article 11.2.4 be amended in Article 11 of the PPA:

“Similarly, any event of Force Majeure affecting the ability of Procurer in ensuring availability of interconnection facilities and/or transmission facilities shall be deemed to be an event of Force Majeure affecting Procurer only.”

13. The supplementary agreement with all additions/modifications be filed with the Commission at the earliest in terms of Sub-Article 3.2(iii) of the agreement.

14. With the above directions, this petition is disposed of.

sd/-
(C.S. Sharma)
Member

sd/-
(Rakesh Sahni)
Chairman