

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 86(1) (b) & (k) of the Electricity Act, 2003, read with MPERC (Conduct of Business) Regulations, 2004 seeking approval of Draft Supplementary Agreement to PPA executed between MPPMCL and Jhabua Power Ltd. on 5th January' 2011 for procurement of 30% power generated from Jhabua Power Station District Seoni (M.P.).

Petition No. 29 of 2020

ORDER

(Date of Order: 2nd November' 2020)

M.P. Power Management Company Ltd.,

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

- **Petitioner**

V/s

Jhabua Power Ltd.,

Unit No. 307, 3rd Floor, ABW Tower, M.G. Road,

Gurugram – 122 002

- **Respondent**

Shri Aashish Barnard, Advocate and Shri Ajasra Gupta, GM (Comml.) appeared on behalf of the petitioner.

Shri Janmejaya Mahapatra, CEO and Ms. Roopam Bansal, Manager (BD) appeared on behalf of the respondent.

M.P. Power Management Company Ltd. (MPPMCL) has filed the subject petition under Section 86(1) (b) & (k) of the Electricity Act, 2003, read with MPERC (Conduct of Business) Regulations, 2004 seeking approval of draft Supplementary Agreement to Power Purchase Agreement (PPA) executed between the Petitioner and Respondent on the 5th January' 2011 for procurement of 30% power generated from Respondent's thermal power plant.

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

- i. *That, the parties, above named, had entered into a Power Purchase Agreement dated 5th January, 2011 for procurement of power generated from Jhabua Thermal Power Plant located at District Seoni. A copy of said Power Purchase Agreement is filed herewith as Annexure P/2.*
- ii. *That, the Central Electricity Regulatory Commission, New Delhi notified the CERC (Indian Electricity Grid Code) Regulations, 2010 (commonly referred to as "Grid Code") on 28.04.2010. The Grid Code was subsequently amended through first, second and third amendments which came into force from 02.04.2012, 17.02.2014 and 01.11.2015, respectively. The Central Commission further amended the Grid Code vide CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016, notified on 06.04.2016.*
- iii. *That, in pursuance of Regulation 6.3B of the Amended Grid Code, the Central Commission, vide Gazette of India notification dated 5th May, 2017, as contained in Annexure P/3 hereto, notified as Appendix-I thereto, the "Detailed Operating Procedure for Backing Down of Coal/ Lignite/ Gas Unit(s) of the Central Generating Stations, Inter-State Generating Stations and other Generating Stations and for taking units under Reserve Shut Down on scheduling below Technical Minimum Schedule" and, as Appendix-II thereto, the "Mechanism for*

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Compensation for Degradation of Heat, Aux Consumption and Secondary Oil Fuel, due to Part Load Operation and Multiple Start/ Stop of Units” commonly referred to as “DOP”.

- iv. *That, Section 3 of Appendix-I of the aforesaid DOP dated 5th May, 2017, provides that the DOP shall be applicable to RLDCs, SLDCs, CGS and ISGS whose tariff is either determined or adopted by the Central Commission and the generating stations which are regional entities but whose tariff is neither determined nor adopted by the Central Commission. For those generating stations whose tariff is determined or adopted by the Central Commission but are scheduled by SLDCs, the DOP provides that a similar mechanism of taking such machines under RSD shall be adopted by the SLDCs. The DOP further provides that Regional entities whose tariff is neither determined nor adopted by the Central Commission shall also be subjected to the procedure of DOP.*
- v. *That, the power station of the Respondent is connected to ISTS for evacuating power and is availing Long Term Open Access from CTU / PGCIL. Its scheduling and metering is monitored by WRLDC. Therefore, the Respondent is a Regional Entity in terms of Section 2(kkk) of the Grid Code. The Respondent being a Regional Entity, is governed by the provisions of the Grid Code.*
- vi. *That, the DOP dated 5th May, 2017, interalia, provides for a detailed Methodology for taking generating stations or unit(s) therefore under Reserve Shut Down in cases of Day Ahead Scheduling and Real Time Schedule Revision and for Methodology for revival of Generating Station or Unit(s) from RSD.*
- vii. *That, in view of statutory mandates of the DOP dated 5th May, 2017, it has become necessary for the parties hereto to amend the PPA dated 5th January, 2011. Accordingly, a draft Supplementary Agreement, as contained in Annexure P/4 hereto, has been prepared and is submitted for necessary approval.*
- viii. *That, the draft Supplementary Agreement (Annexure P/4) seeks to insert new articles proposed to be nomenclated as Article 6.1(A); 6.1(B); 6.1(C) and 6.1(D) in the PPA dated 5th January, 2011 (Annexure P/2). It also seeks to include in the PPA, by way of additional Schedules thereto, the Appendix-I and Appendix-II of the DOP dated 5th May, 2017.*
- ix. *That, the proposed amendments to the PPA by way of draft Supplementary Agreement, as contained in Annexure P/4, are in true spirit of the Fourth Amendment to the Grid Code and are necessary for the parties to be recognized as such in the PPA.*
- x. *That, the proposed amendments, as set out in draft Supplementary Agreement as contained in Annexure P/4, tend to affect the present electricity procurement process by the Petitioner including the price at which the electricity is procured from the Respondent in terms of the PPA dated 5th January, 2011 (Annexure P/2). Hence, it has become necessary for the petitioner to seek approval of the same from the Commission.*

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xi. *That, u/s. 86(1)(b) of the Electricity Act, 2003, the Commission has all powers and jurisdiction to entertain this petition and to approve the draft Supplementary Agreement (Annexure P/4) to the Power Purchase Agreement (Annexure P/2).*

3. With the above submission, the petitioner prayed the following:

"The Commission may be pleased to approve the proposed amendments by way of Supplementary Agreement, a draft of which is as contained in Annexure P/4 herewith, to meet the end of justice. Any other relief that may be considered to be just and proper in the interest of the parties may also be granted, for which the humble petitioner shall for ever remain obliged."

4. The petition was admitted on 19th March' 2020. Vide order dated 19th March' 2020, the respondent was directed to file response on the subject petition by the 9th April' 2020. The case was fixed for hearing on the 16th April' 2020. However, due to outbreak of COVID-19 followed by Nation-wide lock down, the hearing could not be held on 16th April' 2020.

5. By affidavit dated 12th June' 2020, the Respondent (M/s Jhabua Power Limited) had filed response on the subject petition broadly mentioning the following:

i. *The Response could not be filed on time due to the nationwide lockdown imposed in view of the COVID-19 pandemic and the Respondent therefore prays for the condonation of the delay in filing of the response and accept the response submitted herein.*

ii. *The power station of the Respondent is connected to ISTS for evacuating power and is availing Long Term Open Access from CTU/PGCIL. It's scheduling and metering is monitored by WRLDC. Therefore, the Respondent is a Regional Entity in terms of Section 2 (kkk) of the Grid Code. The Respondent being a Regional Entity, is governed by the provisions of the Grid Code.*

iii. *In pursuance to Regulation 6.3B of the Amended Grid Code, the Central Commission, vide Gazette of India notification dated 5th May, 2017, notified, as Appendix - I thereto, the "Detailed Operating Procedure (DOP) for Backing Down of Coal / Lignite / Gas Unit(s) of the Central Generating Stations, Inter-State Generating Stations and other Generating Stations and for taking units under Reserve Shut Down on scheduling below Technical Minimum Schedule" and as Appendix - II thereto, the "Mechanism for Compensation for Degradation of Heat Rate, Aux Power Consumption and Secondary Fuel Oil consumption, due to Part Load Operation and Multiple Start / Stop of Units" commonly referred to as "DOP".*

iv. *Because the Power station of the Respondent being a Regional Entity is covered under the provisions of Regulation 6.3B as mentioned above, the Respondent has been following up with the Petitioner to affect the requisite amendments in the PPA at the earliest.*

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- v. *Subsequent to numerous discussions, meetings and correspondences in the interim, the draft of the amendment as submitted by the Respondent along with the instant Petition was mutually agreed. Accordingly, the Respondent has no objection to the approval and subsequent execution of the amendment in the form submitted by the Petitioner to the Commission.*
- vi. *The Respondent prays that the above amendments be implemented with effect from the date of publication of the Gazette Notification of the DOP i.e. 5th May 2017 since the financials of the Respondent Company have been gravely prejudiced due to the severe partial loading caused by the cyclic scheduling of the Petitioner. The Respondent had no role to play in the delay caused in the execution of the amendment sought now – more than three years. In fact, the Respondent has been following up with the Petitioner for an early amendment of the PPA so that the relief envisaged in the DOP could accrue to it. Various correspondences in this regard are attached as Annexure A. The Respondent humbly submits that in the worst case, the amendments sought should at least be effective from the date of coming into effect of the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 RG-26 (IV) of 2020 i.e. 1st April 2019 which will at least partially alleviate the sufferings of the Respondent. It will also partly reduce the injustice met out to the Respondent.*
- vii. *Based on the facts and circumstances of the case, it is prayed that the Commission may be pleased to approve the proposed amendments and direct the Petitioner to execute the same by way of Supplementary Agreement as per the draft submitted along with the instant Petition at the earliest, effective retrospectively as per the submission at Para 9 above.*
6. During the hearing held on 7th August' 2020, Ld. Counsel of the petitioner sought adjournment mentioning that he will seek instructions from the petitioner for filing rejoinder. The petitioner was allowed to file rejoinder by the 22nd August'2020.
7. During the course of last hearing held on 1st September' 2020, the Commission observed the following:
- i. By affidavit dated 12th June' 2020, the Respondent (M/s Jhabua Power Limited) has filed response on the subject petition. In para 8 of its aforesaid response, the respondent has broadly submitted that the instant petition was mutually agreed after numerous discussions, meetings and correspondences between the parties. The Respondent has also stated that it has no objection to the approval and subsequent execution of the Supplementary Agreement in the form submitted with the subject petition.
- ii. The representative of the Respondent has submitted that the above submission may be considered as written agreement between the parties under Article 16.2.1 of PPA dated 05.01.2011 for Amendment/Supplementary Agreement in the said PPA.

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- iii. Ld. Counsel for the petitioner stated that the petitioner has challenged the concerned Regulations notified by the Central Electricity Regulatory Commission to the extent of claiming compensation towards Technical Minimum before the Hon'ble High Court at Delhi. He requested that the hearing in the matter be adjourned for a month in view of the Letter dated 04.08.2020 received from the Energy Department, Govt. of M.P by the petitioner.
 - iv. The representative of the respondent vehemently opposed the grounds based on which the petitioner has sought one month's time extension at that stage of the case. The Respondent stated that the aforesaid grounds have no merit in law for consideration by the Commission.
 - v. Learned Counsel for the petitioner submitted that if the case is being reserved for orders, then the Commission may record his submission, that its orders shall be the subject to the outcome of Hon'ble Delhi High Court's Verdict.
8. Vide order dated 5th September' 2020, the Commission closed the subject petition and reserved it for final orders with the following observations:
- i. *“Challenge of Regulations notified by the Central Electricity Regulatory Commission to the extent of claiming compensation towards Technical Minimum, before the Hon'ble Delhi High Court is not, itself a ground to grant further one month more time, to petitioner.*
 - ii. *It is apparent from record, that present petition is pending before the Commission since 17.03.2020. On the last hearing dated 10.08.2020, the petitioner was directed to file his rejoinder, positively till the 22.08.2020, still no rejoinder on behalf of petitioner has been filed till now. So, in our considerate view, there are no any sufficient and justified grounds to grant one month more time to the petitioner.*
 - iii. *The Commission observed that, at this stage, while no any order of Hon'ble Delhi High Court, exists in this regard, nor it can be anticipated that what orders, regarding the aforesaid challenge of CERC Regulations, is likely to be passed by Hon'ble Delhi High Court. Therefore, we are of the considered view, that such type of findings cannot be endorsed in orders. So, the submission of Learned Counsel appearing on behalf of petitioner is not sustainable in the interest of justice.”*
9. On going through the draft Supplementary Agreement, the Commission has observed that the draft Supplementary Agreement has covered the following provisions:
- i. Reference of CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations' 2016 and Detailed Operating Procedure issued by CERC are proposed in Recitals of draft Supplementary Agreement.
 - ii. Addition of Article 6.1 (A), 6.1(B), 6.1(C) and 6.1(D) to the PPA are proposed in relation to the Technical Minimum.

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- iii. Addition of Schedule 7 to PPA is proposed for Appendix I of DOP issued by CERC.
- iv. Addition of Schedule 8 to PPA is proposed for Appendix II of DOP issued by CERC.

10. Article 16.2.1 of the Power Purchase Agreement dated 5th January' 2011 executed between the same parties provides as under;

“16.2.1 This agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary.”

11. In view of the above, the Commission has considered draft Supplementary Agreement filed with the subject petition and which has been concurred by the Respondent through a written agreement in terms of Article 16.2.1 of the PPA dated 05.01.2011.

12. Based on the contents in subject petition and submission of the respondent on record, the Commission has observed the following:

- i. The subject petition has been filed for appropriate amendments/ addendum to the Power Purchase Agreement executed between the petitioner and Respondent (M/s Jhabua Power Limited) on 5th January' 2011. The amendments/ addendum through a supplementary agreement are being sought pursuant to CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 wherein the provisions related to Technical Minimum Schedule for operation of Central Generating Stations and Inter-State Generating Stations have been provided. The amendments/ addendum through the supplementary agreement in PPA dated 05.01.2011 are also proposed in line with CERC's order dated 5th May' 2017 for Detailed Operating Procedure and Mechanism for compensation in relation to Technical Minimum Schedule.
- ii. As submitted by the petitioner, the Respondent power station in the subject matter is availing long term open access from Central Transmission Utility and it is connected to ISTS for evacuating power. Further, the scheduling and metering of the power station is undertaken by Western Region Load Despatch Centre (WRLDC). Accordingly, the aforesaid power station of M/s Jhabua Power Ltd. in the subject matter and PPA, is a Regional Entity in terms of the provisions under Indian Electricity Grid Code. Thus, the provisions under CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 are applicable to this power station of M/s Jhabua Power Limited in terms of Clause 4 of Regulation 6.3 B regarding Technical Minimum schedule for operation of central generating stations and Inter-state generating stations of aforesaid CERC Regulations which provides as under;

“4. In case of a generating station whose tariff is neither determined nor adopted by the Commission, the concerned generating company shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule”

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iii. The Respondent prayed that the above-mentioned amendments be implemented with effect from date of publication of Gazette Notification of the Detailed Operating Procedure (DOP) on 05.05.2017 or at least from 1st April' 2019, the date from which "MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 (RG-26(IV) of 2020)" have been made effective. The Commission observed that for applicability of the compensation mechanism, as per clause 4 of Regulation 6.3 (B) of the fourth Amendment in CERC (Indian Electricity Grid Code) Regulations, 2016 and "Applicability" clause under Appendix-II of CERC order dated 05.05.2017, appropriate provisions shall be required in the PPA or any other supplementary agreement. Moreover, as per Article 2.1.1 of the PPA dated 05.01.2011, the Agreement shall come into effect from the date it is executed and delivered by the last of all the parties and such date shall be referred to as the effective date. Accordingly, the provisions incorporated in the supplementary agreement to the PPA, could be made effective only from the date of its execution. In view of the aforesaid provision, the request of the Respondent is not considered

13. Considering all foregoing and the written agreement/consent of the Respondent in term of Article 16.2.1 of PPA dated 05.01.2011, the Commission hereby accords approval to the draft Supplementary Agreement to PPA dated 05.01.2011 filed by the petitioner with the subject petition in respect of M/s Jhabua Power Limited. A copy of the aforesaid draft of approved Supplementary Agreement is annexed as **Annexure I** with this order. The aforesaid Supplementary Agreement shall come into effect from the date it is executed by all the parties in PPA dated 05.01.2011. The parties are also directed to file a copy of the aforesaid approved Supplementary Agreement with the Commission on execution of the same by all the parties in PPA.

With all aforesaid observations and directions, the subject petition is disposed of.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman