

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

5th Floor, "Metro Plaza", Bittan Market, Bhopal - 462016



Petition No. 23 of 2021

PRESENT:

S.P.S. Parihar, Chairman

Mukul Dhariwal, Member

Shashi Bhushan Pathak, Member

IN THE MATTER OF:

Review Petition filed under Section 94(1)(f) of the Electricity Act 2003 read with Regulation 40 of MPERC (Conduct of Business) Regulations, 2016 (Revision-I) seeking review of the order dated 16.12.2020 passed by the Commission in Petition No. 47 of 2019 for 2x250 MW Coal based Thermal Power Station at Bina.

M.P. Power Management Company Limited

Shakti Bhawan, Rampur, Jabalpur – 482008,

Petitioner

//Versus//

Jaiprakash Power Ventures Limited

(Erstwhile M/s Bina Power Supply Company Ltd.

Since merged with Jaiprakash Power Ventures Limited)

JA House, 63, Basant Lok, Vasant Vihar

New Delhi - 110057

Respondent

ORDER
(Date of Order: 6th December' 2021)

Shri Ravin Dubey, Advocate and Shri Ajasra Gupta, Senior Dy. GM (Commercial) appeared on behalf of the petitioner (MPPMCL).

Shri Venkatesh, Advocate and Shri Ajeaya Kumar Tripathi appeared on behalf of Respondent (JPVL)

1. MP Power Management Co Ltd. (hereinafter called "the petitioner" or "MPPMCL") has filed the subject review petition for review of the Commission's order dated 16th December' 2020 in Petition No. 47 of 2019 which was filed by the Respondent for true-up of Generation Tariff of its 2 x 250 MW (Phase-I) coal based Thermal Power Station at Bina, District Sagar (M.P.) determined by the Madhya Pradesh Electricity Regulatory Commission (hereinafter called 'the Commission' or 'MPERC') for FY 2018-19 vide Multi Year Tariff (MYT) Order dated 08th August' 2016. The aforesaid MYT order was based on MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 (hereinafter called "the Generation Tariff Regulations, 2015").
2. The subject review petition is filed under Section 94(1) (f) of Electricity Act 2003 read with Regulation 40 of Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) (Revision-I) Regulations, 2016.
3. The Respondent JPVL has two generating units of 250 MW each. Unit No. 1 and 2 achieved COD on 31.08.2012 and 07.04.2013 respectively.
4. The Respondent had filed petition No. 47 of 2019 for true-up of generation tariff of its Bina thermal power station for FY 2018-19 based on the Annual Audited Accounts and other documents. In the aforesaid true-up petition the M/s JPVL, Respondent in the subject matter had sought true-up of FY 2018-19 based on the additional capital expenditure incurred during FY 2018-19 in accordance with Regulation 8.4 of the tariff Regulations, 2015. Vide Order dated 16th December' 2020 in the aforesaid petition, the Commission determined true-up of tariff in terms of the Regulation 8.4 of the tariff Regulations, 2015, based on the actual additional capital expenditure incurred during FY 2018-19 as per Annual Audited Accounts for FY 2018-19.

Issues in subject petition:

5. The petitioner has sought for review of Commission's aforesaid order dated 16.12.2020 in the subject petition on the following issues:
 - (i) True-up of Primary Fuel ais to be made as per Regulation 8.8 (iii) of the Tariff Regulations, 2015.
 - (ii) Interest on Loan is not allowed as per Tariff Regulations, 2015.

6. The petitioner broadly submitted the following in the subject petition:
- i. *Under the provisions of Regulation 8.8(iii) of 2015 Tariff Regulations, True-up of cost of Primary Fuel is required to be done and the Review Petitioner had made specific prayer in its Reply Dated 13.03.2020 for carrying out True-up of cost of Primary Fuel. However, in the Impugned Order True-up of cost of Primary Fuel has not been done.*
 - ii. *The Review Petitioner, in Paras 6 to 11 of its reply dated 13.03.2020 to the Petition No. 47 of 2019, had submitted before this Commission that Regulations 8.7 and 8.8 of Tariff Regulations mandate that true-up of generation tariff is required to be carried out based on performance of both Controllable and Uncontrollable parameters. Besides, in Para 39 (1) of the said Reply, the Review Petitioner had also made specific prayer for carrying out True-up of Primary Fuel Cost in accordance to Regulation 8.8(iii) of 2015 Tariff Regulations.*
 - iii. *The Commission has done True-up of Controllable Parameters in accordance with Regulation 8.7, as recorded in Paras 123 to 126, the Impugned Order. However, regarding True-up based on Uncontrollable parameters in accordance with Regulation 8.8, it is only recorded in Para 127 that “no claim or submission has been made by the Petitioner on this account.”*
 - iv. *In Para 86 of the Impugned Order, the Commission has allowed Interest on Loan at Weighted Average Rate of 12.25% on the basis of Tariff Form TPS 13 filed by the Respondent. However, this is not in consonance with Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations.*
 - v. *In “Note 15.2” to the Balance Sheet of the Jaypee Bina Thermal Power Plant (as on 31.03.2019), it has been mentioned that repayment of principal amount of Rs. 2,148,856,000/- (Two Hundred and Fourteen Crore Eighty Eight Lac Fifty Six Thousand) and payment of interest amount of Rs. 740,778,608/- (Seventy Four Crore Seven Lac Seventy Eight Lac Six Hundred and Eight) are overdue for maximum periods of 638 days and 455 days respectively.*
 - vi. *True-up of any Capital Cost (including Interest on Loan) is allowed only on actual basis and not on notional basis under the provisions of Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations. Therefore, Weighted Average Rate of interest at 12.25% may not be allowed, as admittedly, the payment of interest on loan is not being made by the Respondent.*

Procedural History:

7. Motion hearing in the subject matter was held on 21st September' 2021. Vide order dated 22nd September' 2021, the petitioner was directed to serve copy of petition on the Respondent within a week. The Respondent was also directed to file its response on maintainability of the subject petition within two weeks, thereafter.
8. At the hearing held on 9th November' 2021, the Commission observed the following:
 - i. By affidavit dated 13th October' 2021, the Respondent (JPVL) filed reply on maintainability of the subject petition.
 - ii. By affidavit dated 3rd November' 2021, the petitioner filed rejoinder to the reply filed by the Respondent.
 - iii. Ld. Counsels who appeared for the parties concluded their arguments on maintainability of the subject review petition.
9. Vide order dated 16th November' 2021, the parties were allowed to file their written submissions in support of their arguments on maintainability of the subject petition within a week. With the above direction, the case was reserved for order.
10. The Respondent (JPVL) and the petitioner (MPPMCL) filed their written submissions on 12.11.2021 and 23.11.2021, respectively.
11. The Respondent (M/s JPVL) in its reply dated 13th October' 2021 broadly submitted the following:
 - i. *The Petitioner while filing the instant Petition has failed to meet the grounds on basis of which a Review of Judgment can be sought by an aggrieved person. At this stage, it would be relevant to highlight the limited grounds on which a Review of Judgment may be sought which is set out in Order XLVII Rule 1 which are as under:*
 - (a) *New and important matter or evidence is discovered which after the exercise of due diligence was not within the knowledge of the Review Petitioner or could not be produced by the Review Petitioner at the time when the decree is passed;*
 - (b) *there is some mistake or error apparent in the face of record;*
 - (c) *there are other sufficient reasons calling for review of the Judgment.*
 - ii. *It is submitted that the first and foremost requirement of entertaining a Review Petition is that the Order of which review is sought suffers from any error apparent on the face of record and permitting the order to stand will lead to failure of justice. Whereas, in the instant Petition, the Review Petitioner is raising question which*

goes to the merits of the case, therefore, cannot be adjudicated by this Hon'ble Commission under Review Jurisdiction. In fact the Review Petition has not even made an attempt to qualify the present Petition within the scope of Order XLVII Rule 1. Hence, the Review Petition deserves to be rejected on the threshold itself.

- iii. At this stage, it would be relevant to consider the interpretation laid down by Hon'ble Apex Court in matter titled Haridas vs Smt Usha Rani Banik & Ors [AIR 2006 SC 1634] which is as under:*

"In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should not exercise the power to review its order with the greatest circumspection..."

- iv. Thus, from the bare reading of the provision of Order XLVII Rule 1 of CPC and position of law laid down above concerning the Review Jurisdiction, the position emerges as under:*

- (a) First and foremost requirement of entertaining a Review Petition is that the order, review of which is sought, suffers from any error apparent on the face of record and permitting the order to stand will lead to failure of justice. Admittedly, in the present case the Petitioner has not even attempted to bring its Petition within the scope of Review.*
- (b) In the absence of any such error, finality attached to the Judgment/order cannot be disturbed.*

- (c) *Where there are two possible views regarding the interpretation or application of law vis-à-vis the particular facts of a case, taking one view, even if it is erroneous, cannot be said to be an error apparent on the face of record.*
 - (d) *Power of review cannot be exercised for an erroneous decision to be reheard and corrected.*
 - (e) *Power of review is not confused with the appellate power which may enable the appellate Court to correct all errors of subordinate Court.*
 - (f) *Contentions raised and decided in main proceedings cannot be reopened and agitated under the guise of review petition.*
- v. *It is submitted that none of the above requirements are satisfied in the instant Petition as there is no apparent error on the face of it which calls for Review of the Impugned Judgment. The Review Petitioner by filing the instant Petition is seeking reconsideration of the contentions/submission raised by it in the Subject Petition and the alleged errors as raised in the instant Petition are not self-evident and has to be detected by the process of reasoning.*
- vi. *In view of the law settled by Hon'ble Supreme Court of India and submission made above, it is evident that the instant Petition filed by the Review Petitioner is bereft of the merit, hence not maintainable and is liable to be dismissed with exemplary cost. Further, this is to humbly submit that answering respondent is not filing para wise reply at this juncture but reserve the right to file the same when ever this Commission directs.*
12. The petitioner in its rejoinder dated 3rd November' 2021 to the aforesaid reply broadly submitted the following:
- i. *The Review Petitioner also seeks to rely upon the grounds already urged in the Review Petition which are not being repeated for brevity. Grounds urged in the present Rejoinder are in addition to the grounds already urged in the Review Petition.*
 - ii. *It is humbly submitted that in its Reply dated 13.10.2021, the Respondent has failed to establish that the said Review Petition is not maintainable.*
 - iii. *In its Reply, the Respondent has contended that the present Review Petition is not maintainable because:*
 - a. *This Commission has examined all the issues and documents in Petition No. 47 of 2019, in accordance with the principles, methodology and norms specified in MPERC (Terms & Conditions) for determination of Generation Tariff, 2015.*

- b. *There is no error apparent on the face of the record in the Impugned Order dated 16.12.2020 therefore there is no case for review under Section 94 of Electricity Act 2003 in respect of Order 47 of CPC is made out.*
- c. *The Petitioner has right to file appeal if he is aggrieved of an order but Review Petition is to be strictly heard as per the principle of Order 47 of CPC.*
- iv. *The Respondent has also sought to rely upon judgments passed by Hon'ble Supreme Court of India in case of State of West Bengal and Ors Vs. Kamal Sengupta and Anr. and Parsion Devi Vs. Sumiri Devi.*
- v. *It is most humbly submitted that the legal principles cited or the Case Laws sought to be relied upon by the Respondent are not applicable to the facts of the present case due to reasons given in the subsequent paragraphs. Therefore, it is prayed that this Commission may graciously be pleased to ignore the contentions of the Respondent and admit the Review Petition and adjudicate the same on merits.*
- vi. *The scope and ambit of powers of Central Electricity Regulatory Commission, particularly on the aspect of "Review" of tariff was clarified by Hon'ble Supreme Court of India in its judgment dated 03.03.2009 passed in Civil Appeal No. 1110 of 2007 [U.P Power Corporation Ltd. Vs National Thermal Power Corporation Ltd.*
- vii. *It is most humbly submitted that the functions and powers of this Hon'ble Commission under Sections 86 and 181 of the Electricity Act 2003, are analogous to the functions and powers of the Central Commission under Sections 79 and 178 thereof. The powers this Hon'ble Commission are also same as those of the Central Commission under Section 94 of the Electricity Act 2003 which includes its powers of review of its own decisions, directions and orders.*
- viii. *Therefore, it is respectfully submitted that the legal principles laid down by the Hon'ble Supreme Court of India in the judgment passed in case of U.P Power Corporation Ltd. would be directly applicable to the facts of the present case.*
- ix. *In view of the legal principles laid down by Hon'ble Supreme Court of India, the contention of the Respondent that the review of a tariff order can be sought strictly under Order 47 Rule 1 of CPC is misconceived because while exercising its powers of review, so far as alterations and amendment of a tariff is concerned, this Hon'ble Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1 thereof. Its jurisdiction, in that sense, would also not be barred in terms of Order II, Rule 2 of the Code of Civil Procedure or the principles analogous thereto. Besides, tariff determination is a continuous process and if the need arises, the tariff can be revised at any stage.*

- x. *In the present Review Petition, the Review Petitioner has pointed out that in the Impugned True-up Order, true-up of Primary Fuel has not been done and interest on loan allowed is not as per 2015 Tariff Regulations. As such the review / reconsideration of the Impugned Order by this Hon'ble Commission is necessary. It is most humbly submitted that in view of the legal principles laid down by the Hon'ble Apex Court in U.P Power Corporation Ltd. (Supra), while exercising its powers of Review, this Hon'ble Commission is not barred by the provisions of either Section 114 of CPC or Order 47 Rule 1 thereof. On the contrary, tariff determination being a continuous process this Hon'ble Commission is fully empowered to seek further information from the Respondent and review and reconsider the true-up of the tariff on that basis.*
- xi. *Without prejudice and in addition to above, in the Review Petition, the Review Petitioner has clearly set out sufficient reasons and cogent grounds for review / reconsideration of the Impugned Order by this Hon'ble Commission.*
13. The Respondent in its notes for arguments dated 12th November' 2021 broadly submitted the following:
- i. *This Commission has examined all the issues in the subject petition in accordance with the principles, methodology and norms specified in MPERC Tariff Regulations, 2015 and after examining/scrutinizing all the documents including Annual Audited Accounts and other documents sought by this Commission and provide by JPVL.*
- ii. *In addition to the review being wholly not maintainable as it is not filed in compliance of Order XLVII Rule 1 of Code of Civil Procedure, 1908 ("CPC"), the present review is also a classic case of review petitioner, approbating and reprobating on the merits of the Impugned Order as well as the applicability of Order XLVII Rule 1. This is evident from the following:-*
- (a) *In JPVL Review Petition, the Review Petitioner herein has filed a reply on 06.08.2021, contending that;*
- i. *Impugned order has been passed in accordance with law and suffers with no infirmity.*
- ii. *Petitioner therein i.e. Answering Respondent has not demonstrated the presence of any of the principles enshrined under XLVII Rule 1.*
- (b) *This contention of the Review Petitioner, had been accepted by the Commission and the Hon'ble Commission was pleased to dismiss the Review Petition of JPVL vide its order dated 13.09.2021 ("Review Order"), holding that the principles of XLVII Rule 1 have not been met. The relevant extract of the Review Order is reproduced hereunder:*

- “8. Respondent No.1 (M.P. Power Management Company Ltd) in its reply has submitted the following
- iv. In view of the submissions made by the respondents herein above it is crystal clear that all the issues raised by the petitioner have already been decided by the Hon’ble Commission vide its order dated 16.12.2020 and there is no error apparent on the face of the record in the impugned order dated 16.12.2020, **therefore, no case for Review under the Section 94 of the Electricity Act r/w the Order 47 Of CPC is made out. Hence, no case is made out, the Review Petition deserves to be dismissed, on the ground of the maintainability itself. It is submitted that the petitioner has right to file appeal if he aggrieved of an order but the Review Petition is to be strictly heard as per the principle of the order 47 of CPC and the petitioner has failed to demonstrate that there is any prima-facie error on the face of the record. It is submitted that it is settled law that even an erroneous decision is not subject matter of Review and the party should exercise power of Review. -----**

38. Having discussed and deliberated at length on the issues claimed for review in the subject petition, **the Commission has examined the subject review petition in accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), which provides that a person aggrieved by an order may apply for a review under the following circumstances: (a) On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made; (b) An error apparent on the face of the record; (c) For any other sufficient reason.**
39. **In light of the issues examined in preceding paragraphs of this order, it is observed that the issues raised by the review petitioner in the present petition do not fall under any of the abovementioned circumstances articulated in Rule 1 Order 47 of CPC for review in the instant case. Therefore, the subject review petition is not maintainable and hence is disposed of and dismissed accordingly.**
- (c) On one hand, Review Petitioner itself contended applicability of Order XLVII Rule 1 and the fact that order suffers from no infirmity, however, in the present case, the Review Petitioner seeks to highlight certain issues for reconsideration and disputes the applicability of Order 47 Rule 1 citing the judgment of Hon’ble Supreme Court in UPPCL v NTPC (2009) 6 SCC 235.

- (d) *The above contentions do not inure to the benefit of Review Petitioner, as this Hon'ble Commission has already taken a considerate view qua the answering Respondent that a Review Petition will only be maintainable if the ingredients of XLVII Rule 1 are established.*
- (e) *Hence, firstly, the Review Petitioner is barred from making any contentions to the contrary and secondly the issue of applicability of XLVII Rule 1 inter se parties qua this vey Impugned Order is no more res integra as this Hon'ble Commission vide its Order dated 13.09.2021 has rejected the Answering Respondent Review Petition by applying the principles envisaged under Order XLVII Rule 1.*
- iii. *The reliance placed by MPPMCL upon Judgment titled UPPCL vs NTPC (2009) 6 SCC 235 to contend that this Hon'ble Commission does not exercise power akin to Section 114 or Order XLVII Rule of CPC is misplaced and not applicable to the facts and circumstances of present case for following reasons:*
- (a) *The Judgment in question arises from a Petition filed by National Thermal Corporation of India ("NTPC") under the Electricity Act, 1998 read with CERC (Conduct of Business) Regulations, 1999 for Review of Tariff Order passed by Hon'ble Central Electricity Regulatory Commission.*
- (b) *Admittedly, Section 94(1)(f) of the Electricity Act, 2003 was absent under Electricity Act, 1998 which provides that Appropriate Commission shall for the purpose of any inquiry or proceedings under this Act, **have the same powers as are vested in a civil court under CPC for reviewing its decision, directions and order.***
- (c) *Furthermore, in CERC Conduct of Business Regulations, 1999, there was no provision equivalent to Regulation 40 of MPERC (Conduct of Business) Regulations, 2016 which envisage that an application for Review of any decision, direction or order may be reviewed on fulfillment of the following conditions which are as under:*
- i. *Discovery of new and important matter or evidence, which after exercise of due diligence was not within knowledge or could not be produced at the time when the order was passed;*
- ii. *On account of some mistake or error apparent on the face of record; or*
- iii. *Any other sufficient reason.*
- (d) *It is evident that the condition as envisaged in MPERC (Conduct of Business) Regulations, 2016 have been drawn from Order XLVII Rule 1 of CPC and makes a positive requirement which are to be demonstrated to prefer an application for Review of Order, decision or direction passed by this Hon'ble Commission.*

(e) *Therefore, the principle/conditions of Order XLVII Rule 1 read with Regulation 40 of MPERC (Conduct of Business) Regulations, 2016 are to be fulfilled to file an application for review of decision, order or direction passed by this Hon'ble Commission.*

iv. *The Hon'ble Appellate Tribunal for Electricity has held in catena of Judgments that power of the State Commissions under Section 94(1)(f) is similar to the power of the Hon'ble Tribunal under Section 120(2)(f) of the Act. The relevant Judgments are as under:*

(a) *Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited. v. Madhya Pradesh Electricity Regulatory Commission, 2013 SCC OnLine APTEL 59 : [2013] APTEL 52.*

"10. The perusal of the above judgments would reveal that the ratio and principles have been laid down by this Tribunal following the dictums decided by the Hon'ble Supreme Court with reference to maintainability of the Appeal as against the order passed by the State Commission dismissing the Review Petition. They are as follows:—

(a) *The order of the court rejecting the Application for Review shall not be Appealable under Order 47, Rule 7 of the Code of Civil Procedure.*

(b) *The main order alone can be Appealed before the Tribunal and the Appeal has not been provided as against the order of dismissal of Review petition by the Commission which confirmed the main order earlier passed.*

(c) *The course open to the Appellant whose application for the Review of the main order has been dismissed is to file an Appeal as against the main order along with an application to condone the delay which occurred due to the pendency of the Review petition before the Commission. The Appellate Tribunal, in such an event, would decide the condoning delay application taking into consideration the pendency of the Review petition before the Commission during that period. The Tribunal after condoning the delay would then entertain the Appeal. Without doing so, the Appellant cannot straightaway file an Appeal as against the dismissal order passed by the Review petition alone.*

(d) *Under the Civil Procedure Code(CPC), the Appeal is provided as against the orders mentioned below:*

(i) *Order 41, Rule 1 read with section 96 provides for the Appeal arising out of original decree.*

(ii) *Order 43, Rule 1 provides for an Appeal arising out of the orders passed under CPC*

(iii) *Section 100 of CPC provides for the second Appeal. These provisions do not provide for any prohibition for the Appeal against*

the orders referred to above. But the prohibition of an Appeal as against the order rejecting the Review petition has been specifically provided in Order 47 Rule 7.

- (e) Therefore, restriction contained in Order 47, Rule 7 will have application to the orders passed by the Commission dismissing the Review petition concerning the main order.*
- (f) Section 94(1)(f) incorporates by reference to the provisions of the Code of Civil Procedure in regard to exercise of power over the Review of its own decision, directions and orders. Accordingly, the relevant provisions of CPC 114 and Order 47 Rule 7 deal with Review as if it has been provided for in Section 94 of the Electricity Act, 2003 including the provision of Order 47 Rule 7. (g) The reading of section 94 of the Act, 2003 would indicate that it incorporates the provision of the CPC not only in respect of Rule 1 but also in respect of Rule 7 of Order 47. If the intention of Parliament was to restrict the incorporation of the Review only to the extent that the Appropriate Commission exercises powers and not to deal with any other incident of Review such as Rule 7 of Order 47, the same would have been incorporated for separately. (h) Section 94(2) of the Act, 2003 deals with the powers of the Appropriate Commission to pass interim orders. In this section, the Parliament has chosen to say specifically that provisions of the CPC would not apply but has recognized the power to pass interim orders under section (2) of 94 of the Act. Hence, there is no bar provided for Appeal in those cases. But, in the case of Review, the Parliament had decided that the application must be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in the case of interim orders under Section 94(2) of the Act as stated above.”*
- (b) Tamil Nadu Electricity Board Anna Salai vs Central Electricity Regulatory Commission, 2010 SCC Online APTEL 16:
“21. So, a reading of section 94 of the Act would indicate that it incorporates the provision of the CPC not only in respect of Rule 1 but also in respect of Rule 7 of Order 47. If the intention of Parliament was to restrict the incorporation of the review only to the extent that the Central Commission exercise powers and not to deal with any other incident of review such as Rule 7 of Order 47, the same would have been incorporated for separately.
22. In other words, the Parliament would have provided for a separate provision stating that the Appropriate Commission shall have the powers to review its decision, directions and orders de horse the CPC. As a matter of fact, section 94(2) deals with the powers of the Commission to pass interim orders. In this section, the Parliament has chosen to say that*

provision of the CPC will not apply but has specifically recognised the power to pass interim orders under section (2) of 94 of the Act. So the distinction in approach adopted in the case of interim orders under Section 94(2) of the Act and in the case of Review under Section 94(1)(f) is quite relevant. **In the case of Review Parliament had decided that the application shall be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in the case of interim order under Section 94(2) of the Act. Therefore, the implication mentioned in Rule 7 of Order 47 will certainly apply.**"

- v. MPPMCL while filing the instant Petition has failed to meet the grounds on basis of which a Review of Judgment can be sought. The limited grounds on the basis of which a Review of Judgment can be sought under Order XLVII Rule read with Regulation 40 of MPERC (Conduct of Business) Regulations, 2016 are not even pleaded by MPPMCL.
 - vi. Furthermore, the Review Petitioner has not even made an attempt to qualify the present Petition within the scope of Order XLVII Rule 1. It is a well settled principle of law that even an erroneous decision is not subject matter of Review. In this regard, reliance is being placed upon:
 - (a) State of West Bengal & Ors. vs. Kamal Sengupta & Anr. (2008 (8) SCC 317).
 - (b) Parsion Devi vs. Sumiri Devi (1997 (8) SCC 715).
 - (c) Haridas vs. Smt. Usha Rani Banik & Ors. (AIR 2006 SC 1634).
14. Vide written submission dated 12th November' 2021, the petitioner (MPPMCL) filed the response on the arguments placed by the Respondent broadly mentioning the following:
- A. **Respondent has argued that Review Petition is not maintainable as it is not filed in compliance of Order XLVII Rule 1 of Code of Civil Procedures 1908.**
 - i. In the present Review Petition, the Review Petitioner has pointed out that in the Impugned True-up Order, true-up of Primary Fuel has not been done and interest on loan allowed is not as per 2015 Tariff Regulations. As such the review / reconsideration of the Impugned Order by this Hon'ble Commission is necessary. As per Regulation 8.8(iii) of 2015 Tariff Regulations true-up of performance of Power Plant in respect of Primary Fuel is mandatorily to be done by this Hon'ble Commission. Also, the interest on loan allowed is not in accordance with the provisions of Tariff Regulations, which is likely to result in higher cost of power for the Review Petitioner and higher tariff for the end consumer.

- ii. *In view of above, there is sufficient reason for review of the Impugned Order. Thus the present Review Petition meets the requirement of of Order XLVII Rule 1 of CPC read with Sub-Clause (c) of Clause 2 of Regulation 40 of MPERC (Conduct of Business), Regulations 2016, under the category of “any other sufficient reason”. As such the present Review Petition is maintainable.*
 - iii. *It is thus prayed that this Hon’ble Commission may graciously be pleased to reject the argument of the Respondent and admit the Review Petition and review the Impugned Order to the extent prayed.*
- B. Respondent has argued that Review Petitioner is approbating and reprobating on merits of the Impugned Order as well as the applicability of Order XLVII Rule 1 of CPC as in JPVL’s Review Petition No. 15 of 2021, the Review Petitioner has taken the plea that Order XLVII Rule 1 of CPC is applicable and the contention of the Review Petitioner has been accepted by this Commission and Respondent’s Review Petition has been rejected.**
- iv. *It is submitted that the above contention of the Respondent is wrong and misconceived. The Review Petitioner has never argued in the present Review Petition that Order XLVII Rule 1 of Civil Procedure Code 1908 is not applicable to the cases of Review of orders, decisions and directions of this Hon’ble Commission. On the contrary the Review Petition itself has been filed under the provisions of Section 94(1)(f) of the Electricity Act 2003 read with Regulation 40 of MPERC (Conduct of Business) Regulations, 2016.*
 - v. *Section 94(1)(f) of the Electricity Act 2003 provides that Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of reviewing its decisions, directions and orders. Regulation 40 of MPERC (Conduct of Business) Regulations, 2016 directly adopts the provisions of Order XLVII Rule 1 of CPC.*
 - vi. *In its Rejoinder to the Reply on maintainability filed by the Respondent to the present Review Petition, the Review Petitioner has relied on the observations of Hon’ble Supreme Court in the judgment dated 03.03.2009 in the case of U.P Power Corporation Ltd. Vs National Thermal Power Corporation Ltd. and Ors.]. [(2009) 6 SCC 235] to explain scope and powers of Review of “tariff” by Central Commission and also by State Commissions. The Review Petitioner has specifically referred to the observation of Hon’ble Supreme Court that ...While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1*

thereof...Making of a tariff is a continuous process. It can be amended or altered by the Central Commission, if any occasion arises therefor.

- vii. Besides, in Para 15 of the said Reply, it is also pleaded that “Without prejudice and in addition to above, in the Review Petition, the Review Petitioner has clearly set out “sufficient reasons” and cogent grounds for review/ reconsideration of the Impugned Order by this Hon’ble Commission.”
- viii. Besides, the Review Petition No. 15 of 2021 filed by the Respondent was rightly dismissed by this Hon’ble Commission, concluding that the reasons pleaded by the Respondent for review of the Impugned Order did not meet any of the conditions laid down under Order XLVII Rule 1 of CPC.
- ix. In view of the above, it is humbly submitted that there is no case of approbation and reprobation by the Review Petitioner. Hence, it is most humbly prayed that this Hon’ble Commission may graciously be pleased to reject the above argument of the Respondent and admit the present Review Petition and review the Impugned Order to the extent prayed.

C. Respondent has argued that Ratio of judgment passed by Hon’ble Supreme Court in case of UPPCL Vs. NTPC Ltd., is not applicable to the facts and circumstances of present case.

- x. As explained earlier, the legal principles laid down by Hon’ble Supreme Court in the case of U.P Power Corporation Ltd. (Supra) were pleaded to highlight the scope of review of “tariff” by the Central Commission and the powers of the Electricity Regulatory Commissions and the fact the tariff determination is a continuous process.
- xi. It is also respectfully submitted that the legal principles laid down in the above said judgment will still apply to all case of tariff determination and true-up thereof. MPERC (Conduct of Business) Regulations 2016 do not limit the powers of this Hon’ble Commission created under Electricity Regulatory Commissions Act 1998 and continued under Electricity Act 2003 subsequently, in any manner.
- xii. In view of the above, it is humbly submitted that this Hon’ble Commission may graciously be pleased to reject the above argument of the Respondent and admit the present Review Petition and review the Impugned Order to the extent prayed.

D. Respondent has argued that the Respondent has placed reliance on the judgments passed by Hon’ble APTEL in the case of Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited. v. MPERC, 2013 SCC On Line

APTEL 59 : [2013] APTEL 52 [Para 10(f)] and in the case of Tamil Nadu Electricity Board Anna Salai vs Central Electricity Regulatory Commission, 2010 SCC Online APTEL 16 [Para 22]

- xiii. *It is most humbly submitted ratio of the judgments passed by Hon'ble APTEL in the above cases is not applicable to the facts and circumstances of the present Review Petition as explained hereinafter.*
- xiv. *In the cases of Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited. v. Madhya Pradesh Electricity Regulatory Commission and Tamil Nadu Electricity Board Anna Salai vs Central Electricity Regulatory Commission, Hon'ble APTEL has in Para 10(f) and 22 respectively, clarified "non appealability of orders of Rejection" of Review under Order 47 Rule 7 of the CPC. Admittedly, these two case laws do not deal with aspect of Review Tariff and therefore are not applicable to the facts and circumstances of the present Review Petition wherein review is being sought on the grounds of "sufficient reasons" covered under Regulation 40 of MPERC (Conduct of Business), Regulations 2016.*
- xv. *In view of the above, it is humbly submitted that this Hon'ble Commission may graciously be pleased to reject the above argument of the Respondent and admit the present Review Petition and review the Impugned Order to the extent prayed.*

E. Respondent has argued that MPPMCL has failed to meet the grounds on basis of which a Review of Judgment can be sought. Furthermore, the Review Petitioner has not even made an attempt to qualify the present Petition within the scope of Order XLVII Rule 1.

- xvi. *Above contention of the Respondent is entirely misconceived and wrong. In the present Review Petition, the Review Petitioner has pointed out that in the Impugned True-up Order, true-up of Primary Fuel has not been done and interest on loan allowed is not as per 2015 Tariff Regulations. As such the review / reconsideration of the Impugned Order by this Hon'ble Commission is necessary.*
- xvii. *As per Regulation 8.8(iii) of 2015 Tariff Regulations true-up of performance of Power Plant in respect of Primary Fuel is mandatorily to be done by this Hon'ble Commission. Also, the interest on loan allowed is not in accordance with the provisions of Tariff Regulations, which is likely to result in higher cost of power for the Review Petitioner and higher tariff for the end consumer.*
- xviii. *In view of the above, it is humbly submitted that this Hon'ble Commission may graciously be pleased to reject the above argument of the Respondent and admit the present Review Petition and review the Impugned Order to the extent prayed.*

Commission's observations and findings:

15. In accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), a person aggrieved by an order may apply for a review under the following circumstances:
- a. On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
 - b. An error apparent on the face of the record;
 - c. For any other sufficient reason.
16. Keeping in view of the above provisions and on perusal of the submissions made by the petitioner and Respondent, the Commission has examined the issues raised in the subject review petition as under:

Issue No. 1 – True-up of Primary Fuel as per Regulation 8.8 (iii) :

17. Regarding the true-up of cost of primary fuel, the petitioner has contended that the true-up of cost of primary fuel is required to be done under the provisions of Regulation 8.8(iii) of the Tariff Regulations, 2015. Let us look into the relevant provisions of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015.
- i. Regarding the true-up of tariff, Regulation 8.4 of the Generation Tariff Regulations, 2015 provides as under:

“A generating company shall file a petition at the beginning of the Tariff period. A review shall be undertaken by the Commission to scrutinize and true up the Tariff on the basis of the capital expenditure and additional capital expenditure actually incurred in the Year for which the true up is being requested. The generating company shall submit for the purpose of truing up, details of capital expenditure and additional capital expenditure incurred for the period from 1.4.2016 to 31.3.2019, duly audited and certified by the auditors.”

- ii. With regard to truing-up of tariff of generating station on uncontrollable parameters, Regulation 8.7 provides as under:

“The generating company shall carry out truing up of tariff of generating station based on the performance of following Controllable parameters:

Controllable Parameters:

- i) Station Heat Rate;*
- ii) Secondary Fuel Oil Consumption; and*
- iii) Auxiliary Energy Consumption; “*

- iii. With regard to truing-up of generating station on uncontrollable parameters, Regulation 8.8 of the Generation Tariff Regulations, 2015 provides as under:

“The Commission shall carry out truing up of tariff of generating station based on the performance of following Uncontrollable parameters:

- i) Force Majeure;*
- ii) Change in Law; and*
- iii) Primary Fuel Cost.”*

- iv. Regarding the cost of fuel for working capital, Regulation 34.2 of the Generation Tariff Regulations, 2015 provides as under:

*“The cost of fuel shall be based on the landed cost incurred (taking into account normative transit and handling losses) by the generating company and gross calorific value of the fuel as per actual for the three months preceding the first month for which tariff is to be determined and **no fuel price escalation shall be provided during the tariff period.**”*

- v. Regulation 36.5 of the Generation Tariff Regulations, 2015 provides the mechanism recovery of energy charges on monthly basis:

*“The energy charge shall cover the primary and secondary fuel cost and shall be payable by every beneficiary for the total energy scheduled to be supplied to such beneficiary during the **calendar month** on ex-power plant basis, at the energy charge rate of the month (**with fuel price adjustment**).”*

- vi. For details of the actual parameters of GCV and landed cost of coal, Regulation 36.7 of the Generation Tariff Regulations, 2015 provides as under:

“The generating company shall provide to the beneficiaries of the generating station the details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, etc., as per the forms prescribed to these Regulations:

Provided that the details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal and the weighted average GCV of the fuels as received shall also be provided separately, along with the bills of the respective month:

Provided further that copies of the bills and details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal shall also be displayed on the website of the generating

company. The details should be available on its website on monthly basis for a period of three months.”

18. On conjoint reading of the aforesaid provisions under MPERC Generation Tariff Regulations, 2015, the Commission has noted the following:
- i. The true-up petition No 47 of 2019 was filed by the Respondent (JPVL) under Regulation 8.4 of the MPERC Tariff Regulation 2015. As per Regulation 8.4, the truing-up exercise is limited only to the extent of capital expenditure and additional capital expenditure actually incurred in the year.
 - ii. Regulation 8.7 provides the truing-up of tariff in respect of controllable operating parameters like Station Heat Rate, Specific Fuel Oil Consumption and Auxiliary Energy Consumption. The Commission in Para 121 to 127 of the order dated 16.12.2021 has deliberated at length the issue of true-up of tariff based on the controllable parameters and held that the petitioner (Respondent in the subject review petition) incurred a loss of Rs. 5.18 Crore on account of the inferior performance and poor actual operating parameters achieved by it during FY 2018-19.
 - iii. Further, Regulation 8.8 provides for true-up of tariff on uncontrollable parameters like Force Majeure, Change in Law and cost of Primary Fuel. However, during the proceeding in the order under review in this petition, no uncontrollable circumstances in respect of primary fuel were neither placed on record by Respondent herein nor pointed out by the petitioner. Therefore, the provision under this Regulation could not be exercised under normal condition.
 - iv. Regarding fuel cost for working capital, it is provided in Regulation 34.2 provided that “no fuel price escalation shall be provided during the tariff period”. In accordance to the Regulation 1.3 of the Generation Tariff Regulations, 2015, the Regulations shall remain in force from 1st April to 31st March’ 2019. It means that the fuel cost for working capital shall be remain same for the entire control period as determined in MYT order.
 - v. Further, Regulation 36.5 provides the mechanism for monthly recovery of energy charges / fuel cost corresponding to the scheduled energy for the month. In this Regulation, it is specifically mentioned that the monthly energy charges shall be “**with fuel price adjustment**”. Therefore, in accordance to the Regulation 36.5, monthly energy charges are paid to the generating company based on the actual GCV and actual landed cost of fuel for the respective month.
 - vi. In accordance to the Regulation 36.7, the generating company has to provide all the details/documents related to primary coal like actual GCV and price of coal of Coal, blending ratio of domestic coal, imported coal, e-auction coal etc. along

with bills on monthly basis. The generating company is required to provide all such details to the beneficiary duly filled up in form TPS 15 of the Regulations, 2015.

- vii. As a matter of fact, the petitioner (MPPMCL) recovers monthly actual fuel cost towards any variation in landed cost of fuel in terms of fuel cost adjustment (FCA) from the consumers as approved by the Commission on quarterly basis in accordance with Regulation 9 of the MPERC (Terms and Conditions for determination of tariff for Supply and Wheeling of electricity and method and principles for fixation of charges) Regulations, 2015.
19. In view of the above, it is observed that in the Generation Tariff Regulations, 2015, the scope for true-up exercise is confined to the extent of capital cost and additional capitalization actually incurred in the year based on the Annual Audited Accounts. The provision for true-up of primary fuel was provided only on account of uncontrollable factors/circumstances. It is further observed that in terms of the provisions under the Regulations, the generating company is entitled to recover monthly energy charges based on the actual GCV and actual landed cost of coal.
 20. In accordance to the provisions under the Regulations, 2015, the generating company is required to provide all the details and documents related to landed cost of coal and GCV of coal. The petitioner (MPPMCL) is required to pass on the actual cost of coal on monthly basis after examination of all the details/documents and no true-up of primary fuel is required in accordance to the provisions under the tariff Regulations, 2015. Moreover, the Commission had to followed the similar approach in true-up exercise for past financial years of other thermal power stations of the review petitioner, however, the petitioner has not preferred to file any review on the aforesaid true-up orders issued by the Commission. Therefore, the prayer of the petitioner for review of true up of the primary fuel cost in the subject review petition has no merit, hence, not considered.

Issue No. 2: Interest on Loan allowed is not as per Regulations

21. Regarding the Interest on Loan, the review petitioner in the subject review petition has contended that the Commission has allowed interest on loan at weighted average rate of interest @12.25% on the basis of details provided in form TPS 13 of the petition. However, in "Note 15.2" to the Balance Sheet, it has been mentioned that the repayment of principal and interest amount are overdue which falls in the period of True-up i.e. FY 2018-19. The petitioner further submitted that the true-up of any Capital Cost (including Interest on Loan) is allowed only on actual basis and not on notional basis under the provisions of Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations.
22. Regarding the Interest on Loan of thermal power stations Regulation 32 of MPERC

(Terms and Conditions for Determination of Generation Tariff) Regulations, 2015, provides the following:

- 32.1 The loans arrived at in the manner indicated in Regulation 25 shall be considered as gross normative loan for calculation of interest on loan.*
- 32.2 The normative loan outstanding as on 1.4.2016 shall be worked out by deducting the cumulative repayment as admitted by the Commission up to 31.3.2016 from the gross normative loan.*
- 32.3 The repayment for each of the year of the tariff period 2016-19 shall be deemed to be equal to the depreciation allowed for the corresponding year/period. In case of de-capitalization of assets, the repayment shall be adjusted by taking into account cumulative repayment on a pro rata basis and the adjustment should not exceed cumulative depreciation recovered upto the date of de-capitalisation of such asset.*
- 32.4 Notwithstanding any moratorium period availed by the generating company, the repayment of loan shall be considered from the first year of commercial operation of the project and shall be equal to the depreciation allowed for the year or part of the year.*
- 32.5 The rate of interest shall be the weighted average rate of interest calculated on the basis of the actual loan portfolio after providing appropriate accounting adjustment for interest capitalized:*
- Provided that if there is no actual loan for a particular year but normative loan is still outstanding, the last available weighted average rate of interest shall be considered:*
- Provided further that if the generating station does not have actual loan, then the weighted average rate of interest of the generating company as a whole shall be considered.*
- 32.6 The interest on loan shall be calculated on the normative average loan of the year by applying the weighted average rate of interest.*
- 32.7 The generating company shall make every effort to re-finance the loan as long as it results in net savings on interest and in that event the costs associated with such re-financing shall be borne by the beneficiaries and the net savings shall be shared between the beneficiaries and the generating company in the ratio of 2:1.*
- 32.8 The changes to the terms and conditions of the loans shall be reflected from the date of such re-financing*

23. The above Regulation provides that the rate of interest shall be the weighted average

rate of interest calculated on the basis of the actual loan portfolio after providing appropriate accounting adjustment for interest capitalized. The petitioner has contended that the Commission allowed Interest on Loan at Weighted Average Rate of 12.25%, which is not in accordance with Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations.

24. With regard to weighted average rate of interest filed in the in the true-up petition No. 47 of 2019, while examining the aforesaid petition, vide letter dated 21st January' 2020, detailed computation of the weighted average rate of interest was sought from the Respondent on the basis of the actual loan portfolio.
25. On perusal of the details filed by the Respondent M/s JPVL, it was observed that the respondent (JPVL) had claimed the weighted average rate of interest @ 12.25% based on the rate of interest applicable on the Respondent (JPVL). The Respondent had submitted the required supporting documents in terms of the Bankers' Certificates of loan outstanding and interest payment during FY 2018-19 with the Petition No 47 of 2019. Therefore, the weighted average rate of interest was considered based on actual loan portfolio for FY 2018-19 as per the provisions under Tariff Regulations, 2015 without considering the over due amount towards repayment and interest on interest. In 'Note-15.3 of the Annual Audited Accounts, the Auditor has mentioned that the interest rates (excluding penal interest) on above loans for Bina TPP varies from 11.80% to 12.25%".
26. The Respondent (JPVL) in its notes for arguments has referred the Review petition No. 15 of 2021 filed by it for review of the same order dated 16.12.2021 which is under review in this petition. In the aforesaid review petition, the MPPMCL, who is the petitioner in the subject matter was the Respondent No. 1. **MPPMCL in its reply dated 06.08.2021 to the review petition No. 15 of 2019 had contended the following;**
 - i. Impugned order has been passed in accordance with law and suffers with no infirmity.
 - ii. Petitioner therein i.e. Respondent has not demonstrated the presence of any of the principles enshrined under XLVII Rule 1.
27. The above contention of the Review Petitioner was accepted by the Commission and vide order dated 13.09.2021, the review petition of JPVL was dismissed by this Commission, mentioning that the issues raised in aforesaid review petition do not fall under any of the abovementioned circumstance articulated in Rule 1 Order 47 of CPC for review of the instant case. The relevant extract of MPPMCL submission in review petition No. 15 of 2021 is reproduced below:

"8.(iv) In view of the submissions made by the respondents herein above it is crystal clear that all the issues raised by the petitioner have already been decided by the

*Commission vide its order dated 16.12.2020 and there is no error apparent on the face of the record in the impugned order dated 16.12.2020, **therefore, no case for Review under the Section 94 of the Electricity Act r/w the Order 47 Of CPC is made out. Hence, no case is made out, the Review Petition deserves to be dismissed, on the ground of the maintainability itself. It is submitted that the petitioner has right to file appeal if he aggrieved of an order but the Review Petition is to be strictly heard as per the principle of the order 47 of CPC and the petitioner has failed to demonstrate that there is any prima-facie error on the face of the record. It is submitted that it is settled law that even an erroneous decision is not subject matter of Review and the party should exercise power of Review.***

28. Having discussed and deliberated at length on both the issues on which review is being sought in the subject petition, the Commission has examined the subject review petition in accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), which provides that a person aggrieved by an order may apply for a review under the following circumstances:
- (a) On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
 - (b) An error apparent on the face of the record;
 - (c) For any other sufficient reason
29. In light of issues examined in preceding paragraphs of this order, it is observed that the issues raised by the review petitioner in the present petition do not fall under any of the abovementioned circumstances articulated in Rule 1 Order 47 of CPC for review in the instant case. Therefore, the subject review petition is not maintainable, hence disposed of and hereby dismissed accordingly.

(Mukul Dhariwal)
Member

(Shashi Bhushan Pathak)
Member

(S.P.S Parihar)
Chairman

Date: 6th December' 2021

Place: Bhopal