

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

Petition No. 12/2016

ORDER

(Date of Order: 8th December'2016)

M/s. Essar Power M.P. Limited

Petitioner

Equinox Business Park, 5th Floor, Tower-2,
Off Bandra Kurla Complex, L.B.S. Marg,
Kurla (W), Mumbai-400070

V/s

M.P. Power Management Co. Ltd.,

Respondent

Block No. 11, Shakti Bhawan, Rampur,
Jabalpur – 482008

The petitioner (M/s. Essar Power M.P. Ltd.) filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between the petitioner and M.P. Power Management Co. Ltd., Jabalpur in relation to termination of the Power Purchase Agreement executed by both the parties on 29.10.2010 for supply of 150 MW power from its 2x600 MW thermal power plant at Distt. Singrauli (M.P.).

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

*“(1) The Petitioner i.e., Essar Power M.P. Limited (“**EPMPL**”) is a generating company setting up a 1200 (2x600) MW Thermal Power Plant at District-Singrauli, Madhya Pradesh. The Petitioner Company is a subsidiary of the Essar Power Ltd. (“**EPOL**”) incorporated under the Companies Act, 1956 with the purpose of developing, owning and operating the Power Plant.*

*(2) The Respondent i.e., MP Power Management Company Limited (“**MPPMCL**”) formerly known as MP Power Trading Company Ltd is a Company registered under the Companies Act, having its office at Jabalpur. The Respondent is a successor entity of the erstwhile Madhya Pradesh State Electricity Board (“**MPSEB**”). MP Power Trading Company Limited had entered into a Power Purchase Agreement (“**PPA**”) dated 29.10.2010 with the Petitioner for supply of 150 MW power from the generating station being developed by the Petitioner.*

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Pursuant to the decision of the GoMP, MP Power Trading Company Ltd has been renamed as MP Power Management Company Ltd. and is the holding company of all the Discoms operating in the State of Madhya Pradesh having its registered office at Shakti Bhawan, Rampur, Jabalpur, Madhya Pradesh.

- (3) EPOL applied for the allocation of Mahan Coal Block on 18.06.2004 for meeting the coal requirement of its proposed 2x500 MW captive power plant in Sidhi District of MP. EPOL was allocated the Mahan Coal Block (jointly with Hindalco) on 12.04.2006. The allocation was for utilization in the power plant proposed to be set-up in the State of Madhya Pradesh.*
- (4) EPOL and Hindalco incorporated a joint venture company in the name and style of M/s. Mahan Coal Limited (“MCL”) to develop the Mahan Coal Block as per the conditions specified in the allocation letter. As on 31.12.2014 EPOL has made investments in excess of Rs.190 Crore in MCL and MCL has made investment of in excess of Rs 390 Crore towards development of the captive coal mine.*
- (5) In light of the policy of the GoMP to facilitate private investment in development of power plant and in order to ensure smooth development of the Power Project with the help of the State Government, a Memorandum of Understanding (“MoU”) was executed between the Government of the State of Madhya Pradesh and Petitioner herein for establishment and operation of 1000 MW (+20%) thermal power plant in phases with an ultimate capacity of 2000 MW at District-Singrauli, Tehsil-Siddhi, Madhya Pradesh. Pursuant to and in accordance with the provisions of the MoU, an Implementation Agreement was entered into between the Petitioner and the State of Madhya Pradesh on 16.07.2008.*
- (6) In response to RFQ issued by the Respondent, Petitioner submitted its response dated 22.08.2006. Upon issuance of the RFP, the Petitioner submitted its bid on 15.11.2007. Thereafter, protracted negotiations took place between the Petitioner and Negotiation Committee established by the Respondent.*
- (7) Further in response to RFP bid submitted dated 15.11.2007 and during negotiation period, the Petitioner had indicated that the bid was based on Mahan*

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Coal Block only. The Non -Financial bid also contained reference to Mahan Coal Block and numerous correspondence exchanged as per the details given below:

- (i) Refer clause No 2.1.5 of RFP - documents to be submitted by Bidder where it is stipulated that bidders need to have allocation of coal mine prior to the submission of bid.*
- (ii) Letters dated 12.08.2008 and 21.08.2008 written by the Petitioner to the Respondent mentioning about reduction in quantum from 300 MW to 150 MW due to lower reserve share of Mahan Coal Block.*
- (iii) MP Power Trading Company Ltd (MPPTCL) letter dated 17.02.2009 admits that Essar Bid was based on Mahan coal Block.*
- (iv) Refer Schedule 11 as part of the quoted tariff in PPA dated 29.10.2010, where fuel type is mentioned as Domestic Captive coal mine*
- (v) The fundamental premise of the Bid was the procurement of coal from Mahan Coal Block and this stands admitted by the Respondent in its letter dated 17.02.2009 addressed to Petitioner.*
- (8) It is respectfully submitted that it is the very cancellation of Mahan Coal Block which has resulted in the frustration of PPA.*
- (9) The Respondent issued Letter of Intent (“LOI”) to the Petitioner on 24.07.2009; after the in-principle approval of the revised bid submitted by the Petitioner on 12.08.2008. The LOI provided the levelised tariff as Rs.2.45/unit for supply of 150 MW power subject to approval of the Hon’ble Madhya Pradesh Electricity Regulatory Commission. The LOI was accepted by Petitioner vide letter dated 29.08.2009. The approval for adoption of levelised tariff of this Hon’ble Commission was granted on 25.08.2011.*
- (10) The Mahan Coal Block which was allocated to Mahan Coal Company Limited, a joint venture of Essar Power Limited and Hindalco Industries Limited to supply coal on an exclusive basis to the thermal power plants owned and managed by the*

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Petitioner and M/s Hindalco Industries in the ratio as stipulated in the allocation letter dated 12.04.2006, by a gazette notification dated 02.07.2009 by the Ministry of Coal, Government of India (“MoC”), to meet the fuel requirements for their Power Plants.

- (11) The PPA was entered into between the parties pursuant to a competitive bidding process. The Bid dated 15.11.2007 of the Petitioner and the Tariff quoted in the Bid, for supply of power to Respondent, was premised upon the availability and usage of coal from the said Mahan Coal Block. Variable charge under the bid submitted by the Petitioner was determined taking into account that the captive coal block allocated to the Petitioner would be the source of fuel for the generating station. The financial bid submitted by Petitioner is paramount here as the entire basis of financial bid, which is also part of PPA under Schedule 11, was premised based on Mahan Coal Block Only.*
- (12) By letter dated 17.09.2011 the Petitioner intimated the Respondent that it had entered into a coal off take (FSA) agreement with MCL on 10.11.2008 and submitted a copy of the same to the Respondent. This communication was in terms of Clause 3.2 of the PPA to satisfy the condition in Clause 3.1.2. It is therefore clear that the condition subsequent of the PPA was satisfied only by the FSA entered into by the Petitioner with MCL.*
- (13) A conjoined reading of the bid document, the PPA and the satisfaction of the condition subsequent would clearly show that the fundamental premise of the contract was the procurement of the coal from Mahan Coal fields.*
- (14) After all the environment and forest related approvals were obtained the execution of mining lease for the captive coal project was withheld by Ministry of Coal due to the pendency of Writ Petition before the Hon’ble Supreme Court challenging the validity of the allocation of the coal blocks. Subsequently, the allocation of the coal block has been declared illegal and the allocation of all the captive coal blocks (except four) was cancelled.*

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- (15) *Furthermore, the Hon'ble Supreme Court vide its Order dated 24.09.2014 (reported as (2014) 9 SCC 614) cancelled the captive coal blocks allocated (including the Mahan Coal Block allocated to the Petitioner).*
- (16) *Further the Condition Subsequent Cl 3.1.2 (i) (iv) in the PPA states that Fuel Supply Agreement has to be submitted. The Petitioner had executed FSA for sourcing and supply of coal from the Mahan Coal block and supplied a copy of the said FSA to the Respondent as required under Clause 3.1.2 (iv) of the PPA. Clause 3.4.1 of the PPA entitled the Petitioner to seek reduction in the amount of Performance Bank Guarantee ('PBG') provided to the Respondent on the fulfilment of all the conditions specified under Clause 3.1.2 of the PPA alongwith an investment of 25% of the equity required for the project. In view of the fulfilment of the said conditions under Clause 3.1.2 of the PPA, the Petitioner sought reduction in PBG as per Clause 3.4.1 which was not acceded to by the Respondent in view of the cancellation of the Mahan coal block by the judgment dated 25.08.2014 of the Hon'ble Supreme Court. Thus, Respondent vide its conduct of not acceding to reduction in PBG acknowledged that the fuel security of the plant was jeopardised in view of the cancellation of the Mahan Coal block and the performance of the PPA would thus become very difficult on the part of the Petitioner. Such conduct indicates that the Respondent is also convinced that performance of PPA has been jeopardised on account of the cancellation of the Mahan block and hence the PPA stands frustrated. It was submitted that in view of the facts and circumstances, the Petitioner was unable to agree to the letter dated 27.01.2016 and that it was wrong to suggest that the Petitioner had failed in honouring its contractual obligation of supplying 150 MW power to MPPMCL, and is therefore liable to pay liquidated damages for the delay in scheduling of contracted capacity of power.*
- (17) *It is respectfully submitted that the PPA is liable for termination in view of the non-fulfilment of Condition Subsequent due to Force Majeure event. The non-fulfilment is arising out of Fuel Supply Agreement (Annexure P-14) (the copy of the same was provided to Respondent as part of the Conditions Subsequent fulfilment) submitted as part of the Condition Subsequent Cl 3.1.2 (iv) is no more*

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valid as the Mahan Coal Block allocation has been cancelled by Hon'ble Supreme Court, which has led to Force Majeure. MCL has already issued frustration notice to the Petitioner in view of the cancellation as per the provisions under Coal Offtake Agreement/FSA (Annexure P-14). The Condition Subsequent has to be in compliance all the time of the PPA tenure and any non-fulfilment make the PPA unserviceable. The attention of Hon'ble Commission is drawn to Clause 3.3.3 the PPA which states that PPA is liable for termination as the Mahan Coal Block is cancelled Further We bring to notice to the Hon'ble Commission that the Government of Madhya Pradesh had allocated 20% of coal from Amelia mine to be used for supply of power under the PPA executed with the Respondent/Government of Madhya Pradesh however with cancellation of the Amelia Coal block by Hon'ble Supreme Court, this source of coal was also not available to the Petitioner. The Clause 3.3.3. states that beyond a maximum extension of 10 Months from date of the force majeure notice issued, agreement can be terminated by either party. It is respectfully submitted that Petitioner had issued Force Majeure notice in Oct 2014 itself and 10 Months period have already elapsed. Hence the PPA stands terminated.

- (18) *The Respondent vide its letters dated 16.12.2015 and 04.01.2016 have directed the Petitioner to extend the Performance Guarantee and also have specifically indicated that the performance bank guarantee furnished by the Petitioner would be encashed in the event the same is not extended. The action of the Respondent is indicative of its intention of encashing the performance bank guarantee which is arbitrary, patently illegal and liable to be stuck down by this Hon'ble Commission. Further, the Petitioner is entitled to return of the original bank guarantee furnished to the Respondent.*
- (19) *The Respondent vide its further correspondence dated 04.01.2016 yet again demanded fulfilment of contractual obligations by the Petitioner in spite of being well aware of the impossibility of performance of the contract (PPA) on account of the supervening event of cancellation of the source of fuel (Mahan Captive Coal Block) which formed the basis of the Contract (PPA). It also sought imposition of Liquidated Damages as per clause 4.6 of the PPA.*

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- (20) *The Respondent sent yet another correspondence being Letter No. 07-11/IPC/Case-1/Essar/85 dated 27.01.2016 seeking Liquidated Damages from the Petitioner as well as apprising it of the possibility of the initiation of coercive action including forfeiture of its Bank Guarantee (Performance Guarantee). The same has necessitated in filing this present petition seeking indulgence from this Hon'ble Commission in protecting the interest of the Petitioner in view of settled law of frustration of the Contract.*
- (21) *The Petitioner replied to the said Letter dated 27.01.2016 vide its Letter dated 03.03.2016 and stated that the very basis of the commercial arrangement entered into between Essar Power and the Respondent has come to naught and resultantly the PPA stood frustrated and in view of the same, the alleged threat of invocation of the Performance Bank Guarantee was coercive in nature. It was further submitted in the response that there were no conditions in the tender document for coal block auction or any other documents related to coal block auction that to participate in the auction process, a bidder needs to disclose the existing PPA(s) details. It can further be confirmed that the qualification of the Petitioner to participate in Coal Block auction was not based on its existing PPA tie ups.*
- (22) *It is pertinent that there were no conditions in the coal block tender document, that to participate in future bids post the auction, a bidder needed to disclose the existing PPA(s). **The existing PPA(s) were only disclosed vide communication sent to the nominated authority on 01.03.2015 in response to their letter dated 27.02.2015, for the limited purpose of capturing the quantum of performance security under Clause 6.1.2. After winning the Tokisud (North) Coal block, the Petitioner disclosed the list of PPAs to Ministry of Coal for that limited purpose.** Further communication was sent on 02.03.15, in which the Petitioner clearly stated that the PPA with the Respondent is under dispute thereby confirming that the coal available from the Tokisud (North) coal block is for the undisputed/untied capacity of the Petitioner and not for meeting the obligation under the PPA dated 29.10.2010 signed with the Respondent.*

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(23) *Further the performance security was computed under Clause 6.1.2 (b) (ii) of the Coal Mine Development and Production Agreement dated 02.03.2015 and not under Clause 6.1.2 (b) (i). Hence this was computed for not having a PPA tied up for the full requirement. Accordingly, the Petitioner made provisions for the coal from Tokisud (North) block considering that it will be used for future PPAs vide various upcoming tenders. Further to that, the Petitioner have already bid for various long term tenders issued by various state distribution companies like APSPDCL, TPDDL and recently UPPCL. In view of the same TOKISUD (North) is not for meeting the obligations under the PPA dated 29.10.2010. It is also pertinent to mention here that under Coal Mines (Special Provisions) Rules 2014 the Eligibility was principally relied upon the investment made in End Use Plant which shall not be less than 80% of the total project of the Unit or Phase for Schedule II Coal Blocks. It was also submitted that provisions for the coal from Tokisud (North) block was to be used for future PPAs vide various upcoming tenders and for the same Petitioner had already bid for various long term tenders issued by various state distribution companies like APSPDCL, TPDDL, and recently UPPCL. It is also important to mention here that under Coal Mines (Special Provisions) Rules 2014 a successful allottee was allowed to use the coal for other plants of Successful Allottee or its subsidiary company.”*

3. In its subject petition, the petitioner made the following prayer:

- (a) *“Declare the Power Purchase Agreement dated 29.10.2010 for supply of 150 MW power (“PPA”), executed between the Petitioner and Respondent to have become null and void;*
- (b) *Declare that the obligations of the Petitioner under PPA stand discharged on account of frustration of the PPA and consequently release both parties from their obligations under the PPA;*
- (c) *Direct the Respondent to return the performance bank guarantee and all other benefits received from the petitioner in terms of the Power purchase agreement dated 29.10.2010;*
- (d) *Pass any other appropriate order/directions as the Hon’ble Commission may deem fit in the facts and circumstances of the present case.”*

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4. The subject petition was filed by M/s. Essar Power M.P. Ltd. on the following grounds :

- “(i) *The allocation of the Tokisud coal block to the Petitioner has nothing whatsoever to do with the PPA dated 29.10.2010 and in view of this, as soon as the allocation of Mahan Coal block was cancelled by the Hon'ble Supreme Court, the foundational basis of the commercial arrangement entered into between the Petitioner and Respondent has come to naught and resultantly the PPA stood frustrated. The fuel security which the Petitioner had owing to assured coal supply from Mahan coal block and in support whereof fuel supply agreement signed with Mahan Coal Ltd. was submitted as part of condition subsequent under Cl 3.1.2 (i) (iv) no longer remains available to the Petitioner. Compelled by such sudden turn of events, the Petitioner issued a force majeure notice to the Respondent on 3rd October 2014 as per the provisions of PPA (Article 12.5). However, the Petitioner did not receive any response from Respondent to their letter. Accordingly, on 26.03.2015 the petitioner issued the frustration/termination notice to the Respondent informing them about the termination of the PPA in the background of the given facts, and thus requesting them to inter-alia return the Performance Bank Guarantee. In view of the same the PPA stood validly terminated.*
- (ii) *That there were no conditions in the coal block tender document that to participate in future bids post the auction, a bidder needed to disclose the existing PPA(s). **The existing PPA(s) were only disclosed for the limited purpose of capturing the quantum of performance security under Clause 6.1.2. After winning the Tokisud (North) Coal block, the Petitioner disclosed the list of PPAs to Ministry of Coal for that limited purpose.** The communication in this regard (already annexed as Annexure – P-16A (Colly.)), in which the Petitioner clearly stated that the PPA with the Respondent is under dispute thereby confirming that the coal available from the Tokisud (North) coal block is for the undisputed/untied capacity of the Petitioner and not for meeting the obligation under the PPA dated 29.10.2010 signed with the Respondent. Further the performance security was computed under Clause 6.1.2 (b) (ii) of the Coal Mine Development and Production Agreement dated 02.03.2015 and not under Clause 6.1.2 (b) (i). Hence this was computed for not having a PPA tied up for the full*

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requirement. Accordingly, the Petitioner made provisions for the coal from Tokisud (North) block considering that it will be used for future PPAs vide various upcoming tenders. Further to that, the Petitioner have already bid for various long term and medium term tenders issued by various state distribution companies like APSPDCL, TPDDL and recently UPPCL. In view of the same TOKISUD (North) is not for meeting the obligations under the PPA dated 29.10.2010.

- (iii) The schedule 11 to the PPA will clearly show that the PPA was premised and founded on the availability of a pit head coal mine. This is clearly evident from the fact that in the said Schedule 11, the petitioner has not bid any transportation charges at all for the coal. The simple reason for that is the Mahan Coal block was located 4ms from the generating facility. The Tokisud coal block is located in the State of Jharkhand several hundred kilometers from the petitioner's generating facility in Mahan. The fundamental premise of the bid and PPA being a pit head coal block for the generating facility there can be no question of performing obligations under the PPA from a non pit-head coal mine like Tokisud.*
- (iv) That it is settled law that the performance of a contract cannot be insisted upon when the new circumstances are so radically different from the circumstances prevalent when the contract was entered into between the parties. The circumstances prevalent, when the contract was entered into between the parties undisputedly, was the availability of the pit head coal mine. Today in the absence of a pit head coal mine the performance under the contract Act by procurement of coal from a coal mine several hundred kms away can never be treated as similar circumstance to warrant an insistence of performance under the contract.*
- (v) That the day the Mahan coal block was cancelled the contract stood frustrated and the Petitioner stood discharged from all obligation under the contract by operation of law. It did not require any overt act on the part of the Petitioner to rescind the contract even though out of abundant caution, the Petitioner did issue*

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a notice of termination on 26.3.2015. However as on 24.9.2014 the contract stood frustrated in law and parties were discharged of their respective obligation. The contract once frustrated in law would not stand revived by any subsequent change in circumstance especially when the changed circumstance do not bear even a semblance of resemblance to the circumstances which existed on the date of the contract. There can be no question upon insistence of performance of obligations under the contract by relying upon the allotment of a coal block to the petitioner several Hundred kms away from Mahan. If at all a new circumstance could justify insisting upon performance under the contract it could only be if the petitioner were allotted a captive coal mine at the pit head of the generating facility. The change in circumstances as existing today is so radically different from the circumstances existing at the time of the contract, that performance of obligations under the contract cannot, in law, be insisted upon.

- (vi) That the word “impossible” as contained in Section 56 of the Indian Contract Act has been interpreted by the Hon’ble Supreme Court to mean an event which substantially alters the bargain arrived at the time of entering into the contract. In the present case the impossible event has occurred subsequent to the execution of the PPA and has substantially altered the bargain arrived at the time of entering into the Contract, rendering the Contract impossible to perform and hence void.*
- (vii) That upon cancellation of captive coal mine, the PPA entered into by Petitioner and Respondent premising the supply of power based on the designated fuel source has been substantially altered rendering the Contract impossible to perform and hence void.*
- (viii) That owing to causes unforeseen and beyond the control of the parties between the date of signing of PPA up to the date of its performance in view of the changed circumstances it would be unjust to enforce performance of the obligations under the PPA.*
- (ix) The fact that the bids for supply of power assumed availability of coal from the block allocated to the petitioner cannot be disputed and therefore the coal block was the primary basis for the supply of power under the PPA. Despite the*

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generating station being ready and capable of operating to supply power, the obligations under the PPA cannot be performed on account of impossibility of performance due to the subsequent event of cancellation of the captive coal block allocated to the Petitioner. That it settled law that when frustration occurs without default of either party a contractual obligation becomes impossible to fulfil.

- (x) *That under Article 3.1.2 (iv) of the PPA, one of the condition subsequent provided is the execution of a fuel supply agreement by the Petitioner. That the cancellation of the coal block, has materially affected the fulfilment of the said condition subsequent, therefore rendering the PPA impossible to perform.*
- (xi) *The cancellation of the coal blocks by the Hon'ble Supreme Court, including that of the Petitioner clearly qualifies as a **"Force Majeure"** event and in pursuance of the same a notice dated 3.10.2014 was issued under clause 12.5 of the PPA by the Petitioner, validly terminating the said PPA.*
- (xii) *That the tariff quoted by the Petitioner and accepted by the Respondent was based on the fundamental premise that the coal mined from the Government allocated Mahan coal block would be utilized to supply power to the Respondent. Hence, the availability of coal from the Mahan coal block was an integral and indivisible part of the PPA agreed to by the parties.*
- (xiii) *That the qualification of Petitioner was based Mahan Coal Block only as confirmed vide the RFQ submitted. Now that the coal block is cancelled hence the very basis on which Respondent had Qualified the Petitioner in the RFQ process is under question as well.*
- (xiv) *Further the cancellation of Mahan Coal block has made the entire qualification of Petitioner in the bid as null and void as it was basis on which the Petitioner entered, into commercial arrangement for power sale is completely altered. Thus Petitioner is constrained to approach Hon'ble Commission.*

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- (xv) *That the basis of PPA was Mahan Coal block only as evident from numerous correspondences and more specifically the correspondence highlighting the main reason of reduction of bid quantum from 300MW to 150MW was due to reduction in mineable share coal of Petitioner in Mahan Coal Block. It could have been possible that if Mahan Coal Block would not have been there and some other block then Petitioner may have signed PPA for 300MW. Inter alia it is very clear that Mahan Coal block was the only basis of PPA and no other fuel source.*
- (xvi) *That the coal block can no longer be used by the Petitioner (due to cancellation of coal blocks), the entire basis for the PPA has become infructuous, as the PPA has become impossible to perform. Therefore, the PPA has become void and the parties ought to be discharged from their respective obligations contained in the PPA by operation of law. Accordingly, the parties must now return all benefits received under the PPA to the counter party, such that the position as it existed prior to the date of execution of the PPA is restored.*
- (xvii) *That in terms of Article 3.3.3 if one or more conditions specified under Article 3.1.2 remains unfulfilled due to any force majeure events the time period for fulfilment of such conditions shall be extended for the period of force majeure event subject to a maximum extension of ten months continuous or non-continuous in aggregate. Thereafter, the agreement may be terminated either by the seller or the procurer by giving a termination notice of at least 7 days in advance in writing to the other party. The termination of the agreement shall take effect upon the expiry of the last date of the said notice period. Under Article 3.5.1 the procurer has an obligation to return/ release the contract performance guarantee in the event of termination of the agreement under Article 3.3.3 of this agreement.*
- (xviii) *The termination of the PPA on the basis of a force-majeure is a valid one as any event or circumstances that wholly or partly prevent or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, or combination of events beyond reasonable control of the party, qualifies as a force-majeure under the PPA.*

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(xix) *Therefore, from the reading of the clauses of the PPA, it is clearly provided that should there be an event of force majeure, which cannot be cured for a period beyond 10 months from the date of completion of conditions subsequent, then the agreement can be terminated by either party and as such, the contract performance guarantee is required to be returned by the procurer. In view of the same the Petitioner has validly terminated the PPA on the ground of force-majeure and therefore the Petitioner's obligations under the PPA stand discharged."*

(xx) *That in view of the valid termination of the PPA by the Petitioner the Respondent is liable to return the performance guarantee to the Petitioner."*

5. The subject petition was admitted on 26th April' 2016 and the petitioner was directed to serve copies of the petition on the respondents in the matter. The petitioner was also directed to confirm whether the provisions under Article 17.2 for amicable settlement of dispute have been exhausted by it before filing the subject petition. If so, the documents regarding compliance with Article 17.2.1, 17.2.2 and 17.2.3 of the PPA were also sought from the petitioner. The respondent was directed to file its reply to the petition by 18th May' 2016 after serving a copy of the same on other side also.

6. Vide Commission's order dated 24th May' 2016, the following directives were issued to the parties in the matter:

- (i) M/s. Essar Power M.P. Ltd. was required to establish/ demonstrate whether this Commission has the jurisdiction under the provisions of Power Purchase Agreement to decide the existence of PPA. All relevant articles under the said PPA be mentioned specifically along with justification of the same
- (ii) M.P. Power Management Co. Ltd., Jabalpur was directed to file its reply to the petition and also the additional affidavit filed by the petitioner with the Commission on 23rd May' 2016.
- (iii) The parties were directed to ensure compliance with the above directives by 10th June' 2016 after serving the copy on the other side.

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7. During the course of next hearing held in this matter on 21st June' 2016, the Commission observed the following :

(a) By affidavit dated 23rd May' 2016, M/s. Essar Power M.P. Ltd. had broadly submitted the following with regard to compliance with the Article 17.2.1, 17.2.2 and 17.2.3 of the PPA dated 29.10.10:

- (i) *"The requirements as contained under Article 17 of the PPA are not applicable as the present petition has been filed by the Petitioner under Section 86(1)(f) of the Electricity Act 2003. It is humbly submitted by the Petitioner that statutory power as contained under Section 86 of the Electricity Act 2003 cannot be curtailed or fettered by the provisions of the PPA between the parties. The exercise of statutory power under Section 86 of the Act is not and could not, in law, be dependent upon the fulfillment of any contractual terms between the parties.*
- (ii) *Without prejudice to the above, Article 17.2 of the PPA does not provide for any specific form of notice to be given by a party to the PPA. That in the absence of a specific form of notice, if at all the same were applicable, the same would have to be only substantially complied with.*
- (iii) *That without prejudice to the above, it is submitted that Article 17.2 has been complied with in letter and spirit by the Petitioner. The notice dated 03.10.2014 sent by the Petitioner to the Respondent, in itself is a complete compliance of the provisions of Article 17.2.1 of the PPA. A copy of the letter dated 03.10.2014 is annexed herewith and marked as Annexure A1. (Already annexed as Annexure P-18 to the captioned Petition at Page No. 375). That as required under Article 17.2.1 the said letter dated 03.10.2014 provides the details of the dispute i.e. frustration of the PPA. Further, it also states the grounds for the dispute i.e., cancellation of the Coal Block (Mahan Coal Block) also the material in support of the same has been provided i.e. the judgment of the Hon'ble Supreme Court of India dated 24.09.2014, passed in W.P. (Crl.) No. 120 of 2012.*

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

The letter dated 03.10.2014 was replied to by the Respondent vide its letter dated 18.05.2015. A copy of the letter dated 18.05.2015 is annexed herewith as Annexure A2. (Already annexed as Annexure P-20 to the captioned Petition at Page No. 379-381) Wherein the Respondent has disputed the claim of the Petitioner and has raised a counter-claim also, the material for the same has been provided by the Respondent. Therefore, it is submitted that the abovementioned letters dated 03.10.2014 and 18.05.2015, satisfy the requirements as set out under Article 17.2, in letter and spirit.

Further, in addition to the abovementioned letters, the letter dated 26.03.2015, written by the Petitioner to the Respondent, a copy of which is annexed herewith and marked as Annexure A3 (already annexed as Annexure P-19 to the captioned Petition at Page No. 376-378), letter dated 27.01.2016, written by the Respondent to the Petitioner, a copy of which is annexed herewith and marked as Annexure A4 (already annexed as Annexure P-16 to the captioned Petition at Page No. 351) and letter dated 03.03.2016, written by the Petitioner to the Respondent, a copy of which is annexed herewith and marked as Annexure A5 (already annexed as Annexure P-17 to the captioned Petition at Page No. 356-358) clearly show that the requirements as set out under Article 17.2.1 and 17.2.2 of the PPA have been complied with.

- (iv) *Lastly, the requirement of meeting between the parties has also been complied with as per the requirement under Article 17.2.3 of the PPA. Several meetings have taken place between the parties to resolve the disputes. Further, specific reference has also been made to the meetings/ discussion between the parties in respect of the dispute in letters dated 08.10.2015 and 04.01.2016 written by the Petitioner to Respondent.*

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

(v) *It is humbly submitted before this Hon'ble Commission that the very fact that there has been no amicable settlement between the parties is evident from the Petitioner's letter dated 03.03.2016 (Annexure-A5 hereinabove). Further, as there was no response of the Respondent to the abovementioned letter dated 03.03.2016 therefore the Petitioner was constrained to file the present Petition on 05.03.2016. It is submitted that the disputes are continuing."*

(b) Subsequently, by affidavit dated 10th June' 2016, M/s. Essar Power M.P. Ltd. filed the following with regard to jurisdiction of MPERC to adjudicate in the subject matter/ dispute:

"That the case of the Petitioner, in a nutshell, as set out in the captioned Petition is that:

- (i) The cancellation of the Mahan Coal Block by the Hon'ble Supreme Court is a 'Force Majeure' event, and*
- (ii) That due to the occurrence of a 'Force Majeure' event the PPA dated 29.10.2010 has become impossible to perform and thus stands frustrated.*

That the abovementioned fact of cancellation of the Mahan Coal Block as well as the impossibility of the performance of the PPA dated 29.10.2010 was duly informed by the Petitioner to the Respondent vide its notice of force majeure dated 03.10.2014. Further, in the absence of receiving any response from respondent, the Petitioner issued notice of frustration on 26.03.2015. That, the said claim of the Petitioner, with respect to force majeure has been denied by the respondent in terms of its letter dated 18.05.2015, therefore disputes have arisen between the parties. (Copies of letters dated 03.10.2014, 26.03.2015 & 18.05.2015 are already annexed to the captioned Petition as Annexure P-18, Annexure P-19 and Annexure P-20 respectively).

However, in terms of the order of this Hon'ble Commission dated 24.05.2016, this Hon'ble Commission has again directed the Petitioner to make demonstrations to show whether this Hon'ble Commission has jurisdiction to adjudicate upon this matter. In this

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connection it is humbly submitted that the Petitioner has approached this Hon'ble Commission under Section 86(1)(f) of the Electricity Act 2003 and the statutory powers as contained under Section 86(1)(f) of the Electricity Act 2003 cannot be curtailed or fettered by the provisions of the PPA between the parties. It is no more res-integra that there is no restriction under Section 86(1)(f) about the nature of dispute. The exercise of statutory power under Section 86(1)(f) of the Act is not and could not, in law, be dependent upon the fulfillment of any contractual terms between the parties."

(c) Counsel on behalf of MPPMCL had sought some more time to file their reply.

8. Considering the request, MPPMCL, Jabalpur was directed to file its reply to the petition and also the additional submissions filed by M/s. Essar Power M.P. Ltd. (by its affidavit dated 23rd May' 2016 and 10th June' 2016) after serving a copy of the same on other side also.

9. By affidavit dated 5th July' 2016, M.P. Power Management Co. Ltd., Jabalpur, for the first time in the subject case, submitted the following preliminary objections on the subject petition:

"(i). It is most respectfully submitted that without prejudice to the right and contentions of the answering respondents to the merits of the matter it is submitted that as per Clause 17.3.2 of the PPA, the instant petition is not maintainable before this Hon'ble Commission as there is an Arbitration Agreement between the petitioner and respondent, therefore, instant dispute has to be adjudicated/referred to an Arbitration Tribunal as per the Arbitration Agreement entered into between the parties.

(ii) It is most respectfully submitted that instant dispute as raised by the Petitioner does not pertain to any of the matters as mentioned in Clause 17.3.1 and is therefore not a dispute covered under Clause 17.3.1 of the PPA. In this view of the matter in accordance with the Article 17.3.2 of the PPA the instant dispute as raised by the Petitioner has to be adjudicated by an Arbitral Tribunal in accordance with the provisions of Arbitration and Conciliation Act 1996 as amended.

(Emphasis supplied)

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

- (iii) *In this regard the provision of Section 5 and Section 8 of the Arbitration & Conciliation Act 1996, as amended is important. As per Section 8, a judicial authority (MPERC) has the power to refer the parties to Arbitration notwithstanding any judgement or order or decree passed by Supreme Court of High Court etc. Further, as per Section-5 it is clearly mentioned that notwithstanding nothing contained in any other law for the time being enforced, no judicial authority shall intervene in the matter governed by the Arbitration & Conciliation Act 1996 as amended except where so provided under the Arbitration Act.*
- (iv) *In view of the matter the instant petition is not maintainable for adjudication before this Hon'ble Commission and it is most respectfully submitted that this Hon'ble Commission may refer the matter for Arbitration Tribunal in accordance with the Article 17.3.1 of the Power Purchase Agreement between the parties read with section 5 and section 8 of the Arbitration and Conciliation Act, 1996 as amended.*
- (v) *Without prejudice to the above the answering respondent reserves it's right to make detailed submission on the merit of the matters and nothing stated herein shall be deemed to an admission thereto. The answering respondents crave leave to file a reply on merits within a short time if the petition is held to be maintainable before this Hon'ble Commission.*
- (vi) *In this view of the matter the Hon'ble Commission may dismiss the instant petition on the ground of it being not maintainable before this Hon'ble Commission and direct the petitioner and the answering respondents to adjudicate their dispute through arbitration in accordance with the Clause 17.3.2 of the Power Purchase Agreement.* **(Emphasis Supplied)**

10. During the course of next hearing in this matter held on 23rd August' 2016, the arguments by both the parties could not be taken place before the Commission as the Counsel appearing on behalf of M/s. Essar Power M.P. Ltd. requested to fix any next date for arguments in the matter. Accordingly, the case was fixed on 20th September' 2016 for final arguments.

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11. By counter affidavit dated 19th September' 2016, M/s. Essar Power M.P. Ltd. filed its response on the aforementioned preliminary objections raised by M.P. Power Management Co. Ltd., Jabalpur (mentioned at Para 9 of this order). In its aforesaid affidavit, while quoting certain judgments pronounced by the Hon'ble Supreme Court and Hon'ble APTEL regarding scope of Section 86(1)(f), M/s. Essar Power M.P. Ltd. broadly submitted the following:

- “(a) *That the Petitioner has approached this Hon'ble Commission under Section 86(1)(f) of the Electricity Act 2003 and not under the terms of the PPA dated 29.10.2010, for adjudication of disputes and the statutory powers as contained under Section 86(1)(f) of the Electricity Act 2003 cannot be curtailed or fettered by the provisions of the PPA between the parties.*
- (b) *That the above position has time and again been enunciated by the Hon'ble Apex Court as well as the Hon'ble Appellate Tribunal for Electricity, as follows:*
 - (i) *The Hon'ble Supreme Court of India while interpreting the scope of Section 86(1)(f) in its landmark judgment of **Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd, (2008) 4 SCC 755**, (which has been subsequently followed in a catena of cases) has held that:*

‘... all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of dispute’.

‘It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an arbitrator’.

Thus, making it clear that it is the discretion of the State Commission to refer a dispute to arbitration and further, there is no restriction on the nature of the dispute referred to the Hon'ble Commission under Section 86(1)(f) of the Act

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

- (ii) *Further, the Hon'ble Supreme Court in the case of T.N. Generation and Distbn. Corpn. Ltd. vs. PPN Power Gen. Co. Pvt. Ltd., (2014) 11 SCC 53, completely relying on the abovementioned decision of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd, (2008) 4 SCC 755 has held as under:*

“Considering the provisions contained in Sections 173, 174 and 175 of the Electricity Act, this Court observed that since Section 86(1)(f) provides a special manner of making reference to an arbitrator in disputes between a licensee and a generating company, by implication all other methods are barred.

Thereby, leaving no room for doubt that the State Commission can refer a dispute to arbitration in exercise of its powers under Section 86(1)(f) of the Act.

- (iii) *That the abovementioned view has also been reiterated by the Hon'ble APTEL in Appeal No. 200 of 2009 titled as Pune Power Development Private Ltd. (Formerly known as Kalyani Power Development Private Ltd) v. Karnataka Electricity Regulatory Commission, Mangalore Electric Supply Company Limited and Power Company of Karnataka Ltd., decided on 23.02.2011, as follows:”*

“In addition to the above regulatory power, Section 86(1)(f) of the Act vests in the State Commission the power to adjudicate upon the dispute between the licensees and the Generating Companies. Section 86(1)(f) of the Act reads as under:

Section 86(1)(f): adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration.

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

A plain reading of the above provision would clearly show that the State Commission has jurisdiction to entertain disputes between the licensees and also the Generating Companies. Thus, the scope of Section 86(1)(f) is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86(1)(f) regarding the nature of the licensee. Thus, all disputes relating to the regulatory jurisdiction of the State Commission which involves the Distribution Licensee or a trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission.”

*Thus, at the cost of repetition the Petitioner humbly submits that it is no more res-Integra that the power of the State Commission under Section 86(1)(f) of the Electricity Act, 2003 cannot be curtailed by the terms of the PPA entered into between the parties. Further, in view of the well settled principle that it is the discretion of the State Commission, whether to adjudicate upon the disputes between the parties or refer it for arbitration, **the Petitioner humbly submits that it has no-objection if this Hon’ble Commission decides to refer the present Petition to arbitration, in terms of its discretion under Section 86(1)(f) of the Act.*** (Emphasis supplied)

- (c) *It is denied that the instant petition may be dismissed on the ground of it being not maintainable before this Hon’ble Commission. In this regard, further reliance is placed on the ‘Preliminary Submissions’ hereinabove and the same are not being repeated herein for the sake of brevity. Further, as already mentioned above the Petitioner has no-objection if this Hon’ble Commission in exercise of its powers under Section 86(1)(f) of the Act refers the present Petition before an Arbitral Tribunal.*

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(d) *Further, the Petitioner submits that it has received a termination notice in relation to Tokisud North coal block vide letter dated 15.09.2016 from Government of India, Ministry of Coal, Office of Nominated Authority. A Copy of the same is annexed herewith.*

(e) *In view of the above submissions the Petitioner humbly prays that this Hon'ble Commission may dismiss the said 'Preliminary Objections' to the extent that the present Petition is not maintainable before this Hon'ble Commission and may be pleased to refer the present dispute to an Arbitral Tribunal under Section 86(1)(f) of the Act."* (Emphasis supplied)

12. During the course of next hearing held in the matter on 20th September' 2016, Counsels appeared on behalf of both the parties had commonly sought four weeks' adjournment in the subject matter.

13. Subsequently, by affidavit dated 4th October' 2016, M.P. Power Management Co. Ltd., Jabalpur filed a brief rejoinder to the above-mentioned reply filed by M/s. Essar Power M.P. Ltd.. In its aforesaid rejoinder, MPPMCL placed the following arguments against the aforesaid contention filed by M/s. Essar Power M.P. Ltd:

“(i) *It is most respectfully submitted that jurisdiction to entertain a matter is a question of law and facts and therefore depends on the facts of every case. In the instant matter, it is an admitted fact that there is a PPA and the same contains a clause for dispute resolution and under Article 17.3.2 the instant dispute raised by the Petitioner is one to be adjudicated through an arbitral tribunal.*

(ii) *In other words, the Parties had entered into an arbitration agreement for disputes falling under clause 17.3.2 and therefore when viewed in light of the amended provisions of Section 8 of the Arbitration and Conciliation Act, it is amply clear that the instant dispute is solely to be adjudicated by the Arbitral Tribunal without any reference to Section 86(1)(f). For easy reference the amended section 8 of the Arbitration and Conciliation Act, 1996 is reproduced hereinbelow:*

“A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration

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agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.”

- (iii) *Further with respect to the second submission made by the Petitioner, where the Petitioner has relied on certain judgments of the Supreme Court and APTEL, it is most respectfully submitted **that these judgments were given prior to the amendment undertaken in the Arbitration and Conciliation Act in 2015.***
- (iv) *It is submitted that a bare reading of the amended section 8 of the Arbitration Act (2015) and section 5 makes the legislative intent amply clear wherein it is expressly stated that notwithstanding any judgment of Supreme Court or any court, if Parties have an arbitration agreement then the judicial authority shall refer them to arbitration. It is submitted that the PPA and the arbitration agreement contained therein is admitted by the Petitioner.*
- (v) *It is therefore submitted that in this view of the matter, the dispute raised by the Petitioner is to be adjudicated through Arbitration under the provisions of Arbitration Act and therefore there is no occasion for invoking the jurisdiction of this Hon’ble Commission under Section 86(1)(f) of the Electricity Act, 2003.*
- (vi) *It is therefore submitted that this Hon’ble Commission may in light of the submissions made hereinabove and in the preliminary objections be pleased to dismiss the Petition as being not maintainable.”*

14. Counsels on behalf of the petitioner and respondent placed their oral arguments also before the Commission in the hearing held on 18th October’ 2016. They sought ten days’ time for filing their written submissions with the Commission in support of their oral arguments placed before the Commission. They were directed to file their written submissions with the Commission at the earliest but not later than 7th November’ 2016. The case was reserved for orders.

15. In compliance with the above directions, MPPMCL, Jabalpur and M/s. Essar Power M.P. Ltd. filed their written submissions with the Commission by their affidavits dated 26th October’

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2016 and 7th November' 2016, respectively.

16. Reiterating provision of Section 5 and Section 8 of the Arbitration & Conciliation Act 1996, as amended, MPPMCL, Jabalpur broadly submitted the following in its final written submission:

- “(1) It is most respectfully submitted that without prejudice to the right and contentions of the answering respondents to the merits of the matter it is submitted that as per Clause 17.3.2 of the PPA, the instant petition is not maintainable before this Hon’ble Commission as there is an Arbitration Agreement between the petitioner and respondent, therefore, instant dispute falls under jurisdiction of only an Arbitration Tribunal as per the Arbitration Agreement entered into between the parties.*
- (2) It is most respectfully submitted that instant dispute as raised by the Petitioner does not pertain to any of the matters as mentioned in Clause 17.3.1 and is therefore not a dispute covered under Clause 17.3.1 of the PPA. In this view of the matter in accordance with the Article 17.3.2 of the PPA the instant dispute as raised by the Petitioner has to be adjudicated by an Arbitral Tribunal in accordance with the provisions of Arbitration and Conciliation Act 1996 as amended.*
- (3) It is submitted that the Petitioner, has relied on certain judgments of the Supreme Court and APTEL such as Gujarat Urja Vikas Nigam Ltd. etc in its reply to aver that the Hon’ble Commission has the jurisdiction to adjudicate the dispute inspite of the Arbitration clause. In this regard, it is most respectfully submitted that these judgments were given prior to the amendment undertaken in the Arbitration and Conciliation Act in 2015 and are therefore not applicable to the facts and circumstances of the instant case when the Section 8 has been amended by the Parliament prior to the dispute.*
- (4) It is submitted that a bare reading of the amended section 8 of the Arbitration Act (2015) and section 5 makes the legislative intent amply clear wherein it is expressly stated that notwithstanding any judgment of Supreme Court or any court if Parties have an arbitration agreement then the judicial authority shall refer them to arbitration. It is submitted that the PPA and the arbitration agreement contained therein is admitted by the Petitioner.*

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

- (5) *In this regard the Respondent relies on the judgment of Supreme Court reported in AIR 1996 SC 1963 in particular para 74 and 75 wherein the Hon'ble Supreme court has dealt with and explained the meaning of a "non-obstante" or "Notwithstanding" clause and the effect it has on interpretation of s Section. The Hon'ble Supreme Court has very clearly mentioned that a non-obstante clause has an "over-riding effect". In this light it is submitted that the Petition is not maintainable.*
- (6) *Two objections were raised by the Petitioner during the time of hearing namely:*
 - a. *There is no Arbitration Agreement as this dispute is covered in clause 17.3.1 of the PPA.*
 - b. *The Hon'ble Commission is not a judicial authority.*
- (7) *It is most respectfully submitted that firstly the Petitioner has not taken any such plea or objections in its reply dated 19.9.2016 and therefore the Petitioner cannot be permitted to argue a point not taken in its reply dated 19.9.2016.*
- (8) *However without prejudice to the above it is submitted that a perusal of the prayer clause of the Petitioner makes it clear that the main relief is that the PPA be declared as null and void and the Petitioner' bank guarantees etc be released by the Respondent.*
- (9) *The Petitioner has not sought any prayer in its petition challenging the letters dated 22.1.2016 and 18.5.2015 on which the Petitioner relies in his oral submission (these points not raised in its reply). Therefore the Petitioner cannot be permitted to change its stand. On the basis of the Petitioner relief the Petition is not maintainable as the same is covered by an Arbitration Clause.*
- (10) *With respect to the issue raised by the Petitioner that the Hon'ble Commission is not a judicial authority it is most respectfully submitted that the same was also not raised in its reply dated 19.9.2016.*
- (11) *However without prejudice to the above it is submitted that the Petitioner approaches the Hon'ble Commission under section 86(1)(f) for adjudication of a dispute and therefore submits itself to a judicial authority. However, it is completely changing it stance during hearing and submits that the Hon'ble Commission is not a judicial authority and the same is contradictory of its own conduct. It is submitted that the Hon'ble Commission under the Electricity Act, 2003 has all the powers of civil court etc and is therefore a judicial authority.*

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- (12) *It is therefore submitted that in this view of the matter the dispute raised by the Petitioner is to be adjudicated through Arbitration under the provisions of Arbitration Act and therefore there is no occasion for invoking the jurisdiction of this Hon'ble Commission under Section 86(1)(f) of the Electricity Act, 2003.*
- (13) *It is therefore submitted that this Hon'ble Commission may in light of the submissions made hereinabove and in the preliminary objections be pleased to dismiss the Petition as being not maintainable.*

17. In its final written submission filed with the Commission on 7th November'2016, while quoting certain judgments pronounced by the Hon'ble Apex Court and Hon'ble APTEL, M/s. Essar Power M.P. Ltd. broadly submitted the following:

- (i) *"It is noteworthy that Section 86(1)(f) of the Electricity Act categorically provides for reference of any dispute between 'generating company' (i.e., Essar Power Madhya Pradesh Limited / Petitioner in facts of the present case) and the 'licensee' (i.e., MP Power Management Company Limited / Respondent in facts of the present case) before the appropriate State Electricity Regulatory Commission. Further, on behalf of the Petitioner herein, it has been submitted that under Section 86(1)(f) of the Electricity Act, this Hon'ble Commission may either adjudicate itself or refer the matter for arbitration for which it is agreeable.*
- (ii) *That in its Rejoinder to the reply to preliminary objections, the Respondent has reiterated its contention that in view of the amended Section 8 of the Arbitration and Conciliation Act 1996, the Hon'ble Commission does not have the jurisdiction to adjudicate the present Petition and this Hon'ble Commission is bound to refer the same to arbitration and dismiss the Petition. That in view of the above Petitioner seeks to make the following legal submissions:*

A. *Section 86(1) (f) of the electricity act, being a special statutory provision will override the general provisions of the arbitration and conciliation act, 1996.*

As the Petitioner has approached the Hon'ble Commission under Section 86(1)(f) of the Act, therefore the Commission can either adjudicate the matter or refer the matter to arbitration. The above position has time and again been enunciated by the Hon'ble Apex Court as well as the Hon'ble Appellate Tribunal for Electricity.....

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

Therefore, there is no room for doubt that the State Commission can refer a dispute to arbitration in exercise of its powers under Section 86(1)(f) of the Act. The statutory powers as contained under Section 86(1)(f) of the Electricity Act, 2003 cannot be curtailed or fettered by the provisions of the PPA between the parties. In other words, it is settled position of law that statutory provisions cannot be circumvented by way of agreement between the parties.

The Petitioner has already made it clear in Paras 8(iii), 14 & 16 of its Affidavit dated 19.09.2016 that it is agreeable for a reference to arbitration in terms of the law laid down by the Hon'ble Supreme Court with reference to Section 86(1)(f).

B. Section 8 of the Arbitration And Conciliation Act, 1996 is not applicable to the present case

*The Respondent's contention that in view of the amended Section 8 of the Arbitration and Conciliation Act 1996, this Hon'ble Commission (being a 'Judicial Authority') is bound to refer the parties to arbitration, is baseless and in contravention of the settled law that a special legislation would supersede a generic one. The well settled position of law that the special law overrides the general law is also reflected in the Latin maxim *generalia specialibus non derogant*, and this principle of interpretation has been upheld by the Hon'ble Supreme Court in several cases such as **Ashoka Marketing Ltd. & Anr. vs. Punjab National Bank & Ors. (1990) 4 SCC 406**, (at Paras 49-53) and recently in **Commercial Tax Officer, Rajasthan vs. Binani Cements Ltd. & Anr. (2014) 8 SCC 319** (at Paras 34, 43 and 44).*

Accordingly, Electricity Act, 2003 having been specifically enacted for regulating the terms of generation, distribution, transmission, trading etc. being a special legislation, would supersede the general legislation i.e., the Arbitration and Conciliation Act, for the purposes of reference of the present matter to arbitration.

Further, without prejudice to the contentions of the Petitioner, and for the sake of argument, even if it assumed (without admitting) that Section 8 of the amended Arbitration and Conciliation Act will supersede Section 86(1)(f) of the Electricity Act, then in such a scenario, this Hon'ble Commission would not constitute a 'Judicial

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Authority’, as it has been held by Hon’ble Supreme Court in the case of Andhra Pradesh Power Coordination Committee and Others vs. Lanco Kondapalli Power Limited & Ors. (supra), relying on the case of MP Steel Corpn. vs. CCE (2015) 7 SCC 58 (at Para 28)] that the State Electricity Regulatory Commission is “...not a court stricto sensu”. Hence, arguendo, Section 8 of the Arbitration and Conciliation Act, 1996 would not be applicable even otherwise as Section 8 proceedings can only be initiated before a ‘Judicial Authority’. In view of the same, it is submitted that this Hon’ble Commission can refer the matter for arbitration only under Section 86(1)(f) of the Electricity Act and not under Section 8 of the Arbitration and Conciliation Act, 1996.

It has also been held in T.N. Generation and Distbn. Corpn. Ltd. vs. PPN Power Gen. Co. Pvt. Ltd., (2014) 11 SCC 53 and also by the Hon’ble APTEL in the Full Bench Judgment of M/s Lafarge India Pvt. Ltd. vs. Chhattisgarh State Electricity Regulatory Commission & Anr., 2015 SCC Online APTEL 118 (Appeal No. 127 of 2013, decided on 13.03.2015) that the State Commission is not a “Court”. In the circumstances, the Judgment of the Supreme Court in Mogan Securities vs. Modi Rubber (2006) 12 SCC 642 (at Paras 27 and 52-59) though holds that the BIFR is a “judicial authority” for the purposes of the unamended Section 8 of the Arbitration Act, it is submitted that the said Judgment would have to be read in the light of the subsequent Supreme Court Judgments cited above.

C. Reference of the dispute to arbitration by this Hon’ble Commission would not result in dismissal of the present petition

The contentions of the Respondent are spread so far across the spectrum of the argument that they end up in a bundle of contradictions. On the one hand the Respondent contends that this Commission “does not have jurisdiction” to entertain the present petition. On the other, it contends that this Commission should “refer parties to arbitration” and on the far end of the spectrum it wants this Commission to “dismiss the petition”. If the Commission is to “refer parties to arbitration”, as both parties are agreeable, there arises no question of “dismiss[al] of the Petition”. Equally, if this Commission “does [did] not have jurisdiction.” it could pass no orders at all, including the Order referring parties to arbitration which admittedly the Respondent is agreeable to.

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between M/s Essar Power M.P. Ltd. and M.P. Power Management Co. Ltd. in relation to termination of the Power Purchase Agreement dated 29.10.2010 executed between them for supply of 150 MW power.

That without prejudice to the above contentions, it is submitted that if this Hon'ble Commission has the power to refer the present Petition to arbitration, then the same would not result in dismissal of the Petition as not maintainable, as prayed by the Respondent.

Further, the contention of Respondent in its 'Rejoinder' to the 'Reply to Preliminary Objections' is completely flawed and contradictory as on one hand the Respondent contends that the present Petition is to be decided by arbitration under the provisions of the Arbitration and Conciliation Act, 1996 and on the other hand prays that the present Petition be dismissed as not maintainable. Clearly, such pleas adopted by the Respondent are contradictory. It is humbly submitted that the Petitioner has no objection if this Hon'ble Commission refers the present Petition to Arbitration in exercise of its powers under Section 86(1)(f) of the Act.

D. Even under Article 17 of the PPA, this Hon'ble Commission has jurisdiction to look into the present dispute

Without prejudice to the above contentions, it is submitted that even on the Respondents own argument of reference to Article 17 of the PPA, the present disputes are not covered by Article 17.3.2 (r/w. Section 8 of the Arbitration Act) under which the Respondent claims a reference to arbitration.

As per Article 17 of the PPA this Learned Commission can adjudicate upon the disputes between the parties.

Article 17.3.1, which predicates this Commission deciding upon disputes between the parties is not limited to "tariff issues" as is sought to be contended by the Respondent.

Article 17.3.1 covers disputes of "Liquidated Damages" under Clause 4.7.1 of the PPA. The Respondent has claimed Liquidated Damages as per its letter dated 27.01.2016 (annexed as ANNEXURE A-4 to the Petitioner's Additional Affidavit dated 23.05.2016 at Page 16);

Article 17.3.1 covers disputes of "Change-in-Law" in Article 13.2 of the PPA. The Respondent has in response to the termination notice claimed a reduction of tariff on account of "change in law" vide its letter dated 18.05.2015(annexed as ANNEXURE P-20 at Page Nos. 379-381 of the Petition Paperbook).

Hence the Respondent himself having raised disputes on issues covered in Clause 17.3.1 could not now do a volte face and seek shelter under Article 17.3.2. In order to get

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over this hurdle, the Respondent takes recourse to the “prayer” in the Petitioner’s petition to contend that the “dispute” raised by the Petitioner does not pertain to any of the clauses mentioned in Article 17.3.1. This disingenuous argument overlooks the fundamental precept that the “prayer” in a petition does not determine the width of the controversy/dispute, it only determines the width of the “relief” that the forum could grant upon adjudication of the dispute. The width of the “dispute”, on the other hand has to be gleaned from the pleadings and documents filed by the parties. The plea of the Respondent, contained in its documents, itself shows that it has raised contentions squarely covered by Article 17.3.1.

*It is however, submitted, that the Petitioner is constrained to raise the aforesaid argument to meet the Respondents contention that the present dispute cannot be looked into by this Commission. **The entire controversy however is of little more than academic interest since both parties are agreeable to arbitration.***

That the Petitioner in compliance of the orders of this Hon’ble Commission has already placed on record affidavits dated 23.05.2016 and 10.06.2016 wherein the Petitioner has demonstrated its compliance with the provisions of Article 17.2.1, 17.2.2 and 17.2.3 of the PPA, and accordingly, even under the PPA, it has been categorically provided that this Hon’ble Commission has jurisdiction to adjudicate upon the present dispute.

Therefore, in view of the foregoing submissions, the Petitioner prays that the ‘Preliminary Objections’ of the Respondent be rejected to the limit of its contentions therein and that present Petition may be referred to arbitration in terms of Section 86(1)(f) of the Electricity Act, 2003.” (Emphasis supplied)

18. On perusal of the contents in the petition and having heard the arguments placed by Learned Counsels of both the parties in this matter, the observations and findings of the Commission are as given below:

Observations:

(A) The subject petition has been filed by M/s. Essar Power M.P. Ltd. on the following two basic grounds:

- i. The cancellation of the Mahan Coal Block by the Hon’ble Supreme Court is a ‘Force Majeure’ event, and
- ii. Due to the occurrence of a ‘Force Majeure’ event, the Power Purchase Agreement

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dated 29.10.2010 entered into by the petitioner and respondent has become impossible to perform and thus stands frustrated.

(B) The respondent (MPPMCL) has strongly objected on maintainability of the subject petition under Section 86(1)(f) of the Act. Almost in its all submissions, the respondent contended that the subject petition is not maintainable under Section 86(1)(f) of the Act invoked by the petitioner. The respondent also sought dismissal of the subject petition on its aforesaid contention, which was defended by the petitioner by explaining the scope of Section 86(1)(f) of the Electricity Act, 2003 for adjudication of any dispute by the Commission or refer the same for arbitration in light of several judgments/orders passed by Hon'ble Supreme Court of India and Hon'ble Appellate Tribunal for Electricity.

(C) On the other side, the petitioner in its various filings has submitted that it has filed the subject petition under section 86(1)(f) of the Electricity Act, 2003 and the requirements under Article 17 of the PPA are not applicable in the subject matter.

(D) The arguments of the respondent are based on the mechanism articulated under Article 17 of the Power Purchase Agreement regarding Governing Law, Amicable Settlement of any dispute and Dispute Resolution between the parties entered into the PPA under dispute. Through its all submissions, the respondent has been strongly contending that the dispute raised by the petitioner has to be adjudicated through arbitration under the provisions of Arbitration Act and Article 17.3.2 of the PPA itself.

(E) Lastly, the petitioner also submitted that *"If this Hon'ble Commission has the power to refer the present Petition to arbitration, then the same would not result in dismissal of the Petition as not maintainable, as prayed by the Respondent"*. It also submitted that *"the Petitioner has no objection if this Hon'ble Commission refers the present Petition to Arbitration in exercise of its powers under Section 86(1)(f) of the Act."*

(F) From the above, the Commission has noted that the parties in this matter have agreed to refer the dispute in this petition for arbitration either in terms of provisions under PPA or in exercise of Commission's power under Section 86(1)(f) of the Act with support of their own contention in this regard. However, maintainability of the subject petition under Section 86(1)(f) of the Act was objected by the respondent seeking dismissal of this petition while agreeing to for resolution of the dispute in this petition by arbitration in terms of Article 17 of PPA itself.

Findings:

(G) It is evident from the records that the Commission adopted the levelled tariff in this matter (on 09th August 2011) under Section 63 of the Act after execution of the PPA by both parties in this matter (on 29th October'2010) and the aforesaid tariff was adopted by the Commission in accordance with the terms and conditions of the said PPA. Section 86(1)(f) of the Electricity Act 2003 has very wide scope in light of various functions being discharged by the Commission under the Electricity Act, 2003. The dispute between the petitioner and the respondent in the subject matter is primarily related to the existence/termination of the same aforesaid Power Purchase Agreement which was placed before the Commission while discharging its one of the functions under Section 63 of the Electricity Act 2003. Accordingly, the Commission admitted the subject petition in the motion hearing and proceeded in this matter to hear the parties. It is clear from the judgments of Hon'ble Supreme Court of India and Hon'ble APTEL referred during proceedings in this matter that it is the discretion of the State Commission whether the dispute should be decided itself or it should be referred for arbitration. Accordingly, while using its discretionary power for discharging any of its functions (i.e, adjudication of dispute or refer the same for arbitration) under Section 86(1)(f) of the Electricity Act, the provisions of the aforesaid Power Purchase Agreement entered into by the parties in this matter are to be looked in carefully by the Commission.

(H) In view of aforesaid observations and facts in the matter, the terms and conditions in the PPA under dispute cannot be by-passed/ignored by the Commission while discharging its functions under Section 86 (1) (f) of the Act. Therefore, the Commission has also gone through the following relevant Articles in the PPA under dispute:

“17.2 Amicable Settlement

17.2.1. Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement **including its existence or validity or termination (collectively “Dispute”)** by giving a written notice to the other Party, which shall contain:

- (i) a description of the Dispute;*
- (ii) the grounds for such Dispute; and*
- (iii) all written material in support of its claim.*

17.2.2. The other Party shall, within thirty (30) days of issue of dispute notice issued under Article 17.2.1, furnish:

- (i) counter-claim and defences, if any, regarding the Dispute; and*
- (ii) all written material in support of its defences and counter-claim.*

17.2.3. *Within thirty (30) days of issue of notice by any Party pursuant to Article 17.2.1 or Article 17.2.2, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days of receipt of the notice referred to in the preceding sentence, the Dispute shall be referred to Dispute Resolution in accordance with Article 17.3.*

17.3 Dispute Resolution

17.3.1. *Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Article 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.*

The obligations of the Procurer under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurer.

17.3.2. *If the Dispute arises out of or in connection with any claims not covered in Article 17.3.1, such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article. In the event of such Dispute remaining unresolved as referred to in Article 17.2.3 hereof, any party to such Dispute may refer the matter to registrar under the Rules of the Indian Council of Arbitration.*

- (i) The Arbitration tribunal shall consist of three arbitrators to be appointed in accordance with the Indian Council of Arbitration Rules.*
- (ii) The place of arbitration shall be Jabalpur, M.P. India. The language of the arbitration shall be English.*
- (iii) The arbitration tribunal's award shall be substantiated in writing. The arbitration tribunal shall also decide on the costs of the arbitration proceedings and the allocation thereof.*
- (iv) The award shall be enforceable in any court having jurisdiction, subject to the applicable Laws.*
- (v) The provisions of this Clause shall survive the termination of this PPA for any reason whatsoever.*

(I) At the outset, the petitioner contended that the requirements under Article 17 of PPA

regarding amicable settlement of any dispute or difference in connection with the PPA are not applicable in the present case. The petitioner also contended that the exercise of statutory power under Section 86 of the Act is not and could not, in law, be dependent upon the fulfillment of any contractual terms between the parties. Having placed the aforesaid arguments, the petitioner on the other hand has made its submissions to demonstrate its compliance with Article 17.2 of the PPA as given below:

(a) Through its letter dated 3rd October 2014, the petitioner provided the details and grounds for the dispute to the respondent i.e, MPPMCL. The petitioner had broadly mentioned the following in its aforesaid letter as a notice to the respondent:

“The supply of power from generating station was premised on the captive coal block allocated for the project, same has been indicated in Schedule 11 of PPA and coal block allocation letter was also attached alongwith bid document. Thus, the de-allocation of captive coal block is an event of force majeure in terms of article 12.3 of the power purchase agreement entered into between EPMPPL and M.P. Power Trading Company Limited (“MPPTCL”) on 29.10.2010 (“PPA”). In addition to other rights available to EPMPPL, which may be exercised later, please treat this letter as notice in terms of Article 12.5 of the PPA.”

(b) The reference of respondent’s reply (vide its letter dated 18th May’ 2015) to the aforesaid notice issued by the petitioner is also mentioned in the subject petition. In its aforesaid reply (filed as annexure to the petition), the respondent broadly submitted the following:

“....2. MPPMCL refutes the above referred notice of force majeure events on following grounds:

- (i) The effect of judgment is, certainly, not an act of God, hence cannot be classified as a “Natural Force Majeure Event” in view of Article 12.3(i) of the PPA.*
- (ii) It is also not an “Indirect Non-Natural Force Majeure Events” to be classified under Article 12.3(ii)2.*
- (iii) It can be a matter of consideration as to whether the de-allocation can be classified as Non-Natural Force Majeure Event in view of Article 12.3(ii) 1 of the PPA. But, since, the de-allocation has not been done on account of nationalization or compulsory acquisition by any Indian Governmental Instrumentality, it cannot be classified as one under Clause (a) of Article 12.3(ii) 1 of the PPA.*
- (iv) That the provisos to sub clauses (b) and (c) of Article 12.3(ii) 1 of the PPA provide that the appropriate Court of Law should declare the revocation or refusal to be unlawful,*

unreasonable or discriminatory and strikes down the same. Contrary to the same, the present deallocation is on account of Judgment passed by Hon'ble Supreme Court. It means that the Hon'ble Supreme Court has been pleased to declare the deallocation as lawful. Hence, the same would also not fall under sub clauses (b) and (c) of Article 12.3(ii) 1 of the PPA.

(v) That, in totality, the deallocation, at all does not fall under any of the Sub Articles/Clauses of Article 12.3 of the PPA.

3. *Further, Article 12.4- Force Majeure Exclusions- of the PPA states that*

(i) 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 of the project;** (emphasis added)*

b)

4. *EPMPL has also failed to indicate any reasonable efforts made by it to mitigate the effect of, so called, Force Majeure in terms of Article 12.6 of the PPA.*

5. *In line with above mentioned Articles, unavailability of fuel does not form an event of Force Majeure.*

6. *However, in the recent auction conducted by GoI, EPMPL has emerged as successful bidder for coal mines of Tokisud (North), Jharkhand and this mine has now been allocated to EPMPL.*

7. *Furthermore, the Ministry of Coal, Government of India, vide its Order No. 13016/9/2014-CA-III dated 26th December, 2014 has ensured that the benefit of coal is passed on to the consumers. Therefore, the allocation of coal blocks under new provisions shall be treated as "Change in Law" for generation capacity contracted through Tariff Based Competitive Bidding under Case 1. This shall enable the Appropriate Commission to revise the Tariff downwards in accordance with provisions of the PPA. The relevant section of the Order is reproduced below:*

***"For the generation capacity contracted through tariff bid based PPAs (Case -1)-**
The Appropriate Commission shall review the quoted energy charge keeping in view*

that the actual bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to Run of Mine (ROM) cost of coal alongwith statutory levies and other permissible components of energy charge, provided that such revision shall not lead to higher energy charge throughout the tenure of PPA than that which would have been obtained as per the terms and conditions of the existing PPA. For this purpose, the allocation of coal block under the new provisions shall be treated as “Change in Law” to enable the Appropriate Commission to revise the tariff downwards in accordance with the provisions of PPA”

The above order also provides that the Ministry of Power will make suitable provisions. Therefore, the Ministry of Power, Government of India vide its Notification No. 23/9/2015-R&R dated 16th April, 2015 exercising its power conferred under Section 107 of the Electricity Act, 2003 directed CERC to adopt prescribed procedure for downward revision of the tariff in already concluded PPAs for generation capacity for cost plus PPAs and Case 1 DBFOO bids.

- 8. Keeping view of the above, the allocation of the coal block under new provisions shall be considered as Change in Law with revision of tariff by the Appropriate Commission. Hence the averment made by EPMPPL is not acceptable and tenable in accordance with the Clauses of the PPA and guidelines issued by the Ministry of Power, Government of India.*
- 9. The PPA signed by M/s EPMPPL mentions “Captive Coal Block” and in light of Para 6 above, EPMPPL has a captive coal mine, which was mentioned in the PPA. Thus they are in condition to fulfill their obligation under the PPA.*
- 10. EPMPPL is therefore requested to please make all efforts for performance of the PPA and schedule 150 MW contracted power in favor of MPPMCL w.e.f. 29.10.2014 as per the PPA.”*

(J) The petitioner mentioned some other correspondence also between it and the respondent made on 26th May’ 2015 and 27th January’ 2016 respectively. By mentioning the aforesaid correspondences between both the parties in this matter and also mentioning that several meetings have been held between the petitioner and respondent to resolve the disputes, the petitioner has submitted that the provisions under Article 17.2 for amicable settlement of dispute have been exhausted before approaching this Commission through this petition.

(K) Article 17.3.1 of the Power Purchase Agreement contains certain type of disputes which shall be submitted to adjudication by the appropriate Commission. The Disputes which are contained in Article 17.3.1 of PPA are either such Disputes which arise from a claim made by any party for any change in Tariff,

OR

Any matter **agreed to** be referred to the Appropriate Commission under the following Articles:

- (i) Article 4.7.1** regarding Liquidated damages for delay due to Procurer Event of Default & Non Natural Force Majeure Events and Natural Force Majeure Events (affecting the procurer)
- (ii) Article 13.2** regarding Application and Principles for computing impact of change in Law
- (iii) Article 18.1** regarding Amendment or Supplementary Agreement
- (iv) Article 10 of Schedule 17** regarding Substitution Consideration

(L) The basic dispute in relation to termination of PPA is not contained /covered in above mentioned sub-Article 17.3.1 of the PPA. The next sub Article 17.3.2 in PPA has provided that the disputes which are not covered in above sub-Article 17.3.1 shall be resolved by arbitration under the India Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in the same sub-Article 17.3.2 (i) to (v) of the PPA under dispute in the subject matter.

Conclusion:

19. In light of the abovementioned provisions in PPA under dispute, it is explicitly clear that the nature of dispute raised in the subject petition is not to be submitted for adjudication by this Commission in terms of sub-Article 17.3.1 of the PPA. Evidently, adequate provisions are available in the PPA itself for resolution of dispute (including the existence, validity or termination of PPA) raised in the subject petition. In view of the aforesaid observations and findings, both the parties in this matter may resolve the dispute raised in the subject petition by arbitration in terms of Article 17.3.2 of the Power Purchase Agreement entered into by them in the subject petition.

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

(Alok Gupta)
Member

(A.B.Bajpai)
Member

(Dr. Dev Raj Birdi)
Chairman