

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject:- In the matter of petition filed under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of disputes arising out of non-payment of Capacity Charges / Fixed Charges for the period April' 2020 and May' 2020 by the Respondent (MPPMCL) to the petitioner by invoking 'Change in Law' provision under PPA.

Petition No. 72 of 2021

ORDER

(Date of Order: 26th July' 2022)

**M/s MB Power (Madhya Pradesh) Ltd.,
239, Okhla Industrial Estate, Phase-III,
New Delhi – 110020**

- Petitioner

Vs.

- 1. M.P. Power Management Company Ltd.,
Block No. 2, Shakti Bhawan, Rampur, Jabalpur.**
- 2. M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur.**
- 3. M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.
Nishtha Parisar, Govindpura, Bhopal.**
- 4. M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Compound, Pologround, Indore.**

- Respondents

Shri Amit Kapoor, Advocate, Shri Akshat Jain, Advocate and Shri Abhishek Gupta, appeared on behalf of the petitioner.

Shri Aashish Anand Bernard, Advocate and Shri Nitin Kumar Khatri, DGM appeared on behalf of Respondent No. 1.

1. M/s. MB Power (Madhya Pradesh) Limited has filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 read with Articles 4.3 & 13.5 of the PPA dated 05.01.2011 executed between the petitioner and Respondent No. 1 (MPPMCL), seeking directions to MPPMCL to release payment of the Capacity Charges to the petitioner based on capacity declared by the petitioner on day ahead basis during April' 2020 and May' 2020 along with the Late Payment Surcharge.

2. The petitioner, M/s MB Power (Madhya Pradesh) Limited is a generating company having 2x600 MW (1200 MW) coal-based Thermal Power Project at District Anuppur in Madhya Pradesh. The petitioner's generating Unit No. 1 and Unit No. 2 achieved Commercial Operation (CoD) on 20.05.2015 and 07.04.2016, respectively. The Respondent No. 1, M.P. Power Management Company Ltd. (MPPMCL) is a holding company of the State distribution licensees in Madhya Pradesh and entered into a Power Purchase Agreement (PPA) with the petitioner on 05.01.2011.
3. The petitioner executed aforesaid Power Purchase Agreement (PPA) dated 05.01.2011 with the Respondent No.1 for supply of electricity from 30% of installed capacity of petitioner's power plant for the period of 20 years. The petitioner executed another PPA with the Government of Madhya Pradesh on 4th May' 2011 for supply of 5% of net energy on variable charges as determined by the Commission.
4. The PPA executed between the petitioner and MPPMCL provides for payment of tariff (Capacity Charges, Variable Charges and any other charges) by MPPMCL to the petitioner as determined by the Commission in accordance with the norms prescribed in the Tariff Regulations. The Commission had passed tariff order dated 30.11.2018 from COD of the generating unit till 31st March' 2019 determining the final tariff applicable for generation and sale of electricity from the petitioner to MPPMCL to the extent of 30% of installed capacity in terms of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015. The Commission also issued Multi-Year-Tariff order for the control period FY 2019-20 to FY 2023-24 based on the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 (Tariff Regulations, 2020).
5. The petitioner has filed the subject petition seeking payment of Capacity Charges of Rs. 34,12,83,756/- (Rupees Thirty-Four Crores, Twelve Lacs, Eighty-Three Thousand and Seven hundred Fifty-Six Only), deducted by the Respondent No. 1 (MPPMCL) against the Monthly Tariff Invoices raised by the petitioner for the power supplied to MPPMCL during the months of April and May 2020 due to restrictions imposed by the nationwide lockdown due to Covid-19 pandemic. The petitioner submitted that during pandemic period, both the Generating Company and the Distribution Licensees were exempted from the restrictions imposed by the nationwide lockdown and were directed to remain operational on account of providing essential services. Accordingly, petitioner's power station was available to supply the Contracted Capacity to MPPMCL/ Discoms in terms of the PPA(s) and declared Availability of its Project during April 2020 and May 2020.

6. Earlier, the petitioner had filed Petition No. 01 of 2021 with this Commission seeking direction to MPPMCL to make payment of Capacity Charges of Rs. 34.13 Crore deducted for the period of April and May 2020 along with Late Payment Surcharge in terms of the applicable provisions of the PPA. However, the aforesaid petition No. 1 of 2021 was withdrawn by the petitioner during the motion hearing held on 23.02.2021. Vide order dated 26.02.2021, the Commission allowed the petitioner to withdraw aforesaid petition and granted liberty to file a fresh Petition as and when required.
7. In the subject petition, the petitioner broadly submitted the following: -
- 1) *On 24.03.2020, Ministry of Home Affairs (“MHA”), Government of India, in exercise of powers under Section 10(2)(l) of the Disaster Management Act 2005, issued Guidelines with respect to measures to be taken by Central Government and State Governments for containing the spread of Corona Virus/Covid-19 in the country. In terms of the MHA Guidelines, a nation-wide lockdown was imposed in the country and all government, commercial and private establishments were directed to be closed except for those providing essential services. **In terms of Clause 4(g) of the MHA Guidelines, power generation, transmission and distribution have been recognized as essential services and are exempt from the lockdown.** In view thereof, all activities pertaining to generation and distribution of power are to continue like normal.*
 - 2) *On 25.03.2020 MoP, issued a letter to the State Secretaries of Power Department stating that generation and supply of electricity being essential commodity/services are exempted from the restrictions imposed by lockdown. MoP further stated that power generation utilities, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), supply inter-state electricity to the grid. Hence, their operations are critical for maintaining power supply across the country. Accordingly, MoP requested all the State Secretaries to ensure that the restrictions of lockdown does not hamper the movement of staff and raw materials of these power plants.*
 - 3) *On 27.03.2020, the MoP issued an order to the Load Despatch Centres, Electricity Regulatory Commissions, Central Electricity Authority, and all the generating and distribution companies, providing that in light of the negative impact of the lockdown on the liquidity of Discoms, it had been decided that till 30.06.2020 power would be scheduled even if payment security mechanism was established for 50% of the amount for which payment security mechanism is to be otherwise established contractually.*

- 4) *On 28.03.2020, MoP, issued a Press Release stating that despite the lockdown imposed to contain the spread of the COVID 19 pandemic, the whole workforce of the power sector, viz: generation, transmission, distribution and system operations is working round the clock to keep all homes and establishments lighted, as MoP is committed to provide 24x7 supply of electricity to all consumers.*
- 5) *On 28.03.2020, MoP issued directions to Hon'ble CERC under Section 107 of the Electricity Act regarding reduction in the rate of Late Payment Surcharge payable by the Distribution Licensees till 30.06.2020. In terms of the aforesaid it is trite that MB Power and MPPMCL/MP Discoms are engaged in providing essential services viz, Generation and Distribution of electricity to the consumers of Madhya Pradesh. Therefore, during the period of lockdown both the entities were exempted from the restrictions imposed due to lockdown and continued to be operational for generating and supplying power with no change/waiver in their respective contractual obligations under the PPA.*
- 6) *On 03.04.2020, Hon'ble CERC while implementing the directions of MoP Notification dated 28.03.2020 to Late Payment Surcharge ("LPS"), passed a Suo Moto Order in Petition No. 6/SM/2020*
- 7) *MPPMCL, on 30.03.2020, issued a Notice to MB Power ("Force Majeure Notice") claiming the nationwide lockdown imposed by MHA Order dated 24.03.2020 due to the outbreak of Covid-19 Pandemic as an event of Force Majeure. By way of the Force Majeure Notice, MPPMCL inter alia, stated that:-*
 - (a) *Spread of corona virus and resulting nationwide lockdown should be considered as a case of natural calamity and is a force majeure situation.*
 - (b) *Imposition of lockdown has led to drastic reduction in collection of revenue from retail consumers. Even demand of the State has been reduced sharply due to closure of industries, shops and major establishments forcing distribution companies in Madhya Pradesh not to schedule or partly schedule power from generating companies.*
 - (c) *Nationwide lockdown to contain spread of Covid-19 is a force majeure event affecting obligations of MP Power Management Co. Ltd under the PPA.*
 - (d) *Due to fall in collection of revenue, payment of power purchase bills by MPPMCL may be delayed. No cause of action for breach or liability would arise on account of such non-payment as the same would be a consequence of force majeure.*

- 8) *On 04.04.2020, the petitioner (M/s MB Power) replied to MPPMCL's Force Majeure Notice dated 30.03.2020, denying MPPMCL's claim qua occurrence of force majeure, as under: -*
- (a) Imposition of lockdown by MHA does not qualify as a force majeure event under Article 11 of the PPA as the same does not in any manner hamper/affect the performance of MPPMCL's obligations to schedule power from MB Power's Project, as all the entities i.e., MB Power, MPPMCL and MP Discoms continue to be operational.*
 - (b) Power generation and distribution are essential services in terms of in terms of Clause 4(g) of the MHA Guidelines of the MHA Order dated 24.03.2020 and accordingly specifically exempted from the nationwide lockdown imposed by MHA.*
 - (c) In terms of Article 4.2 read with Article 4.3.3 of PPA, MPPMCL is obligated to schedule/procure power and pay tariff for the entire capacity declared and made available by MB Power. In case MPPMCL does not schedule the power, it is still liable to pay the entire Capacity Charges to MB Power*
 - (d) MPPMCL's obligations to pay tariff is not predicated on its financial condition and there has been no impact on MPPMCL's ability to supply power. Even otherwise, commercial hardship in performance is not a ground for force majeure.*
 - (e) MPPMCL is and continues to be liable to pay Capacity Charges as per availability declared by MB Power, irrespective of dispatch.*
- 9) *On 04.04.2020, GoMP issued directions under Section 108 of the Electricity Act to this Hon'ble Commission to specify a reduced rate of LPS to be charged by the generating companies and the transmission licensees during the period of 24.03.2020 to 30.06.2020 on account of the unprecedented situation arising due to restrictions placed by the Central Government to contain COVID-19.*
- 10) *For implementation of GoMP directions dated 04.04.2020, this Commission passed a Suo-Motu Order on 05.04.2020 and held that if any delayed payment is made by MPPMCL/MP Discoms to the generating companies and/or intra-State Transmission licensees beyond 45 days from the date of the presentation of the bills/invoices or due date mentioned in PPA falls between 24.03.2020 and 30.06.2020, MPPMCL/Distribution Companies shall make the payment with LPS at the rate reduced by 0.50% per month on the existing LPS rate specified in the respective Regulations.*
- 11) *On 06.04.2020, MoP, issued a further clarification to its earlier letters/Notifications dated 27.03.2020 and 28.03.2020, stating that no exemption has been given to Distribution*

Licensees from making payment of bills within 45 days of its presentation and the obligation to pay for Capacity Charges under the PPA shall continue.

- 12) *On 07.04.2020, in continuation of the Force Majeure Notice, MPPMCL wrote to MB Power stating that: -*
- (a) MPPMCL by its Force Majeure Notice dated 30.03.2020 has already notified MB Power that the nationwide lockdown qualifies as an event of force majeure affecting the performance of MPPMCL's obligations under the PPA 05.01.2011.*
 - (b) Demand of electricity in the State of Madhya Pradesh has sharply decreased due to lockdown resulting in closure of Industries, Shops and other major establishments forcing MPPMCL to not schedule or partly schedule power from some of the Generators.*
 - (c) Under the present force majeure circumstances MPPMCL shall only pay the Capacity Charges corresponding to actual power scheduled by MPPMCL and not for the entire capacity declared available (i.e. Declared Capacity) by MB Power.*

It is submitted that similar letter was again issued by MPPMCL on 25.04.2020, reiterating the contents of its Force Majeure Notice.

- 13) *On 07.04.2020, the petitioner replied to MPPMCL stating that as per MoP's letter dated 06.04.2020, it has been clarified that Discoms are obligated to pay the entire Capacity Charges corresponding to the capacity declared available by the generating companies. Since then, MB Power has followed up by its letters dated 18.04.2020 and 29.04.2020 to dispute the claim of MPPMCL that it is prevented from the performance of its obligations under the PPA including payment of entire Capacity Charges corresponding to capacity declared available by MB Power, along with the Late Payment Surcharge.*
- 14) *On 15.04.2020, MHA issued guidelines extending the nationwide lockdown till 03.05.2020. In terms of Clause 11(iii) of said MHA Guidelines, Power Generating Company and Distribution Licensees continue to be exempted from the restrictions imposed due to lockdown on account of providing essential services. It is submitted that similar guidelines were issued by MHA on 01.05.2020 further extending the lockdown till 17.05.2020.*
- 15) *On 08.05.2020, MB Power raised Monthly Tariff Invoice(s) upon MPPMCL for supply of power during the month of April 2020 amounting to Rs. 61,70,77,058/- (Rupees Sixty-One Crore Seventy Lacs Seventy-Seven Thousand and Fifty-Eight only), which included Capacity Charges amounting to Rs. 36,38,12,758/-, computed as per the provisions of MPERC Tariff Regulations,2020.*

- 16) On 05.06.2020, MPPMCL issued a Notice to the petitioner under Article 11.5.2 of the PPA qua cessation of the effects of the alleged force majeure event i.e., nationwide lockdown due to outbreak of Covid-19 Pandemic. By way of the Cessation Notice MPPMCL defined the force majeure period as 24.03.2020 to 31.05.2020 to state that with effect from 01.06.2020 all rights and obligations of MPPMCL under the PPA stands restored.
- 17) On 09.06.2020, MB Power raised Monthly Tariff Invoice(s) upon MPPMCL for supply of power during the month of May 2020 amounting to Rs. 69,35,29,128/- (Rupees Sixty-nine Crore Thirty-Five Lacs Twenty-nine Thousand One hundred and Twenty-eight only), which included Capacity Charges amounting to Rs. 40,26,08,333/- computed as per the provisions of MPERC Tariff Regulations,2020.
- 18) The details of the Invoices raised by MB Power on MPPMCL towards supply of power during the months of April 2020 & May 2020 and the corresponding payments made thereof by MPPMCL as also the deduction(s) in Capacity Charges by MPPMCL are detailed as under: -

(All Figures in Rs.)

Supply Month	Capacity Charges billed by MB Power	Energy Charges billed by MB Power	Total Invoice Amount	Capacity Charges paid by MPPMCL	Energy Charges paid by MPPMCL	Total Payments made by MPPMCL	Capacity Charges deducted by MPPMCL
Apr-20	36,38,12,758	25,32,64,300	61,70,77,058	19,63,49,922	25,32,64,300	44,96,14,222	16,74,62,836
May-20	40,26,08,333	29,09,20,795	69,35,29,128	22,87,87,413	29,09,20,795	51,97,08,208	17,38,20,920
Total	76,64,21,091	54,41,85,095	1,31,06,06,186	42,51,37,335	54,41,85,095	96,93,22,430	34,12,83,756

- 19) In view of the above it is noteworthy that: -

- (a) The Capacity Charges amounting to Rs.76,64,21,091/- (Rupees Seventy-Six Crore Sixty-Four Lacs Twenty-One Thousand and Ninety-One only) claimed by MB Power from MPPMCL for the supply period of April 2020 and May 2020 correspond to the capacity declared available (i.e., Declared Capacity) to MPPMCL by MB Power during these months, which has been duly certified by Western Regional Power Committee ("WRPC").
- (b) The Capacity Charges amounting to Rs. 42.51 Crore paid by MPPMCL to MB Power for the supply period of April 2020 and May 2020 correspond to only the energy

scheduled by MPPMCL and not for the entire capacity declared available (i.e. Declared Capacity) by MB Power.

- (c) *Total deductions in the Capacity Charges amounting to Rs. 34.13 Crore by MPPMCL for the supply period of April 2020 and May 2020 correspond to the unscheduled energy by MPPMCL i.e. capacity declared available (i.e. Declared Capacity) by MB Power but not scheduled by MPPMCL.*
- 20) *Aggrieved by such unilateral and illegal deduction of Capacity Charges of approx. Rs. 34 Crores, MB Power, on 10.08.2020, wrote to MPPMCL regarding the deficit payment received by MB Power against the Monthly Tariff Invoices raised for supply of power during the months of April and May 2020. MB Power stated that MPPMCL has wrongly deducted Capacity Charges totalling to Rs. 34.13 Crore from the aforesaid Invoices in violation of Article 4.3.1 read with 4.3.3 of the PPA and MoP Clarification. Accordingly, MB Power requested MPPMCL to perform its contractual obligation and make payment of the deducted amount at the earliest.*
- 21) *On 14.10.2020, MB Power wrote to the Principal Secretary (Energy), GoMP, highlighting the wrongful deduction of Capacity Charges by MPPMCL from the Monthly Tariff Invoices for supply period April 2020 and May 2020. MB Power further stated that such unilateral and illegal deduction of Capacity Charges by MPPMCL has resulted in severe financial stress creating challenges in making payments towards procurement of coal and transportation, debt servicing, O&M, and other statutory compliances. Accordingly, MB Power requested the Principal Secretary to kindly look into the matter and advise the concern for expeditious release of the deducted amount for sustainable and smooth operation of the power plant. On 23.10.2020, MB Power again wrote to the Principal Secretary (Energy), Government of Madhya Pradesh, reiterating the contents of its earlier letter dated 14.10.2020.*
- 22) *On 27.10.2020, MB Power again wrote to MPPMCL reiterating the contents of its earlier letter dated 10.08.2020 and requested MPPMCL to make payments towards the unilaterally and illegally deducted Capacity Charges for power supplied during the period of April 2020 and May 2020.*
- 23) *On 01.12.2020, MPPMCL replying to MB Power letter dated 27.10.2020 stated that: -*
- (a) *Capacity Charges of Rs.34,12,83,756/- (Rupees Thirty-Four Crore Twelve Lacs Eighty-Three Thousand Seven Hundred and Fifty-Six only) have been deducted during force majeure situation in accordance with the Article 11.7.1 of the PPA dated 05.01.2011.*

- (b) *For the supply period of April and May 2020, MPPMCL has restricted payment of Capacity Charges only to the energy scheduled by MPPMCL and not the capacity declared available (i.e., Declared Capacity) by MB Power.*
- (c) *Capacity Charges towards unscheduled energy (i.e., Capacity declared available by MB Power but not scheduled by MPPMCL during the supply period of April 2020 and May 2020) will not be paid by MPPMCL on account of force majeure. In case of disagreement with decision of MPPMCL, MB Power may approach this Hon'ble Commission for adjudication of the dispute.*
- 24) *MB Power issued a Dispute Notice to MPPMCL on 02.12.2020, under Article 13.5.2 of the PPA on account of MPPMCL's failure to make payment towards the unilaterally deducted Capacity Charges for the supply period April 2020 and May 2020.*
- 25) *Since MPPMCL by its letter dated 01.12.2020, refused to pay the Capacity Charges towards the unscheduled energy (i.e. Capacity declared available by MB Power but not scheduled by MPPMCL) during April 2020 and May 2020 and sought for the adjudication of this dispute by this Commission, the Petitioner filed Petition No. 01 of 2021 before this Hon'ble Commission on 31.12.2020 seeking Direction to MPPMCL to make payment of Capacity Charges deducted by it (amounting to Rs. 34.13 Cr.) for the supply period of April and May 2020 forthwith to MB Power and LPS corresponding to such deducted capacity charges till date of final payments in terms of provisions of PPA.*
- 26) *Pursuant to filing of the said Petition, MB Power came to know that MPPMCL has admitted/made payment of full capacity charges (including the capacity charges for unscheduled power) to NTPC Limited for the alleged force majeure period of April and May 2020. Hence, MB Power decided to amicably settle to dispute with MPPMCL pertaining to payment of capacity charges for the period April & May 2020 and withdrew Petition No. 01 of 2021.*
- 27) *The Commission by Order dated 26.02.2021 allowed the Petitioner to withdraw Petition No. 01 of 2021 and granted liberty to re-file the subject Petition as and when required.*
- 28) *On 13.05.2021, MB Power wrote to MPPMCL requesting for urgent release of funds towards MB Power's huge outstanding against supply of power to MPPMCL. MB Power further stated that:-*
- (a) *Against the total outstanding amount of more than Rs. 400 Crores, MB Power has not received any funds in May 2021.*
- (b) *MB Power needs to make advance payments towards procurement of coal & freight besides O&M and statutory payments for continues operation of the Plant.*

Further, MB Power is obligated to service its debt on monthly basis, failing which it runs the risk of being declared a Non-Performing Asset (NPA) which has serious consequences and may adversely affect MB Power's ability to supply power to MPPMCL.

Accordingly, MB Power requested MPPMCL to release of its entire outstanding amount (which included capacity charges for April and May 2020) or at least Rs. 200 Crores in the next 10 days to enable MB Power to ensure continued operation of its Power Plant.

- 29) *On 14.07.2021, MPPMCL wrote MB Power enclosing the Reconciliation Statement for payment made to MB Power against monthly, weekly and other charges invoices for FY 2020-21. With respect to MB Power Capacity Charges Invoice for April and May 2020, the Reconciliation Statement issued by MPPMCL states that the same has been deducted due to Force Majeure as already conveyed by MPPMCL's letter dated 01.12.2020.*
- 30) *Despite several rounds of discussion and repeated requests and meetings, MPPMCL has not made payment of the capacity charges for the period April & May 2020. Since the parties have failed to amicably settle the dispute pertaining to payment of capacity charges for the period April & May 2020 and in terms of the liberty granted by this Hon'ble Commission in Order dated 26.02.2021, the Petitioner is constrained to file the present Petition.*
- 31) *It is further highlighted that MPPMCL has not been making full payment of the monthly tariff invoices raised by MB Power for the power supplied to MPPMCL without any basis. As on date, tariff payment of almost Rs. 500 Crores is outstanding on part of MPPMCL for the power procured from MB Power. As a result, MB Power is in severe financial crisis and is not able to make payments for procurement of coal in a timely manner resulting in coal stock out situation at the Plant site, adversely affecting the operational Availability of the Power Plant. It is submitted that MPPMCL appears to have alleged the occurrence of a Force Majeure event only to alleviate its poor financial condition by unilaterally withholding payments to be made to MB Power.*
- 32) *During the nationwide lockdown, Generating Companies and Distribution Licensees were directed to remain operational on account of providing essential services, viz; generation and distribution of electricity. Accordingly, MB power has been declaring the availability of its generation capacity for offtake by MPPMCL as per the Government Orders, PPA dated 05.01.2011 and the other prevailing regulations including the applicable Grid Code etc. Therefore, performance of obligations under the PPA by MPPMCL as well as MB Power have not been impacted by imposition of lockdown in*

any manner. Since there has been no hindrance or stoppage of activities pertaining to generation and distribution of electricity, MPPMCL's claim that the nationwide lockdown imposed by Government of India due to the outbreak of Covid-19 Pandemic, constitutes an event of Force Majeure under the PPA, is erroneous and illegal.

- 33) Both MPPMCL and MB Power were operational during the lockdown period, as both were exempted from the restrictions imposed due to lockdown on account of providing essential services. Therefore, imposition of nationwide lockdown due to outbreak of Covid-19 does not qualify as an event of Force Majeure under Article 11.3 of the PPA.
- 34) For a party to take recourse of the Force Majeure clause under the PPA, it has to be affected by a force majeure event. It is evident from a plain reading of Article 11.2 of the PPA, which defines "affected party", performance is the key issue which has to be seen to ascertain whether a party has been affected by a Force Majeure event. In the present case, the Covid-19 pandemic and the consequent lockdowns had no effect whatsoever on the performance of MPPMCL's contractual obligations. Thus, there is no valid reason for MPPMCL to take shelter of Force Majeure clause.
- 35) A Force Majeure event is not a blanket escape from contractual obligations. The clause can only be invoked if it falls within the ambit of the Contract i.e., the PPA, and /or some Government order, regulation directive and/or notification permits such an invocation. Even otherwise, if MPPMCL was affected by a Force Majeure event, MPPMCL ought to have treated all generating companies supplying power to MPPMCL at par, i.e., the scheduling for all generating companies should have been impacted equally and not as per MPPMCL's own will contrary to the provisions of the PPAs.
- 36) MPPMCL has asserted (by way of Force Majeure Notice dated 30.03.2020) that the lockdown coupled with unexpected reduction in the power demand in the State of Madhya Pradesh has led to drastic reduction in collection of revenue from retail consumers, which qualifies as a force majeure event. As submitted hereinabove, the reduction in load/demand due to imposition of lockdown cannot be considered as an event of force majeure as the same does not affect the performance of MPPMCL's obligations under the PPA, more so, when MPPMCL has not waived incidence of fixed charges payable to it/MP Discoms by its end consumers.
- 37) The alleged reduction in demand and revenue collection of MPPMCL is not recognized as an event of Force Majeure under the PPA. The fluctuation in load/demand is a normal operational reality, which is dependent on the consumption of power in the State of Madhya Pradesh. Therefore, merely because MPPMCL's performance of obligation under the PPA has become onerous or burdensome due to imposition of lockdown, the

same will not qualify as an event of force majeure. In terms of Article 11.4(e) of the PPA 'insufficiency of finances or funds or the agreement becoming onerous to perform' has been specifically excluded from events qualifying as Force Majeure.

- 38) *There has been no major aberration in the power and energy demand pattern of Madhya Pradesh during the supply period of April and May 2020 vis-à-vis subsequent months of June 2020 to September 2020. Assuming but not admitting, if the alleged low demand constituted a Force Majeure event, then it is noteworthy that the demand pattern (both peak demand and energy consumption) of Madhya Pradesh during June 2020 is similar to that of April 2020 and indeed lower than that of May 2020. It may further be noted that scheduling by MPPMCL as a percentage (%) of capacity declared available (i.e. Declared Capacity) by MB Power's Project during June 2020 was indeed lower than the scheduling during the period April 2020 and May 2020.*
- 39) *In view of the above, it is submitted that MPPMCL under the guise of force majeure cannot escape its obligation under the PPA to pay Capacity Charges corresponding to the entire generation capacity declared available (i.e. Declared Capacity) by MB Power, even if it is not scheduled/partially scheduled by MPPMCL. Since MB Power has declared availability of Contracted Capacity to MPPMCL in accordance with the Government Orders, PPA, applicable Regulations including the applicable Grid Code and ABT Regime etc., MB Power is entitled to recover the entire Capacity Charges irrespective of no/partial scheduling by MPPMCL.*
8. With the above submission, the petitioner prayed the following:-
- a. *Direct MPPMCL to make payment of Capacity Charges deducted by it amounting to Rs. 34,12,83,756/- (Rupees Thirty-Four Crore Twelve Lacs Eighty-Three Thousand Seven Hundred and Fifty-Six only) for the supply period of April 2020 and May 2020 forthwith to MB Power along with carrying cost;*
 - b. *Direct MPPMCL to pay Late Payment Surcharge corresponding to such deducted Capacity Charges accrued till the date of making final payments to MB Power in terms of the applicable provisions of the PPA.*
9. The subject petition was admitted at the motion hearing held on 15th March 2022. Vide daily order dated 16th March' 2022, the petitioner was directed to serve copy of petition to the Respondents within a week. The Respondents were directed to file reply to the petition within a week, thereafter. The petitioner was asked file rejoinder within one week, thereafter.

10. At the next hearing held on 12th April' 2022, Ld. Counsel who appeared for Respondent No.1 informed that copy of petition was received on 28.03.2022, therefore, he was not able to reply and requested for further time of one week to file reply. Ld. Counsel for the petitioner submitted that the request of Respondent No. 1 may be granted and once the reply of Respondent No. 1 is filed, one week's time may be granted to petitioner to file rejoinder. Last opportunity was given to Respondent No. 1 to file reply within a week and the petitioner was allowed to file rejoinder within one week, thereafter.
11. At the hearing held on 24th May 2022, the Commission had observed the following:
 - a. By affidavit dated 26.04.2022, Respondent No. 1 (MPPMCL) filed reply to the petition.
 - b. By affidavit dated 12.05.2022, petitioner filed rejoinder to the reply filed by Respondent No. 1.
 - c. Ld. Counsels who appeared for petitioner and Respondent No. 1 concluded their arguments. As requested, both the parties were allowed to file their respective written submissions within ten days. With the above directions, the case was reserved for order.
12. Vide letter dated 03.06.2022 and 10.06.2022, the petitioner and Respondent No. 1 (MPPMCL) filed their respective written submissions.

Submissions by the Parties:

13. By affidavit dated 26th April 2022, the Respondent No. 1 M.P. Power Management Company Ltd. broadly submitted the following in its reply to the subject petition:
 - 1) *Without prejudice to the reply on merits of the case, the instant petition is not maintainable before this Commission and no proceedings can be held for adjudication U/s 86(1)(f) of Electricity Act as the petitioner has not challenged the letter dated 30.03.2020 & 31.03.2021 by virtue of which the Force Majeure and Vis Major clauses were invoked by the Respondent No.1 during the Covid-19 Pandemic. It is submitted that the only prayer of the Petitioner is that payments should be released but there is no prayer or relief being sought for adjudication in the Petition that the letter dated dated 30.03.2020 & 31.03.2021 by virtue of which the Petitioner was informed that there is a force majeure event due to the Covid-19 pandemic, is illegal or not in accordance with law. In the absence of such a specific challenge and in view of the Order of the CPC the instant petition is not maintainable as even if it is assumed that*

the Petitioner has a good case on merits the disbursal of payment is only a consequential relief and cannot be granted till the time the letter dated dt.30.03.2020 & 31.03.2021 invoking force majeure is valid, legal and not set-aside by a court of competent jurisdiction. It is submitted that the instant petition be dismissed as being not maintainable on this ground alone.

- 2) *Without prejudice to the above submissions on the maintainability of the Petition, with respect to the merits of the case it is most respectfully submitted that it is the entire case of the Petitioner that:*
 - a) *There can be no “Force Majeure” with respect to the purchase of power under the PPA as power generation and distribution were under the exempted category from the lockdown imposed due to Covid-19 by the Union of India. Further in this regard the petitioner has relied on several letters of the Union of India and the answering respondent shall deal with same in its reply.*
 - b) *Therefore, on merit the submissions of the Petitioner is that there is no Force Majeure under the PPA.*
 - c) *The third submission by the petitioner is that even if the Force Majeure clause has been invoked by the Respondent, the petitioner is entitled for payment of its capacity charges on account of the fact that despite invoking the Force Majeure clause vide letter dated 30.03.2020 and 31.03.2020, the respondent has accepted the declared capacity (DC) issued by the petitioner on a day to day basis from and scheduled power erratically.*

Distribution is Exempted from COVID-19-Lockdown-Force Majeure Under PPA:

- 3) *With respect to the submission the petitioner that power generation, transmission and distribution are under the exempted category as per the circular dated 24.03.2020 of the Union of India issued during the National Lockdown imposed, it is submitted that the perusal of the said circular highlights that the exception from close down in Clause 1 of the order dated 24.03.2020 is only towards power generation and transmission of units and further any exceptions from Close down of any entity does not in any way establish that there was no Force Majeure Condition as the adjudication of force majeure has to be undertaken on the basis of the provisions of the PPA.*
- 4) *Covid-19 has been a force majeure event and therefore this Commission needs to examine the provisions of the PPA and provisions of the Contract Law for adjudication of the instant petition.*

- 5) *The supply of electricity is an important service, therefore, the respondent and the State DISCOMS were engaged in continuous supply of the electricity. However, as mentioned in the notice of Force Majeure dt.30.03.2020 & 31.03.2021 it has been clearly stated that as the consumption and demand of electricity has drastically reduced, therefore, there is force Majeure situation and in this light that the notice of force Majeure was issued. It is also submitted that the lockdown imposed in March 2020 was a **once in a lifetime** issue and the Respondent had rightfully invoked the force majeure provisions working from their respective homes.*
- 6) *However, the issuance of the Force Majeure notice does not mean the supply of electricity to the Consumers has been completely stopped. It is submitted that the Force Majeure notice was issued as there was admittedly a drastic drop in the demand of electricity and public interest mandated that the Force majeure notice is issued so that appropriate financial resources could be saved and used for efficiently.*
- 7) *It is submitted that eventually all tariff is a pass through to the consumer and by invoking of Force Majeure as per the terms of the PPA the Respondent has exercised its contractual rights correctly and in accordance with public interest. It is submitted that the drastic reduction in demand due to lockdown was anticipated by the officials of the Respondent and accordingly the notice of Force Majeure was issued to not just the Petitioner but also several other generators such as JP Bina, JP Nigrie, BLA, PTC (LANCO), PTC (Torrent), NTPC, MPPGCL etc. The Respondent is attaching a comparative chart showing demand of electricity during the month of April 2020 and May 2020 in comparison with the month of April-May 2019 and 2018 to demonstrate the drop in demand during the lockdown.*
- 8) *It is further submitted that in order dated 27.03.2020 UOI clearly held that the Covid-19 pandemic is unprecedented and force majeure situation. It is submitted that it is the entire case of the respondent herein that the Covid-19 pandemic is a once in a life time pandemic and is a natural force majeure under the terms of power purchase agreement and is unprecedented in nature and therefore, it is completely incorrect on the part of the petitioner to aver or allege that the invocation of force majeure clause is not as per the provisions of PPA. It is submitted that the Covid-19 pandemic being once in a century or life time has affected millions of public globally and when it struck India in the year 2020, there was no knowledge of kind of virus erupted and the fear in the mind of the public was unprecedented towards this unknown virus and it is perhaps for the first time in the history of independent India that a national lock-down*

was imposed. Thus, it is completely incorrect on the part of the petitioner to aver or allege that the covid-19 pandemic is not force majeure as per the provisions of PPA.

- 9) *As per Article 11.3.1 (i) of the PPA, the covid-19 pandemic qualifies as a natural force majeure event. Therefore, as per clause 11.7.1 (c), no tariff is payable to the petitioner at the duration of Force majeure by the Respondent. It is submitted that this Respondent did not interpret it as no payment at all. Conversely, to be fair to the petitioner and also for the benefit of consumers of the State, payment of full Capacity charges and Variable charges for all the energy scheduled during this period was made to the Petitioner.*
- 10) *Further the reliance of the petitioner on the letter dated 06.04.2020 and in particular at Para -3(C) of the said letter wherein the Union of India has clarified that the obligation to pay capacity charges as per the PPA shall continue. It is submitted that the said letter of UOI does not in any manner state that capacity charges have to be paid even if the respondent or the purchaser has invoked the force majeure clause.*
- 11) *It is submitted that a careful reading of para-3(C) of the letter dated 06.04.2020 of the Union of India highlights that the obligation to pay capacity charges is 'as per the PPA' and therefore, the Commission would have to examine the payment of capacity charges in terms & provisions of the PPA, which contains rights and obligations of the parties, and in the instant case, the respondent has invoked the force majeure clause under Article 11.3 of the PPA and as per Article 11.7.1(C), no tariff is payable to the petitioner, therefore, even reliance of the petitioner on the letter dated 06.04.2020 of the UOI is of no help to the petitioner.*
- 12) *The reliance of the petitioner on the letter dated 28.03.2020 issued by the Union of India issued U/s 107 of the Electricity Act is also of no help to the petitioner as firstly the letter dated 28.03.2020 clearly acknowledges that the covid-19 event is force majeure and secondly the directions given in the said letter are only in relation with reduction in the rate of late payment surcharge and do not give any direction that capacity charges has to be paid even in the event of invocation of force majeure by the Purchaser under the PPA. This decision, in itself, implies that Union of India was fully aware of precarious situation faced by all Discoms during lock-down and intended to help them by directing to make fullest use of their dwindling resources and stopping/reducing all phantom payments like high rates of LPSC which do not contribute to purchase of electricity. Payment of idle Capacity charges to the Petitioner without procuring energy also falls under this category of phantom*

payments and hence, the Respondent diligently made payment of Capacity and variable charges for all the energy scheduled during this period.

- 13) The reliance of the petitioner on the letter dated 15.05.2020 is also of no avail as it is a request to the generating company and the transmission company of the central sector by the Union of India, to offer a rebate to the distribution companies. In this regard it is most respectfully submitted that the respondent has in view of the said letter dated 15.05.2020 been successful in getting a rebate from NTPC and MP Genco to the tune of Rs.147.08 Cr. & Rs. 96.42 Crores respectively.
- 14) It is further submitted, without prejudice, that the letters and circulars of the Union of India, cannot in any manner also be helpful to the Petitioner for the simple reason that the **Commission is required to examine the instant dispute in accordance with the terms of the PPA**, which is the contract between the parties. Further without prejudice it is submitted that even the letters of the Union of India clearly hold and state that covid-19 is a force majeure situation and secondly, payment of capacity charges has to be as per the PPA. As per Article 11.7.1(C) (Para-2) of the PPA, no tariff is payable to the petitioner under Force Majeure. However, to be fair to the Petitioner and also for the benefit of consumers of the State, payment of full Capacity charges and Variable charges for all the energy scheduled during this period was made and only payment of phantom charges like idle Capacity charge was stopped.

Declared Capacity Accepted

- 15) With respect to the submission of the petitioner that the respondents has accepted the declared capacity of the petitioner from April 2020 to May 2020 and the said action on the part of the respondents is contrary to its notice of force majeure dated 30.03.2020 and 31.03.2020, it is most respectfully submitted that the averments is without any merit for the simple reason that the respondent does not accept the declared capacity and as per the regulations which are the Madhya Pradesh Balancing & Settlement Code Regulations framed by this Commission, and a perusal of the regulations highlights that the generator (petitioner) is required to give its declared capacity to the SLDC on a day ahead basis and SLDC accepts the DC after prudence check and provides entitlement of the MPPMCL. Thereafter, the respondent is required to give its requisition of power from the respective generators and on the basis of such requisition submitted by the respondent the SLDC issue the drawl schedule for the next date from the respective generators and intimate the same to the respective parties. It is submitted that the detailed procedure regarding the same has been mentioned in the Balancing and Settlement Code.

- 16) *In the instant case, the respondent during the said period has not given its requisition for drawing power from the petitioner and the drawl of power on during the Force Majeure period is in accordance of clause-11.6 of the PPA, and the said drawl of power does not in any manner amplify or demonstrate that the force majeure situation has ceased to exist. It is submitted that under Article 11.7.1(C) of the PPA, which says payment of no tariff under Force Majeure condition, the Petitioner is only entitled to charges for the power scheduled by MPPMCL and not any other charges such as idle capacity charges.*
- 17) *It is also pertinent to mention herein that the petitioner is not just supplying power to the respondent herein but is also supplying its high percentage of its installed capacity to other states such as Uttar Pradesh and therefore, in any case petitioner had to be on-bar for making supply to other states. It is therefore, completely incorrect for the petitioner to aver or allege that the respondents have accepted its declared capacity during the Force Majeure period.*
- 18) *To summarize the question of law raised by the petitioner, “whether the Nation wide lock down imposed by the government of India declaring the COVID 19 as pandemic was a Force majeure Event or not?”, it is most humbly submitted that the instant dispute is a contractual dispute governed by the PPA dated 05/01/2011 wherein an inclusive list of Force Majeure events has been laid down, the said list is not exhaustive and gives scope for inclusion to an unprecedented event due to which the petitioner/respondent could not perform its duties as laid down in the PPA, in the instant case the lockdown had a far reaching effect and the demand for electricity had unpredictably dropped drastically, due to which the respondent could not have performed its obligation under the PPA, the liberty (exemption), granted by Gol to the officials of DISCOMs, TRANSCOMs, to freely move during the lockdown to meet power requirement, cannot be construed otherwise and forgo the fact that the Force Majeure event did existed. It is further submitted that the reliance on the letter dated 15.5.2020 of the Ministry of Power is of no avail as the same was not concerning the IPP’s but was for State Genco’s and even they have granted 25% rebate on bills.*
- 19) *It is submitted that the reliance of the Petitioner on the case of Petition no. 10/21 and order passed by this Commission it is submitted that the Respondent no.1 has challenged the same before the Hon’ble High Court of MP and the Hon’ble High Court has granted stay on the order dated 18.11.2021 vide its order dated 4.3.2022.*
- 20) *In view of the submissions made herein above the instant petition is without any merit and deserves to be dismissed.***

14. By affidavit date 12th May, 2022, the petitioner filed its rejoinder to the reply filed by the Respondent MPPMCL. The petitioner broadly submitted the following in its rejoinder:
- 1) *MPPMCL has contended that the present petition is not maintainable before this Commission and no proceedings can be held for adjudication under Section 86(1)(f) of Electricity Act since MB Power has not challenged the letters dated 30.03.2020 and 31.03.2020 by virtue of which MPPMCL had invoked the alleged Force Majeure provision under the PPA on account of Covid 19 and the only prayer of MB Power in the Petition is that the payment deducted by MPPMCL for April and May 2020 should be released.*
 - 2) *The aforesaid contention of MPPMCL is completely wrong, misplaced, self-contradictory and hence denied. At the outset it is submitted that MPPMCL's claim for Force Majeure on account of Covid-19 Pandemic to deny legitimate claims of the generating company with respect to payment of capacity charges corresponding to the entire capacity declared available by the generating company during the period April to May 2020 has already been held to be illegal and set-aside by this Commission by Order dated 18.11.2021 passed in Petition No. 10 of 2021 titled Jhabua Power Ltd. v. MPPMCL. Hence, MPPMCL's letters dated 30.03.2020 and 31.03.2020 claiming Force Majeure are per se illegal and arbitrary.*
 - 3) *In the present Petition MB Power has challenged the unilateral deduction by MPPMCL of Capacity Charges of Rs. 34.13 Crore against the Monthly Tariff Invoices raised by MB Power for the power supplied to MPPMCL during the months of April and May 2020 under the PPA dated 05.01.2011. It is submitted that such deduction of Capacity Charges by MPPMCL is in violation of the PPA.*
 - 4) *In terms of Article 10.7 of the PPA, if a party does not dispute a Monthly Bill or a Supplementary Bill raised by the other Party within ten (10) days of receiving it, such bill shall be taken as conclusive for payment of the Bill amount. The Hon'ble Supreme Court in T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd, (2014) 11 SCC 53 ('PPN Judgment') has held that: -*
 - (a) *Unilateral deductions from monthly bills by a party without adjudication are illegal.*
 - (b) *Payment of Tariff Invoices have to be made in full when due even if the entire portion or a portion of the invoice is disputed.*
 - 5) *In the present case, MB Power had raised the Monthly Tariff Invoices upon MPPMCL for the power supplied during the month of April 2020 on 08.05.2020 and for May*

2020 on 09.06.2020. MPPMCL did not raise any dispute qua the said Invoices within the time-period prescribed in the PPA. Hence, the said Invoices were deemed to be conclusive in terms of Article 10.7.1 of the PPA. However, while making payment of the said Invoices, MPPMCL has unilaterally deducted an amount of Rs. 34.13 Crore towards the Capacity Charges corresponding to the Contracted Capacity declared available by MB Power but not scheduled by MPPMCL.

- 6) Such unilateral and wrongful deduction of Capacity Charges by MPPMCL is violative of Article 10.7 of the PPA. Thus, the same purely qualifies as a billing dispute between the generating company and the distribution licensee. Hence, in terms of Section 86(1)(f) of the Electricity Act and Article 10.7.6 read with Article 13.5.3 of the PPA, it is only this Commission which has the jurisdiction to adjudicate such billing dispute between the parties. It cannot be the case that MPPMCL will not make payment towards Tariff Invoices raised by MB Power by issuing a Force Majeure Notice for an event which does not contractually and/or legally qualify as a Force Majeure.

MPPMCL's claim of Force Majeure is illegal and not in accordance with the PPA :

- 7) It is submitted that MB Power in the present Petition has clearly demonstrated that MPPMCL's claim of Force Majeure by way of its letters dated 30.03.2020 and 31.03.2020 is illegal and not in accordance with the PPA and law. MB Power by way of its pleadings and submissions in the Petition has challenged illegal Force Majeure claim of MPPMCL, as claimed by way of its letters dated 30.03.2020 and 31.03.2020. Once the Force Majeure claim alleged by MPPMCL by way of its letters dated 30.03.2020 and 31.03.2020 are challenged by MB Power by way its present Petition, MPPMCL's averment that MB Power has not specifically challenged these letters dated 30.03.2020 and 31.03.2020 holds no ground.
- 8) Even the Hon'ble APTEL by Judgment dated 21.02.2018 passed in Appeal No. 176 of 2015 and IA Nos. 364 & 368 of 2015 titled 'Chamundeshwari Electricity Supply Company Ltd vs Saisudhir Energy (Chitradurga) Pvt. Ltd & Anr' upheld the Order passed by Ld. Karnataka Electricity Regulatory Commission (Ld. KERC) whereby Ld. KERC had granted relief of Force Majeure despite there not being prayer to that effect. The Hon'ble APTEL held that Ld. KERC has not passed the Impugned Order without jurisdiction even on issues where reliefs were not sought by the party, as the State Commission is at freedom to frame additional issues if required in view of the facts and circumstances of the case and decide upon them accordingly for arriving at a just and equitable decision. Hence, this Commission based on the pleadings and

submission made by MB Power in its Petition is duly empowered to decide upon MPPMCL's illegal and fallacious claim of Force Majeure in order to adjudicate the dispute raised by MB Power in the present Petition.

Power generation and distribution were declared as essential services and were exempted from the restrictions imposed due to nationwide lockdown:

- 9) *MPPMCL has contended that perusal of Union of India Circular dated 24.03.2020 issued during the National Lockdown highlights that the exception from close down in Clause 1 of the order dated 24.03.2020 is only towards power generation and transmission of units.*
- 10) *It is submitted that the aforementioned contention of MPPMCL is completely wrong, misplaced and hence denied. It is submitted that all essential services were exempt from lockdown since its imposition on 24.03.2020 as is evidenced by the following binding Orders, Guidelines and Circulars issued by the Central Government and State Government: -*
 - (a) *MHA Order and Guidelines dated 24.03.2020 issued under Section 10(2)(I) of the Disaster Management Act 2005 [Clause 4(g) of the Guidelines]: -*

“4. Commercial and private establishments shall be closed down.

Exceptions:

(g) Power generation, transmission and distribution units and services.”
 - (b) *MoP Order dated 25.03.2020 [Clause 2 & 7];*
 - (c) *MoP directions dated 28.03.2020 issued under Section 107 of the Electricity Act 2003;*
 - (d) *MHA Guidelines dated 15.04.2020, 01.05.2020 and 17.05.2020;*
 - (e) *MoP directions dated 28.03.2020 issued under Section 107 of the Electricity Act, to Hon'ble CERC and subsequent Suo-Moto Order dated 03.04.2020 issued by Hon'ble CERC in the Petition No. 6/SM/2020.*
 - (f) *GoMP directions dated 04.04.2020 issued under Section 108 of the Electricity Act, to this Commission and subsequent Suo-Moto Order dated 05.04.2020 issued by this Commission.*
- 11) *Evidently, in terms of Clause 4(g) of MHA Order and Guidelines dated 24.03.2020 Power generation as well as distribution units i.e., MPPMCL was exempted from the restrictions imposed due to lockdown.*

Reduction in consumption and demand of electricity does not qualify as Force Majeure situation under the PPA:

- 12) *MPPMCL has contended that the reduction in consumption and demand of electricity in the State of Madhya Pradesh during April and May 2020 on account of the lockdown imposed due to Covid-19 qualify as Force Majeure situation under the PPA. It is submitted that the aforementioned contention of MPPMCL is completely wrong, misplaced and hence denied. Further the said contention has been specifically rejected by this Commission in the Jhabua Order and by Ld. CERC in Order dated 20.01.2022 passed in Petition No. 594/MP/2020 titled GMR Warora Energy Limited v. DNH Power Distribution Company Limited.*
- 13) *It is submitted that any event impacting MPPMCL to offtake the entire/ partial Contractual Capacity made available to it by MB Power under PPA, especially due to reduced demand from industrial consumers is not covered under Article 11 of the PPA and cannot be a ground for invoking Force Majeure. Hon'ble Supreme Court by its Judgments in Energy Watchdog v. CERC; (2017) 14 SCC 80 [Para 38-42 & 46] and Naihati Jute Mills Ltd v. Khyaliram Jagannath, AIR 1968 SC 522 [Para 10], has held that only because the agreement has become onerous to perform, it does not qualify as Force Majeure - there must be a legal or physical impossibility.*
- 14) *MPPMCL has asserted by way of Force Majeure Notice dated 30.03.2020 and in its reply that the lockdown coupled with unexpected reduction in the power demand in the State has led to drastic reduction in collection of revenue from retail consumers, which qualifies as a Force Majeure event. Reduction in load/demand due to imposition of lockdown cannot be considered as an event of Force Majeure as the same does not affect the performance of MPPMCL's obligations under the PPA.*
- 15) *The alleged reduction in demand and revenue collection of MPPMCL is not recognized as an event of Force Majeure under the PPA. The fluctuation in load/demand is a normal operational reality, which is dependent on the consumption of power in the State of Madhya Pradesh. Therefore, merely because it has become onerous for MPPMCL to perform its obligations under the PPA for any reasons (including due to imposition of lockdown), the same cannot qualify as a Force Majeure event. In terms of Article 11.4(e) of the PPA 'insufficiency of finances or funds or the agreement becoming onerous to perform' has been specifically excluded from events qualifying as Force Majeure.*

No aberration in the Peak Demand pattern and Energy Consumption pattern of Madhya Pradesh during April 2020 and May 2020:

- 16) Without prejudice to the above submissions, as per the data available on the website of CEA, the month-wise Peak Demand and Energy Consumption pattern of Madhya Pradesh during the last 1 Year i.e. from December 2019 to November 2020 is as under: -

Particulars	Dec-19	Jan-20	Feb-20	Mar-20	Apr-20	May-20	Jun-20	Jul-20	Aug-20	Sep-20	Oct-20	Nov-20
Peak Demand (MW)	14,674	14,729	14,886	12,144	9,149	10,173	9,124	10,322	10,027	10,084	12,784	14,381
Energy Consumption (MUs)	7,489	7,423	7,586	6,018	5,360	6,226	5,283	6,510	5,896	6,375	7,400	8,223

- 17) As clearly evident from the above table, there has been no major aberration in the power and energy demand pattern of Madhya Pradesh during the supply period of April and May 2020 vis-à-vis subsequent months of June 2020 to September 2020. Hypothetically, even if the alleged low demand constituted a Force Majeure event, then it is noteworthy that the demand pattern (both peak demand and energy consumption) of Madhya Pradesh during June 2020 is similar to that of April 2020 and indeed lower than that of May 2020. It may further be noted that scheduling by MPPMCL as a percentage (%) of Capacity declared available (i.e. Declared Capacity) by MB Power's Project during June 2020 was indeed lower than the scheduling during the period April 2020 and May 2020 as evident from the following Table: -

Month	Apr-20	May-20	Jun-20
Peak Demand of Madhya Pradesh	9,149 MW	10,173 MW	9,124 MW
Energy Consumption by Madhya Pradesh	5,360 MUs	6,226 MUs	5,283 MW
Scheduling by MPPMCL as a % of Declared Capacity by MB Power	51%	48%	21%
Whether Capacity Charges corresponding to entire Declared Capacity of MB Power were paid by MPPMCL	NO	NO	YES

- 18) Evidently, during April and May 2020, MPPMCL has arbitrarily deducted the Capacity Charges under the garb of alleged Force Majeure when the peak demand and energy consumption of MP is relatively similar to the subsequent period of the year. From the above, it is abundantly clear that COVID-19 and the consequential imposition of lockdown leading to reduced demand does not constitute an event of Force Majeure for MPPMCL in terms of the PPA.

Covid-19 and imposition of lockdown are not Force Majeure events under the PPA:

- 19) *In this regard MPPMCL has contended that:-*
- (a) *Union of India in Order dated 27.03.2020 has clearly held at Para 3 that Covid-19 pandemic is unprecedented and Force Majeure situation.*
 - (b) *Covid -19 pandemic is a once in a lifetime pandemic.*
 - (c) *As per Article 11.3.1(i) of the PPA, Covid-19 pandemic qualifies as a Natural Force Majeure event. Therefore, in terms of Article 11.7.1(c), no tariff is payable to MB Power during the period of continuation of such Force Majeure event.*
- 20) *It is submitted that the aforementioned contention of MPPMCL is completely wrong, misplaced and hence denied. Further the said contention has been specifically rejected by this Commission in the Jhabua Order and by Ld. CERC in GMR Order. It is submitted that whether an event i.e., Covid-19 Pandemic qualifies as Force Majeure or not for MPPMCL has to be ascertained strictly in terms of Article 11 of the PPA, which deals with Force Majeure.*
- 21) *It is submitted that in terms of Article 11.2, MPPMCL will qualify as an Affected Party only if its performance has been affected by an event of Force Majeure. In terms of Article 11.3, Force Majeure with respect to an Affected Party means any event, which:*
- (a) *are stated in Article 11.3 of the PPA.*
 - (b) *wholly or partly prevents the Affected Party i.e., MPPMCL (in the present case) or unavoidably delays the performance of its obligations under the PPA.*
 - (c) *is beyond the reasonable control of MPPMCL.*
 - (d) *could not have been avoided by the Affected Party i.e., MPPMCL by exercise of reasonable care and Prudent Utility Practices.*
- 22) *In terms of Article 11.2 and 11.3 of the PPA, to qualify as an event of Force Majeure it is essential that performance of MPPMCL's obligations under the PPA becomes impossible. In terms of Article 4.2 read with Article 4.3.3 of the PPA, although MPPMCL is not obligated to schedule power from MB Power and MPPMCL has a right to schedule power as per its requirement, however, in such an event, MPPMCL is obligated to pay tariff (i.e., Capacity Charges) for the entire capacity declared Available (i.e. Declared Capacity) by MB Power, even if MPPMCL does not schedule/partially schedule such Declared Capacity. Just because the demand for power may have reduced, MPPMCL's obligation to pay Capacity Charges*

corresponding to the entire capacity declared available by MB Power cannot be done away with particularly in view of Article 4.3.3 of the PPA.

- 23) *Hon'ble Supreme Court by its Judgments in Energy Watchdog v. CERC; (2017) 14 SCC 80 and Naihati Jute Mills Ltd v. Khyaliram Jagannath, AIR 1968 SC 522, has held that only because the agreement has become onerous to perform, it does not qualify as Force Majeure - there must be a legal or physical impossibility. Therefore, any event impacting offtake/ scheduling by MPPMCL of the capacity declared Available (i.e. Declared Capacity) by MB Power is not covered under Article 11 and cannot be a ground for invoking Force Majeure under the PPA.*
- 24) *As demonstrated above, both MPPMCL and MB Power were operational during the lockdown period, as both were exempted from the restrictions imposed due to lockdown on account of providing essential services. Therefore, imposition of nationwide lockdown due to outbreak of Covid-19 does not qualify as an event of Force Majeure under Article 11.3 of the PPA as: -*
- (a) It does not fall under the category of Natural Force Majeure events or Non-Natural Force Majeure events stipulated in Article 11.3 of the PPA.*
 - (b) It does not in any manner hamper/affect MPPMCL's performance of obligations under the PPA, inasmuch as there is no impairment or any legal/physical impossibility on MPPMCL from scheduling/procuring the power declared Available by MB Power.*
 - (c) The Force Majeure Notice neither mentions the provisions of Article 11 of the PPA that is being invoked by MPPMCL nor any evidence has been produced establishing how MPPMCL is prevented from scheduling power from MB Power's Project.*
 - (d) MPPMCL is not an Affected Party under Article 11.2 of the PPA.*
- 25) *For a party to take recourse of the Force Majeure clause under the PPA, it has to be affected by a Force Majeure event. It is evident from a plain reading of Article 11.2 of the PPA, which defines "affected party", performance is the key issue which has to be seen to ascertain whether a party has been affected by a Force Majeure event. In the present case, the Covid-19 pandemic and the consequent lockdowns had no effect whatsoever on the performance of MPPMCL's contractual obligations. Thus, there is no valid reason for MPPMCL to take shelter of Force Majeure clause. A Force Majeure event is not a blanket escape from contractual obligations. The clause can only be invoked if it falls within the ambit of the Contract i.e., the PPA, and /or*

some Government order, regulation directive and/or notification permits such an invocation. Even otherwise, if MPPMCL was affected by a Force Majeure event, MPPMCL ought to have treated all generating companies supplying power to MPPMCL at par, i.e., the scheduling for all generating companies should have been impacted equally and not as per MPPMCL's own will contrary to the provisions of the PPAs.

- 26) MPPMCL's obligations to pay the tariff under the PPA is neither predicated upon its financial position nor on the power demand from its consumers.
- 27) The Hon'ble Delhi High Court by its Judgment dated 29.05.2020 in **M/s Halliburton Offshore Services Inc v. Vedanta Limited & Anr**, (O.M.P (I) (COMM.) No. 88/2020 & I.A. 3696-3697/2020 held that the Force Majeure clauses are to be interpreted narrowly and not broadly and that there has to be a strong justification in order to invoke the Force Majeure clause. The relevant portion of the judgment is reproduced below:

"62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. **Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition.** The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and **only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.**

63. It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in *Energy Watchdog (supra)* it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause."

- 28) In the present case: -
- (a) Generation and supply of power have been held to be essential services that were exempt from the lockdown mandated by the MHA.

- (b) *MB Power has been declaring the availability of its generation capacity for offtake by MPPMCL as per the Government Orders, PPA and the applicable Regulations.*
 - (c) *During April and May 2020, MB Power generated and supplied power to MPPMCL as per the requirement/scheduling approved by MPPMCL, which has been the established practice since inception of power supply under the PPA. During the said period, MB Power was even operating its Project as per its routine operations.*
 - (d) *MPPMCL has in no way been hindered to perform its obligations (re: scheduling of power and payment of Capacity Charges corresponding to the entire capacity declared available by MB Power (i.e. Declared Capacity) by such lockdown.*
 - (e) *Decrease in revenue collection does not fall under the ambit of Force Majeure under the PPA. In fact, insufficiency of funds has been excluded from constituting a Force Majeure event.*
 - (f) *It is settled law that commercial hardship is not a ground for Force Majeure.*
 - (g) *MPPMCL never stated that MPPMCL would not be scheduling power from the Petitioner or the quantum of power that would be required by MPPMCL. The Petitioner having a Long Term PPA with MPPMCL was obligated to perform its obligations in terms of the PPA as envisaged by the various MoP and MHA circulars/notifications. Hence, the Capacity Charges for April and May 2020 unilaterally withheld by MPPMCL is illegal and baseless.*
- 29) *Hence, Covid-19 Pandemic or the lockdown imposed due to Covid-19 does not qualify as an event of Force Majeure for MPPMCL under the PPA.*

MB Power is entitled to entire Capacity Charges in terms of the PPA:

- 30) *In this regard MPPMCL has contended that:-*
- (a) *In terms of Clause 11.7.1(c) of the PPA, no tariff is payable to MB Power during the continuation of Force Majeure event affecting MPPMCL;*
 - (b) *During the Force Majeure event i.e., April to May 2022 MB Power is entitled only to Capacity Charges corresponding to the power scheduled by MPPMCL and not to the Capacity Charges towards the capacity declared available (Declared Capacity) by MB Power but not scheduled by MPPMCL.*
- 31) *At the outset it is submitted that MPPMCL has coined a new term to refer to these charged as idle Capacity Charges, which finds no reference in the PPA. Accordingly,*

for this supply period April to May 2022, MPPMCL has made payment to MB Power towards Capacity Charges and Variable Charges only corresponding to the quantum of power scheduled by MPPMCL.

- 32) The aforesaid contention of MPPMCL is wrong, misplaced, self-contradictory and hence denied. Further the said contention has been specifically rejected by this Hon'ble Commission in the Jhabua Order and by Ld. CERC in GMR Order.*
- 33) At the outset it is submitted that Covid-19 Pandemic or the lockdown imposed on account of Covid-19 Pandemic does not qualify as an event of Force Majeure for MPPMCL under the PPA as demonstrated above. Hence, Article 11.7.1(c) of the PPA, which provides the relief for Force Majeure is not applicable in the present case.*
- 34) It is noteworthy that on one hand MPPMCL has contended that in terms of Article 11.7.1(c) of the PPA, no tariff is payable to MB Power for the period April and May 2020 since MPPMCL was affected by a Force Majeure event. On the other hand, MPPMCL admittedly has stated that for the period April and May 2020, MB Power is only entitled to charges (i.e., Capacity Charge and Variable Charge) for the power scheduled by MPPMCL. Such contradictory stand of MPPMCL evinces that its claim of Force Majeure is illegal and merely an excuse to evade its contractual obligations to make payment towards the Capacity Charges for the entire capacity declared available (Declared Capacity) by MB Power.*
- 35) It is submitted that MB Power had declared availability of its generation capacity for offtake by MPPMCL during the period of April and May 2020 in line with MHA Guidelines and various Notifications issued by MoP mandating power generating companies to be operational during the lockdown. Accordingly, MB Power declared the available capacity of the Project in accordance with the PPA and applicable Regulations including the applicable Grid Code etc.*
- 36) The concept of Fixed Charges/Capacity Charges is the cornerstone of Availability Based Tariff ("ABT") regime, whereby the generating station is entitled to Fixed Charges/Capacity Charges corresponding to the entire capacity made available (i.e. Declared Capacity) to its beneficiary/ distribution licensee(s) under PPA. As per the ABT mechanism, the risk of variation in demand of electricity is that of the distribution licensee(s) and the risk of availing Capacity Charges corresponding to extent of Declared Capacity is that of the generating station. Thus, the core principle of ABT mechanism is to ensure continuity of payment of Capacity Charges by the distribution licensee(s) corresponding to the capacity declared available (i.e. Declared Capacity)*

by the generating station, irrespective of variation in demand. The above position has been laid down in: -

- (a) Hon'ble Central Commission's Order dated 04.01.2000 passed in Petition No. 2 of 1999.
 - (b) The Explanatory Memorandum issued along with CERC (Terms and Conditions of Tariff) Regulations, 2009 [Para 25.9].
- 37) It is submitted that the ABT regime is recognised and embedded in the PPA as well. It is submitted that in terms of Article 4.3.1 read with Article 4.3.3 of the PPA, the ABT regime as set out herein above read with the Hon'ble Tribunal's Judgment dated 22.04.2015 passed in Appeal No. 261 of 2013, MPPMCL is obligated to pay Capacity Charges corresponding to the entire capacity declared available (i.e. Declared Capacity) by MB Power, even if MPPMCL does not schedule/partially schedule such Declared Capacity. In this regard reliance is placed on: -
- (a) Article 4.3.1 of the PPA, which mandates MPPMCL to pay Tariff (Capacity Charges) for all the Available Capacity up to the Contracted Capacity: -
"4.3.1. Subject to the terms and conditions of this Agreement, **the Company undertakes to make available to the Procurer the Contracted Capacity and the Procurer undertakes to purchase the Scheduled Energy and pay the Tariff.** The title and risk to the Scheduled Energy shall pass from the Company to the Procurer at the Delivery Point."
 - 4.3.3. **If the Procurer does not schedule the whole or part of the Available Capacity for any reason whatsoever, the Company shall be entitled to make available such Available Capacity not scheduled by the Procurer, to any other person without losing the right to receive the Capacity Charges from the Procurer for such unscheduled Available Capacity. During this period, the Company will continue to receive the Capacity Charges from the Procurer. For any such third-party sale, all open access charges including losses, as may be applicable, shall not be payable by the Procurer. The Company shall maintain accounts and provide all details regarding price of sale etc. to the Procurer in respect of such sales under this Article.**
 - (b) Hon'ble Tribunal's Judgment dated 22.04.2015 passed in Appeal No. 261 of 2013 titled "**Maharashtra State Electricity Distribution Co. Ltd vs. Central Electricity Regulatory Commission & Ors**" wherein it was held that distribution licensee is under obligation to pay capacity charges so long as the generator has declared

available capacity, irrespective of whether the distribution licensee schedules the capacity offered by generator or not.

- 38) *In view of the above, it is submitted that MPPMCL under the guise of Force Majeure cannot escape its obligation under the PPA to pay Capacity Charges corresponding to the entire generation capacity declared available (i.e. Declared Capacity) by MB Power, even if it is not scheduled/partially scheduled by MPPMCL. Since MB Power has declared availability of Contracted Capacity to MPPMCL in accordance with the Government Orders, PPA, applicable Regulations including the applicable Grid Code and ABT Regime etc., MB Power is entitled to recover the entire Capacity Charges irrespective of no/partial scheduling by MPPMCL.*
- 39) *Apart from this, on 06.04.2020, MoP clarified that no exemption has been given to distribution licensees (i.e., MPPMCL in the present case) from making payment of bills within 45 days of its presentation and the obligation of Distribution Licensees (i.e. MPPMCL) to pay for Capacity Charges under their Power Purchase Agreements (i.e., corresponding to the entire Declared Capacity of MB Power) shall continue during the lockdown period as well.*
- 40) *Further, in terms of the following directions issued by MoP/GOMP under the Electricity Act read with Hon'ble CERC and this Hon'ble Commission's Orders, no relief has been provided to any distribution licensees including MPPMCL with respect to waiver of its contractual obligation to pay capacity charges corresponding to the capacity declared available (i.e., declared capacity) by a generating company during the alleged Force Majeure period:-*
- (a) MoP directions dated 28.03.2020 issued to Hon'ble CERC under Section 107 of the Electricity Act;*
 - (b) Hon'ble CERC Suo-Moto Order dated 03.04.2020 in Petition No. 6/SM/2020;*
 - (c) GoMP directions dated 04.04.2020 to this Hon'ble Commission issued under Section 108 of the Electricity Act,*
 - (d) This Hon'ble Commission Suo-Moto Order dated 05.04.2020.*
- 41) *It is submitted that the limited relief provided to MPPMCL under these directions/Order is only with respect to reduced rate of Late Payment Surcharge ("LPS") on payment of invoice(s) raised on MPPMCL, where the payment due date falls between 24.03.2020 and 30.06.2020. Even, complete waiver of LPS has not been directed. In view thereof it is abundantly clear that MPPMCL is obliged in law to*

pay Capacity Charges to MB Power corresponding to the entire capacity declared available (i.e., Declared Capacity) by MB Power during April 2020 and May 2020.

42) *It is submitted that MPPMCL has contended that this Hon'ble Commission Order dated 18.11.2021 passed in Petition No. 10 of 2021 titled Jhabua Power Ltd. v. MPPMCL has been stayed by the Hon'ble High Court of Madhya Pradesh vide Order dated 04.03.2022 passed in M.P No. 564 of 2022 upon challenge by MPPMCL. At the outset it is submitted that it is a settled position of law that stay of an Order is inter-se parties and does not apply to other parties. Further the Hon'ble Supreme Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn, (1992) 3 SCC 1 has categorically held that stay of the Order only means that the Order, which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. Even if the Order has been stayed it continues to exist in law.*

15. Vide submission dated 03.06.2022, the petitioner filed its final written submission broadly submitting the following:

- i. In terms of Article 4.2 read with Article 4.3.3 of the PPA, MPPMCL is obligated to pay tariff (i.e., Capacity Charges) for the entire capacity declared Available by MB Power, even if MPPMCL does not schedule/partially schedule such Declared Capacity. Just because the demand for power may have reduced, MPPCL's obligation to pay capacity charges cannot be done away with. This obligation of MPPMCL is in no manner impeded by the lockdown or COVID-19.*
- ii. Fluctuation in load/demand is a normal operational reality of every distribution company, including MPPMCL, and being so, reduction in demand / supply of power in the State of Madhya Pradesh was never contemplated to be a force majeure event under the PPA. Merely because MPPMCL's performance of obligation under the PPA had become onerous or burdensome due to imposition of lockdown, the same will not qualify as an event of force majeure.*
- iii. MPPMCL has admitted/paid capacity charges for the alleged force majeure period of April & May 2020 to NTPC Limited for the power sourced from various generating station of NTPC during the said period. MPPMCL being a state instrumentality is not expected to discriminate between State Generating Stations and Independent Power Producers. Such discriminatory actions of MPPMCL apart from being violative of the Electricity Act and Article 14 of the Constitution of India also distorts the level playing field.*

- iv. *In any case the Hon'ble High Court has not passed any order/directions restraining this Hon'ble Commission from adjudicating, deciding and passing Orders in similar matters filed by other parties. Further, MB Power's claim in the present Petition is based on the provisions of the PPA and MoP Clarification dated 06.04.2020 amongst other legal provision and is not solely based on Jhabua Order.*
 - v. *It is further submitted that during the hearing on the present Petition held before this Hon'ble Commission on 24.05.2022, MPPMCL contended that based on the merits, the Hon'ble High Court of Madhya Pradesh was pleased to stay the operation of Jhabua Order. It may kindly be appreciated that the neither the Petitioner is privy to the challenge raised by MPPMCL before the Hon'ble High Court, nor the Petitioner is aware of the submissions made before the Hon'ble High Court of Madhya Pradesh by the Respondents including this Commission. Accordingly, this Hon'ble Commission may kindly take a view.*
16. The Respondent No. 1 filed its final written submission broadly stating the following:
- i. *It is an admitted fact the electricity has to be supplied to hospitals and private homes and therefore it is not the case of the Respondent that there was no supply to be made during lockdown. It is submitted that due to the lockdown there was a drop in demand due to closure of commercial and industrial establishment and this even of covid-19 lockdown is a force majeure event under the PPA clause 11.3.1 and 11.3.1(i) read along with clause 11.2.1 of the PPA and therefore no tariff payment is payable under clause 11.7.1 (c) for this Natural Force Majeure event.*
 - ii. *It is submitted that it is a matter of admitted fact that the petitioner was not generating electricity exclusively for the respondent and the petitioner was supplying electricity to other states (UP and Haryana) as per its PPA with those states and therefore the plant was not kept operational only for the Respondent as the case is being made out to be.*
 - iii. *It is submitted that the Respondent is not concerned with the transaction between the Petitioner and other parties as the respondent had invoked the force majeure clause, the respondent was not under obligation to purchase the full contracted demand. It is submitted that the Force Majeure notice was issued as there was admittedly a drastic drop in the demand of electricity and public interest mandated that the Force majeure notice is issued so that appropriate financial resources could be saved and used for bringing down the costs which ultimately is recoverable from the Public.*

- iv. *Further the reliance of the Petitioner on the order dated 18.11.2021 passed in Petition no. 10 of 2021 in the case of Jhabua Power Ltd to aver and submit that the issue is no longer Res Integra and has been decided in favour of the Petitioner by the Hon'ble Commission it is most respectfully submitted that the order dated 18.11.2021 passed in the case of Jhabua Power Ltd has been stayed by the Hon'ble High Court in M.P No.564/2022 vide its order dated 4.3.2022 and therefore it is of no avail to submit that the issue is finally decided in favour of Petitioner.*
- v. *It is lastly submitted that it is incorrect on the part of the Petitioner to aver that Respondent was first required to approach this Hon'ble Commission for declaration of covid-19 as a Force Majeure and only then could the Respondent invoke Force Majeure. It is submitted that the instant submission is absurd and illogical. The provisions of the PPA are clear and express and give either party to the PPA a right to invoke Force Majeure as per the provisions of the PPA. Nowhere does the PPA mandate that a Party has to first obtain a declaration from this Hon'ble Commission and then invoke force majeure. It is reiterated that the Respondent has invoked Force Majeure as per the provisions and in accordance with the PPA.*
- vi. *Further the reliance of the Petitioner on clauses 4.4.3 of the PPA to aver and submit that capacity charges have to be paid in full for the available capacity irrespective of the quantum of energy actually scheduled and drawn. It is in this regard most respectfully submitted that the clause 4.4.3 and such other clause pertain to a period when there is no Force Majeure, however when Force Majeure is invoked (as in the instant case) then no Tariff is payable as per clause 11.7.1 (c)(Para -2) of the PPA. It is submitted that even then the Respondent has paid for the amount of energy scheduled by it during the force majeure period to be just, fair and reasonable to the Petitioner.*

Commission's Observations and Findings:

- 17. The subject petition is filed by the petitioner (M/s M.B. Power (Madhya Pradesh) Limited) under Section 86 (1)(f) of the Electricity Act' 2003 seeking payment of Capacity Charges of Rs. 34.13 Crore deducted by MPPMCL against the Monthly Tariff Invoices raised by the petitioner for the power supplied to MPPMCL during the months of April and May 2020 under the PPA dated 05.01.2011.
- 18. The issue under dispute in this petition is non-payment of Capacity Charges / Fixed Charges by Respondent No. 1 to the petitioner corresponding to the actual Plant Availability Factor (PAF) based on declared capacity (DC) for a period of April and May

2020. During the aforesaid period, the Respondent No. 1 invoked Force Majeure clause under the PPA on account of nationwide lockdown due to Covid-19 pandemic and restricted payment of Capacity Charges / Fixed Charges to the extent of power actually scheduled by Respondent No. 1 without considering the actual Plant Availability Factor (PAF) based on declared capacity (DC) of the plant.

19. The dispute in the subject matter occurred when the Respondent No. 1 vide letter dated 30.03.2020 invoked 'Force Majeure' clause under the PPA mentioning the following reasons which affected the performance of obligations by Respondent No. 1 (MPPMCL) under PPA:

- (a) Spread of corona virus and resulting nationwide lockdown should be considered as a case of natural calamity and is a force majeure situation.
- (b) Imposition of lockdown has led to drastic reduction in collection of revenue from retail consumers. Even demand of the State has been reduced sharply due to closure of industries, shops and major establishments forcing distribution companies in Madhya Pradesh not to schedule or partly schedule power from generating companies.
- (c) Nationwide lockdown to contain spread of Covid-19 is a force majeure event affecting obligations of MP Power Management Co. Ltd under the PPA.
- (d) Due to fall in collection of revenue, payment of power purchase bills by MPPMCL may be delayed. No cause of action for breach or liability would arise on account of such non-payment as the same would be a consequence of force majeure.

20. While issuing the aforesaid force majeure notice, Respondent No. 1 referred the order dated 24.03.2020 of National Disaster Management Authority (NDMA) which was addressed to the Union Home Secretary to take effective measures for ensuring social distancing to prevent spread of COVID-19 in the country. It is observed that the Guidelines issued by NDMA provided for a complete lockdown in the country while ensuring maintenance of essential services and supplies. In the aforesaid guidelines, **the services of power generation, transmission and distribution, being essential in nature, were exempted from the purview of the said lockdown.** The Respondent No. 1 had also referred the Ministry of Power, Government of India's letter dated 27.03.2020 vide which certain directions were issued to generating companies and distribution licensees regarding payment security mechanism as mentioned below:

“Considering the unprecedented and force majeure situation, it has been decided that power may be scheduled even if payment security mechanism is established

for 50% of the amount for which payment security mechanism is to be otherwise established contractually.”

21. In continuation to aforesaid letter, Respondent No. 1 wrote another letter dated 31.03.2020 informing the petitioner that the Respondent No. 1 is not desirous to avail power from the petitioner’s power plant as there is no such power requirement due to massive drop in consumers’ demand and that the Declared Capacity (DC) is not being accepted by it till further notice. MPPMCL stated that the date of commencement of the Force Majeure event is 24.03.2020.
22. It is further observed that vide letter dated 06.04.2020, Ministry of Power issued a clarification to its earlier order dated 27.03.2020 and 28.03.2020, mentioning that there has been some misconception regarding interpretation of its previous order and clarified that the **obligation to pay for Capacity Charges as per the PPA shall continue**, as does the obligation to pay for transmission charges. The directions of MOP in aforesaid clarificatory order are summarized below:

“The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.

- (a) Late payment surcharge shall apply at reduced rate only for the period between 24.03.2020 to 30.06.2020 (on those payments that become overdue during the period 24.03.2020 to 30.06.2020 and not on those payments which were already overdue before 24.03.2020) and after 30.06.2020, the delayed payment surcharge shall be payable at rates given in the PPA/Regulations.
- (b) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges.

Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly, However, Discoms may also raise funds, if required, to meet the crises.”

23. The petitioner vide its letter dated 04.04.2020 requested Respondent No. 1 to withdraw the said notices dated 30/03/2020 & 31/03/2020, and to make payment of invoices in terms of provisions under PPA. The petitioner stated that the invocation of Force Majeure clause by Respondent No. 1 is erroneous due to following reasons:

- (a) Imposition of lockdown by MHA does not qualify as a force majeure event under Article 11 of the PPA as the same does not in any manner hamper/affect the performance of MPPMCL's obligations to schedule power from petitioner's Project, as all the entities continue to be operational.
 - (b) Power generation and distribution are essential services in terms of Clause 4(g) of the MHA Guidelines of the MHA Order dated 24.03.2020 and accordingly specifically exempted from the nationwide lockdown imposed by MHA.
 - (c) In terms of Article 4.2 read with Article 4.3.3 of PPA, MPPMCL is obligated to schedule/procure power and pay tariff for the entire capacity declared and made available by MB Power. In case MPPMCL does not schedule the power, it is still liable to pay the entire Capacity Charges to MB Power.
 - (d) MPPMCL's obligations to pay tariff is not predicated on its financial condition and there has been no impact on MPPMCL's ability to supply power. Even otherwise, commercial hardship in performance is not a ground for force majeure.
 - (e) MPPMCL is and continues to be liable to pay Capacity Charges as per availability declared by MB Power, irrespective of dispatch.
24. Vide letter dated 07.04.2020, MPPMCL in continuation of the Force Majeure Notice to the petitioner stated the following: -
- (a) MPPMCL by its Force Majeure Notice dated 30.03.2020 has already notified MB Power that the nationwide lockdown qualifies as an event of force majeure affecting the performance of MPPMCL's obligations under the PPA 05.01.2011.
 - (b) Demand of electricity in the State of Madhya Pradesh has sharply decreased due to lockdown resulting in closure of Industries, Shops and other major establishments forcing MPPMCL to not schedule or partly schedule power from some of the Generators.
 - (c) Under the present force majeure circumstances MPPMCL shall only pay the Capacity Charges corresponding to actual power scheduled by MPPMCL and not for the entire capacity declared available by the petitioner.
25. Further, MPPMCL vide letter dated 25.04.2020 stated that it is not invoking force majeure conditions solely on account of the restrictions imposed during the lockdown period, but in view of the reduction in demand of power faced by it from its consumers, especially the commercial/industrial consumers, in view of the lockdown, which has led it to face extreme reduction in revenue and financial liquidity. MPPMCL further mentioned that

imposition of lockdown is preventing it from performing several of its obligations under the PPA. MPPMCL also stated that the reduction in demand squarely qualifies under force majeure and has compelled it not to schedule any power from the Petitioner's plant. Thus, under Article 11.7.1(c) of the PPA, the Respondent No. 1 is not liable to pay any tariff to the petitioner. The Respondent No. 1 (MPPMCL) also mentioned the following in its letter to petitioner:

"In the above scenario and in view of long lasting and healthy commercial relations to be shared between MB Power and MPPMCL, a proportionate relaxation in payment of capacity charges was sought by MPPMCL during the period of present force majeure event. Your good selves may appreciate that in view of the long tenure of the PPA, a small sacrifice on the part of MB Power may not only be in a longer public interest but shall also adhere to principles of equity, good consciousness and natural justice. It is also submitted without prejudice that public interest is paramount in such a force majeure situation and MB Power Ltd. is requested to adhere to same.

26. The petitioner submitted that against the capacity charges of Rs. 76.64 Crore for the monthly bill of April and May 2020 claimed by the petitioner corresponding to the declared capacity, MPPMCL only made payment of Rs. 42.51 Crore and Rs. 34.13 Crore was deducted. Aggrieved by such deduction of Capacity Charges, MB Power, on 10.08.2020, wrote a letter to MPPMCL regarding the deficit payment received by MB Power against the Monthly Tariff Invoices raised for supply of power during the months of April and May 2020. The petitioner stated that deduction of Capacity Charges of Rs. 34.13 Crore from the aforesaid Invoices is violation of Article 4.3.1 read with 4.3.3 of the PPA and MoP Clarification. Accordingly, the petitioner requested MPPMCL to perform its contractual obligation and make payment of the deducted amount at the earliest.
27. The petitioner vide its letters dated 10.08.2020, 14.10.2020, 23.10.2020, 27.10.2020 and 01.12.2020 protested against the method adopted by the Respondent No. 1 for processing the petitioner's monthly bills of April and May 2020 based on scheduled power instead of actual DC given. The petitioner requested the Respondent No. 1 for payment of capacity charges deducted by MPPMCL. However, it was not accepted by the Respondent No. 1.
28. On 02.12.2020, the petitioner issued a Dispute Notice to MPPMCL under Article 13.5.2 of the PPA on account of MPPMCL's failure to make payment towards the unilaterally deducted Capacity Charges for the period during April 2020 and May 2020. The petitioner

submitted that since the parties have failed to amicably settle the dispute pertaining to payment of capacity charges for the period April & May 2020, the petitioner is constrained to file the present Petition under Section 86(1)(f) of the Electricity Act' 2003.

29. The Respondent No. 1 (MPPMCL) in its reply to the subject petition has submitted that the Covid-19 pandemic is a once in a life time pandemic and is a natural force majeure under the terms of power purchase agreement and is unprecedented in nature. During this period consumption and demand of electricity was drastically reduced, therefore, there is force majeure situation and hence, notice of force majeure was issued.
30. With respect to the petitioner's submission that power generation, transmission and distribution were under the exempted category as per the circular dated 24.03.2020 of the Govt. of India, issued during the National Lockdown imposed, Respondent No. 1 has submitted that the said circular highlights that the exception from close down in Clause 1 of the order dated 24.03.2020 is only towards power generation and transmission of units and further any exceptions from Close down of any entity does not in any way establish that there was no Force Majeure Condition as the adjudication of force majeure has to be undertaken on the basis of the provisions of the PPA. MPPMCL has further submitted that the Covid-19 has been a force majeure event and therefore this Commission needs to examine the provisions of the PPA and provisions of the Contract Law for adjudication of the instant petition.
31. MPPMCL has also contended that the petitioner is not just supplying power to the Respondent No. 1 but is also supplying to other states such as Uttar Pradesh and therefore, in any case petitioner had to be on-bar for making supply to other states. It is therefore, completely incorrect for the petitioner to aver or allege that the respondents have accepted its declared capacity during the Force Majeure period.
32. In response to the reply filed by the Respondent No. 1, the petitioner in its rejoinder dated 13.05.2022 has submitted that in terms of Article 10.7 of the PPA, if a party does not dispute a Monthly Bill or a Supplementary Bill raised by the other Party within ten (10) days of receiving it, such bill shall be taken as conclusive for payment of the Bill amount. The petitioner further submitted that MPPMCL did not raise any dispute on the said Invoices within the time-period prescribed in the PPA, hence, the said Invoices were deemed to be conclusive in terms of Article 10.7.1 of the PPA.

33. The petitioner has referred CERC Order dated 20.01.2022 passed in petition No. 594/MP/2020 GMR Warora Energy Ltd. Vs. DNH Power Distribution Co. Ltd. as follows:
*“58. In view of the above discussions, the submission of the Respondent that Covid19 pandemic led lockdown **and consequent reduction in demand constitute force majeure event absolving the Respondent from making payment of capacity charges under the PPA deserves to be rejected and accordingly, the Respondent is directed to make payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 within 60 days from the date of this order.”***
34. MPPMCL has contended that this Commission’s Order dated 18.11.2021 passed in Petition No. 10 of 2021 titled *Jhabua Power Ltd. v. MPPMCL* has been stayed by the Hon’ble High Court of Madhya Pradesh vide Order dated 04.03.2022 passed in M.P No. 564 of 2022 upon challenge by MPPMCL.
35. In response to aforesaid contention of Respondent No. 1, the petitioner stated that it is a settled position of law that stay of an Order is inter-se parties and does not apply to other parties. Further the Hon’ble Supreme Court in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn*, (1992) 3 SCC 1 has categorically held that stay of the Order only means that the Order, which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. Even if the Order has been stayed it continues to exist in law.
36. Let us now look into the articulations regarding Force Majeure Events under Article 11 of the PPA dated 05.01.2011 executed between the parties in this matter.

ARTICLE – 11: FORCE MAJEURE

11.1 Definitions

11.1.1 In this Article, the following terms shall have the following meanings:

11.2. Affected Party

11.2.1. An affected Party means the Procurer or the Company whose performance has been affected by an event of Force Majeure.

11.2.2. Any event of Force Majeure affecting the performance of the Company or affecting the transmission facilities from the Power Station to the Delivery Point shall be deemed to be an event of Force Majeure affecting the Company only if the event affects and results in interruptible or no power supply to the Procurer.

11.2.3. Any event of Force Majeure affecting the performance of the Company's contractors shall be deemed to be an event of Force Majeure affecting Company only if the Force Majeure Event is affecting and resulting in:

- (a) late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Power Station; or
- (b) a delay in the performance of any of the Company's contractors.

11.2.4. Similarly, any event of Force Majeure affecting the performance of the Procurer or Procurer's contractor for setting up or operating Interconnection Facilities and/ or transmission facilities shall be deemed to be an event of Force Majeure affecting Procurer only if the Force Majeure Event is resulting in a delay in the performance of Procurer or Procurer's contractors.

11.3 Force Majeure

11.3.1. A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party has taken reasonable care or complied with Prudent Utility Practices:

- (a) **Natural Force Majeure Event(s)**
act of God, including but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclon, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.
- (b) **Non-Natural Force Majeure Event(s)**

1. Direct Non-Natural Force Majeure Event(s)

- a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Company or the Company's contractors; or
- b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the Company to perform its obligations under the Power Station Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the

development / operation of the Power Station, provided that a Competent Court of Law declared the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the supply of power by the Company to the Procurer, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non-Natural Force Majeure Event(s)

- a) *any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo; revolution, riot, insurrection, terrorist or military action; or*
- b) *radioactive contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non-Natural Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Station by the Affected Party or those employed or engaged by the Affected Party.*
- c) *Industry wide strikes and labour disturbances having a nationwide impact in India.*

11.4. Force Majeure Exclusions

11.4.1. *Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

- a. *Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;*
- b. *Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 11.2;*
- c. *Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d. *Strikes or labour disturbance at the facilities of the Affected Party;*
- e. *Inefficiency of finances or funds or the agreement becoming onerous to perform; and*

- f. *Non-performance caused by, or connected with, the Affected Party's:*
- *Negligent or intentional acts, errors or emissions;*
 - *Failure to comply with an Indian Law; or*
 - *Branch of, or default under this Agreement or any other Power Station Documents.*

37. On perusal of the aforesaid conditions, the events for Natural force majeure as articulated under PPA are act of God, including but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years. When in definition certain terms are used and thereafter there is a general term, the general term has to be construed to the words used prior in the very same definition. However, in the instant case, the reasons enumerated by the Respondent No. 1 like sharp decrease in demand due to closure of industries, shops and other major establishments due to the lockdown and disruption in the economic activity caused reduction in collections of revenue by the Respondent No. 1 from the consumers does not fall under the events/conditions for natural force majeure under clause 11.3.1 of the PPA. Further, Article 11.4 which deals with Force Majeure exclusion states that the conditions like insufficiency of funds or the agreement becoming onerous to perform would not include under Force Majeure event.
38. National Disaster Management Authority (NDMA)'s Order dated 24.03.2020 was issued to take effective measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country. The Guidelines issued provided for a complete lockdown in the country, while ensuring maintenance of essential services and supplies. In terms of the above, the activities relating to power generation, transmission and distribution, being essential in nature, were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19.
39. It is observed that Ministry of Power, Government of India's vide letter dated 27.03.2020 issued certain directions to generating companies and distribution licensees regarding payment security mechanism. Vide letter dated 06.04.2020, the Ministry of Power issued a clarification to its earlier order dated 27.03.2020 and stated that there has been some mis-conception regarding interpretation of its previous order and clarified that the obligation to pay for Capacity Charges by the procurer as per the PPA shall continue, as does the obligation to pay for transmission charges.

40. Moreover, the recovery of Capacity (Fixed) Charges by the generating companies under the disputed period shall be governed in accordance to the provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020. Therefore, let us look into the provisions under Generation Tariff Regulations, 2020 for recovery of capacity Charges by the Generator:

“The fixed cost of a thermal generating station shall be computed on annual basis, based on norms specified under these Regulations, and recovered on monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share / allocation in the capacity of the generating station. The capacity charge shall be recovered under two segments of the year, i.e. High Demand Season (period of three months) and Low Demand Season (period of remaining nine months), and within each season in two parts viz, Capacity Charge for Peak Hours of the month and Capacity Charge for Off-Peak hours of the month as follows ---- :

Normative Plant Availability Factor for “Peak” and “Off-Peak” Hours in a month shall be equivalent to the NAPAF specified in Regulation 49 of these Regulations.

The Plant Availability Factor achieved for a Month (PAFM) shall be computed in accordance with the following formula:

$$\text{PAFM} = 1000 \times \sum_{i=1}^N \frac{DC_i}{[N \times IC \times (100 - Aux)]} \%$$

Where,

AUX= Normative auxiliary energy consumption in percentage.

DC_i = Average declared capacity (in ex-bus MW), for the 1th day of the period i.e. the month or the year as the case may be, as certified by the concerned load dispatch centre after the day is over.

IC = Installed Capacity (in MW) of the generating station

N = Number of days during the period

Note: *DC_i and IC shall exclude the capacity of generating units not declared under commercial operation. In case of a change in IC during the concerned period, its average value shall be taken.*

41. As per the above provisions under the Tariff Regulations, 2020, the Capacity (fixed) Charges are payable to the generator based on the actual plant availability factor with reference to normative plant availability factor. The actual plant availability factor is to be determined based on the declared capacity of the generating unit/station on day ahead basis in terms of the provisions under the Regulations. However, the Respondent No. 1 while invoking force majeure clause has computed Capacity (fixed) Charges for the petitioner's plant based on scheduled Power, which were not in accordance to the aforesaid provisions under MPERC Tariff Regulations.
42. In view of the foregoing observations, the Commission has found that the reasons/conditions for invocation of Force Majeure clause by MPPMCL are not in accordance to the provisions of the PPA dated 05.01.2011 (and the applicable Regulations). Therefore, the prayer in the subject petition is allowed and the Respondent No. 1 is directed to pay the Capacity Charges / Fixed Charges for the period of April and May 2020 alongwith late payment surcharge in accordance to the provisions under the MPERC Tariff Regulations, 2020, the PPA executed between the parties read with Commission's order dated 5th April' 2020 regarding reduction of Late Payment Surcharge (LPS).

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

(Gopal Srivastav)
Member (Law)

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman