

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION  
BHOPAL**

**Petition No.81/2012**

**Subject: In the matter of review petition under Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 read with Section 94 of the Electricity Act, 2003 for review of the Order passed by this Hon'ble Commission dated 7<sup>th</sup> September, 2012 passed in petition No.11 of 2012 in the matter of approval of Power Purchase Agreement executed between the Review Petitioner and Respondents.**

**ORDER**

(Date of Order: 6<sup>th</sup> February, 2013)

**M/s Jaiprakash Power Ventures Limited, Noida  
(Erstwhile M/s Bina Power Supply Company Ltd.  
since merged with Jaiprakash Power Ventures Limited)**

**Petitioner**

V/s

- 1. M. P. Power Management Co. Ltd., Jabalpur**
- 2. M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur**
- 3. M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal**
- 4. M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore**

**Respondents**

Shri Ashok Shukla and Shri Venkatesh, Advocate appeared on behalf of the petitioner.

Shri Prakash Pachori, DGM (Comml.) and Shri R. V. Saxena, DGM appeared on behalf of Respondent No.1 and also on behalf of Respondent No.2.

Shri V. Ramesh Iyer, DGM (Comml.) appeared on behalf of Respondent No.3.

Shri Anant Chaure, Law Officer appeared on behalf of Respondent No.4.

The petitioner has filed the subject petition under Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 read with Section 94 of the Electricity Act, 2003 seeking review of the Order passed by the Commission dated 7<sup>th</sup> September, 2012 in petition No.11 of 2012 in the matter of approval of Power Purchase Agreement executed between the Review Petitioner and Respondents.

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

- a) *“That the Hon’ble Commission while passing the Impugned Order at Para 12 has unilaterally imposed an obligation on the Review Petitioner of obtaining concurrence of the procurer, Respondent No.1 herein, to the fuel supply agreement, which the Review Petitioner enters into with its fuel supplier for long term fuel supply.*
- b) *That the Hon’ble Commission in imposing such a condition has gone beyond the scope of the PPA dated 05.01.2011 and the Original Petition No.11 of 2012, wherein there was no such obligation on the Review Petitioner to procure such concurrence.*
- c) *That during the proceedings of Petition No.11 of 2012 there was no discussion/ deliberation either through pleadings or orally to add the aforesaid conditions. The said condition appears to be an error apparent on the face of the record as it was not an issue that had been discussed or agitated in any of the hearings. Hence, the Review Petitioner has ‘sufficient reasons’ to file the present Review Petition for the reconsideration of the same.*
- d) *That the conditions laid down by the Hon’ble Commission at para 12 (iii) read with the second part of the condition at para 12(v), go beyond the scope of the petition and such a condition is not included in a PPA, wherein the concurrence of the procurer is to be sought for the fuel supply agreement. While the condition in para 12(v) is acceptable, there should be no requirement for seeking any concurrence of the fuel supply agreement from the procurer.*
- e) *That the Review Petitioner has already made significant progress in the development of the project and has invested significant amounts already towards the project and that the 1<sup>st</sup> Phase of the Project is about to be commissioned. Moreover, the Review Petitioner by Petition No.40 of 2012 has approached this Hon’ble Commission for determination of Tariff under Section 62 of the Electricity Act, 2003. Further, the Review Petitioner on 31.08.2012 has commissioned Unit-I of the Plant. Therefore, it is humbly prayed that any subjective condition in the PPA at this stage will add to the risk of the project and can potentially lead to lenders concerns in addition to putting the Review Petitioner to additional burden if the Procurer were to not grant its concurrence. It is submitted that the Review Petitioner apprehends that this condition could lead to avoidable disputes. It was always the intention of the Parties that the Project would source fuel under appropriate FSA (s) to be executed pursuant to the Implementation Agreement (IA) with assistance of the Government of Madhya Pradesh. The specific provision relating to fuel supply are contained in the IA and the PPA, and these provision are consistent with the terms and conditions of*

*the extant GoI policies. So long as the Review Petitioner undertakes such obligation and executes the fuel supply agreement consistent with GoI policy and prevalent agreements, there can be no occasion for any further subjective concurrence from the procurer at a later stage. It is also pertinent to mention that the Review Petitioner on 10.07.2012 has already entered into a requisite Fuel Supply Agreement for more than 20 years and if the said condition is added at this stage then the same would also jeopardize the FSA already entered into by the Review Petitioner.*

- f) *That this Hon'ble Commission in the various hearings did not ever bring up the issue of incorporating such a condition subsequent for the Company to obtain concurrence of the Respondent to the fuel supply agreement. It is submitted that it is a principle of natural justice that a party should be heard before the Court decides to pass an Order affecting the party. This Hon'ble Commission will appreciate that before passing the Impugned Order the issue of fuel supply agreement never arose. The Review Petitioner has reproduced above the issues that the Hon'ble Commission discussed in the hearings. It is imperative to mention that as per the principles of audi alteram partem; as the maxim denotes that no one should be condemned unheard and every person is entitled to know the reasons for the decision rendered by a Court. This Hon'ble Commission will appreciate that while passing the Impugned Order, this Hon'ble Commission has failed to give any reasons as to why the Review Petitioner is obligated to obtain concurrence from the Respondent when the Respondent has nothing to do with the arrangement that the Review Petitioner has with the fuel supplier. It is further submitted that the Petitioner is procuring Long Term Fuel supply through Ministry of Coal approved Coal companies and in view of the current scenario pertaining to Coal there is no scope for negotiating the Coal Price with such Companies. Therefore, if the said Clause is allowed to be incorporated in the PPA then the same would cause tremendous difficulty to the Review Petitioner such as, if the Procurer chooses to not approve or impose conditions unilaterally, in respect of the fuel supply agreement then the Review Petitioner will have no option but halt its supply of Power to the Procurer leading to shutdown in the generation cycle of the Petitioner's Plant.*
- g) *It is further submitted that if the order dated 07.09.2012 to the extent impugned is not reviewed and if the said obligation of the Review Petitioner obtaining concurrence from the Respondent of the Fuel supply Agreement is not quashed, extreme hardship would be caused to the Review Petitioner in as much as Review Petitioner has already entered into a requisite Fuel Supply Agreement with Central Coalfields Limited on 10.07.2012 and if the said clause is not removed then even the said FSA could be jeopardized.*

- h) *That the Hon'ble Commission in passing the Impugned Order has failed to appreciate that by incorporating Clause 3.1.1.2 the Hon'ble Commissions seeks to amend the contract between parties which neither of the parties sought for. It is submitted that it is a cardinal principle of law that for creation of contract or alteration and amendment thereof it is imperative that there should be meeting of minds between parties. In the present case neither the Review Petitioner nor the Respondent No.1 ever anticipated such a clause let alone the inclusion of the same. Hence, in view of the aforesaid it is submitted the Review Petitioner prays the re-considerations/review of the Impugned Order.*
- i) *That the additional condition is onerous and is susceptible to mis interpretation and may potentially lead to disputes. The Review Petitioner has no control over the policy of GoI under which the fuel will be procured. The FSA and GoI policy will have to be accepted by the Review Petitioner and Procurer without any further subjective evaluation.*

3. The case was listed for motion hearing when the Counsel appearing on behalf of the petitioner argued, inter-alia, that satisfaction of the conditions subsequent by the company for having obtained concurrence of the procurer to the Fuel Supply Agreement entered into with the fuel supplier was neither agitated/deliberated in any previous hearing nor discussed in any of the daily orders issued by the Commission in the matter. The petitioner, therefore, did not get any opportunity to examine and respond in the matter.

4. Considering this argument, the subject review petition was admitted under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and the petitioner was directed to serve copy of the petition on all respondents. The respondents were also directed to appear before the Commission in this matter on the date of next hearing and file their reply on the issues in the petition by 10<sup>th</sup> December, 2012.

5. M P Power Management Co. Ltd., Jabalpur, Respondent No.1 in the matter, filed its response with the Commission on 14<sup>th</sup> December, 2012. The respondent broadly submitted the following:

- (i) *"The petition filed by the Review Petitioner for review of the judgement and order dated 7.9.2012 passed by the Hon'ble Commission is totally misconceived and is without any merit. It is well settled that a petition for review is maintainable only on error apparent on the face of record or for sufficient reasons akin to the same or for discovery of any material which were not available at the time of the hearing of the main petition.*

- (ii) *The decision of this Hon'ble Commission in the Order dated 7<sup>th</sup> September, 2012, in particular, in paragraph 12 (iii) and (v) have been taken consciously in the circumstances that fuel constitutes significant part of the cost of power generation and sale of electricity by the Review Petitioner to Respondents. The higher fuel cost will be against the interest of the consumers. The said decision of the Hon'ble Commission cannot be said to be erroneous much less an "error apparent on the face of the record".*
- (iii) *In terms of clause 3.2 (iii) of the PPA, the review petitioner has duly agreed to implement the PPA "with such modification to the terms thereof as may be decided by the Appropriate Commission". Accordingly, the decision of the Hon'ble Commission on the aspect of modification to clauses 3.1.1.2 and clause 4.1(iii) of the PPA are fully in accordance with the terms agreed to by the review petitioner in the PPA.*
- (iv) *MPPMCL while denying all the arguments put forth by the review petitioner has stated that there is no merit in this review petition filed by the review petitioner."*

6. During hearing held on 18<sup>th</sup> December, 2012 :

- a) Respondent No.1 stated : that it had filed its reply with the Commission on 17<sup>th</sup> December, 2012.
- b) Respondent No.2 authorized Respondent No.1 to represent it before the Commission in the subject matter.
- c) The representative appearing on behalf of the petitioner sought two weeks' time to file a rejoinder to the reply filed by Respondent No.1 since the reply from Respondent No.1 was received only on 15<sup>th</sup> December, 2012.

7. By affidavit dated 27<sup>th</sup> December, 2012, the petitioner filed a rejoinder to the reply filed by Respondent No.1. The petitioner broadly submitted the following in the aforesaid rejoinder :

- a) *"It is humbly submit that the contentions of Respondent No. 1 that the petition filed by the Review Petitioner "is totally misconceived and is without any merit", is unfounded. Respondent No. 1 in the very next line of para 1 has submitted "it is well settled that a petition for review is maintainable only on error apparent on the face of record or for sufficient reasons akin to the same or for discovery of any material which were not available at the time of the hearing of the main petition".*

*I say that the contents of para 12 of this Honble Commission's Order dated 7<sup>th</sup> September, 2012, particularly in paras (iii) and (v) were not discussed or raised during any of the hearings held before the Hon'ble Commission and therefore would be in the category of "for discovery of any material which were not available at the time of the hearing of the main petition".*

- b) *In response to para 2, the Review Petitioner humbly submits that the averment of Respondent No. 1 that “The higher Fuel cost will be against interest of the consumers” is unfounded and misplaced as, Long Term Fuel Supply Agreement (FSA) signed by the review petitioner with Central Coal Fields Limited (CCL) can not be construed to mean or infer that the same would result in higher fuel cost.*
- c) *In response to para 3, the Review Petitioner humbly submits that that submission’s of Respondent No. 1 that “the Review Petitioner does not suffer any prejudice by implementing the Orders of this Hon’ble Commission” is wrong and misplaced and therefore liable to be struck down. The reason for the above submission is that the Long Term FSA signed by the Review Petitioner with CCL and to be signed shortly with South Eastern Coal Fields Limited (SECL), are as per the laid down formats, terms and conditions, pricing etc of the respective Companies and the Review Petitioner would probably not be in a position to arrange for any changes therein.*

*The Hon’ble Commission may like to appreciate the fact, as reported in the media, that the current coal scenario in the country is very bleak and the intervention from the Prime Minister’s Office resulted in signing of the recent FSAs. We understand that in the normal set of circumstance the model FSA’s signed with Coal India Limited and / or its subsidiaries, CCL and SECL in our case, would invariably be concurred to by Respondent No. 1. The Review Petitioner humbly submits before this Hon’ble Commission that in the eventuality that Respondent No. 1 objects to, or asks for any changes in the executed FSAs, the Review Petitioner, in light of the current coal scenario, would in all probability be unable to arrange the same. This would lead to an impasse, wherein the directions, as contained in this Hon’ble Commission’s Order dated 7<sup>th</sup> September, 2012 at paras 12 (iii) and (v), would be difficult to implement.*

*In view of the facts and circumstances of the case mentioned above, the Review Petitioner would humbly like to request the Hon’ble Commission to consider amending the Order dated 7<sup>th</sup> September, 2012 at paras 12 (iii) and (v) to exclude the Long Term Fuel Supply Agreements (FSA’s) entered into by the Generator with Central Govt./ State Govt./ PSU’s (both Central and State) from the ambit of the above mentioned clauses.*

- d) *In response to para 4, the Review Petitioner humbly submits that the contents reference to clause 3.2 (iii) of the PPA is a statement of fact and the rest of the contents are specifically denied and objected to.*
- e) *In response to para 5 & 6, the Review Petitioner humbly submits that in view of the aforesaid submissions, the contents of para 5 & 6 of the submissions of Respondent No. 1 are liable to be dismissed/rejected”.*

8. During the hearing held on 5<sup>th</sup> January, 2013, the representatives who appeared on behalf of the respondents submitted that they had nothing to add to their written submission already filed with the Commission. During the same hearing, the representatives appearing on behalf of the petitioner was allowed to file the rejoinder if any, after serving a copy on the other side also by 16<sup>th</sup> January, 2013. No further rejoinder was filed by the petitioner.

9. The Commission has carefully considered the arguments put forwarded by the petitioner and respondents. The Commission finds merit in the petitioner's contention that the amendment in Sub-Articles 3.1, 3.2(ii) and 4.1.1 directed by the Commission's Order dated 7<sup>th</sup> September, 2012 injects a certain ambivalence to the clearly agreed and stipulated responsibility of the procurer in so far as the creation of the evacuation infrastructure is concerned. Indeed, in directing the said amendment, the Commission in its Order of 7<sup>th</sup> September, 2012 was merely seeking to cover all possible options of creating the evacuation infrastructure, whether directly by the procurer or through third agencies. It was never intended to divide or otherwise reduce the procurer's responsibility in this regard. The Commission has therefore, decided to clarify the issue.

10. The second objection of the petitioner is regarding the Commission's direction dated 7<sup>th</sup> September, 2012 that it would have to seek the concurrence of the procurer to the terms and conditions etc. of the FSA. The petitioner believes that the amendment directed by the Commission would confer on the procurer an extra right to walk out of a duly executed PPA at its own pleasure. The petitioner believes that giving such right to one party will violate the balance of responsibility and authority inherent in any agreement between parties. The petitioner feels that this makes the agreement unequal and can, at the hand of the procurer, adversely impact the long term prospects of the power generation venture. Such a PPA would also raise doubts in the minds of the lenders who could demand unaffordable guarantees to cover unforeseen and indeterminate risks. The petitioner would have no objection to any authority of this kind being vested in the Commission itself but definitely to the way the procurer is sought to be authorized. The petitioner is willing to submit the FSA for examination according to law by the Commission.

11. Having considered this argument, the Commission find itself in agreement with the petitioner that the suggested amendment would, in a manner, confer on the procurer a virtual regulatory authority which would not be in order.

12. In view of the foregoing analysis, the Commission, on review has decided that its Order dated 7<sup>th</sup> September, 2012 in petition No.11 of 2012, be amended as follows :

**a) Para 12 (ii) be read as follows :**

Definition of "Scheduled Connection Date" in Sub-Article 1.1 in Article 1 of the PPAs be amended :

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

**b) Para 12 (iii) is deleted.**

**c) Para 12 (iv) be read as follows :**

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

**“The procurer shall establish at its cost or ensure the availability of necessary evacuation infrastructure through CTU/STU or any other agency beyond the Interconnection point, necessary for evacuation of the Contracted Capacity at least 210 days prior to CoD.”**

**d) Para 12 (v) is deleted.**

13. All other conditions and directions in the Commission’s order dated 7<sup>th</sup> September, 2012 in petition No.11 of 2012 shall remain unchanged.

Ordered accordingly.

**sd/-  
(Alok Gupta)  
Member**

**sd/-  
(A. B. Bajpai)  
Member**

**sd/-  
(Rakesh Sahni)  
Chairman**