

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: Petition under Section 86(1)(b) of the Electricity Act, 2003 read with Regulation 4.24 of the MPERC (Power Purchase and Procurement Process) Regulations, 2023 seeking approval of the draft Supplementary Power Supply Agreement to be executed amongst MP Power Management Company Limited, Pench Thermal Energy (MP) Limited and Mahan Energen Limited, for assigning the Power Supply Agreement dated 12.03.2020, executed between MP Power Management Company Limited and Pench Thermal Energy (MP) Limited, to Mahan Energen Limited.

ORDER

**Date of hearing: 19th July, 2023
(Date of Order: 26th July, 2023)**

Petition No. 25 of 2023

M/s Pench Thermal Energy (MP) Ltd.

Adani Corporate House, Shantigram,
Near Vaishno Devi Circle, S. G. Highway,
Khodiyar, Ahemdabad– 382421

- Petitioner

Versus

- 1. M.P. Power Management Company Ltd,**
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh-482008
- 2. M/s Adani Power Ltd.**
Adani Corporate House, Shantigram,
Near Vaishno Devi Circle, S. G. Highway,
Khodiyar, Ahemdabad – 382421
- 3. M/s Mahan Energen Ltd.,**
Adani House, C-105, Anand Niketan,
New Delhi- 110021

- Respondents

Shri Amit Kapoor, Sr. Advocate and Shri Dilip Kumar Moolchandani appeared on behalf of petitioner.

Shri Ashish Anand Bernard, Advocate and Shri Rakesh Thukral appeared on behalf of Respondent No. 1.

M/s Pench Thermal Energy (MP) Limited has filed the subject petition under Section 86(1)(b) of the Electricity Act, 2003 read with Regulation 4.24 of the MPERC (Power Purchase and Procurement Process) Regulations, 2023 seeking approval of the draft Supplementary Power Supply Agreement (PSA) to be executed amongst MP Power Management Company Limited, Pench Thermal Energy (MP) Limited and Mahan Energen Limited, for assigning the Power Supply Agreement dated 12.03.2020, executed between MP Power Management Company Limited and Pench Thermal Energy (MP) Limited, to Mahan Energen Limited and extension of time for fulfilling the Conditions precedent and achieving Financial Close.

2. M/s Pench Thermal Energy (MP) Limited (hereinafter called the petitioner or PTEMPL) is a generating company under Section 2(28) of the Electricity Act, 2003 and is 100% owned subsidiary of M/s Adani Power Limited which is engaged in the business of generation and supply of electricity.
3. MP Power Management Company Limited (hereinafter called Respondent No. 1 or MPPMCL) is the holding company of three distribution licensees in the State of Madhya Pradesh is entitled to undertake transaction of bulk sale and purchase of electricity on behalf of Discoms.
4. M/s Adani Power Limited (hereinafter called the Respondent No. 2, or "APL") is a generating company in terms of Section 2(28) of the Electricity Act, 2003 and 100% owns M/s Pench Thermal Energy (MP) Limited and M/s Mahan Energen Limited.
5. M/s Mahan Energen Limited (hereinafter called 'Respondent No. 3' or 'MEL') is a generating company under Section 2(28) of the Electricity Act, 2003 and is 100% owned by M/s Adani Power Limited.
6. On 22.05.2017, Ministry of Coal (MoC) issued Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India, as SHAKTI Policy, 2017. Para B(iv) of SHAKTI Policy provides coal linkages to the States and the State may indicate these linkages to distribution companies/state designated agencies and based on such linkages to undertake tariff based competitive bidding for long-term and medium-term procurement of power as per the guidelines issued by Ministry of Power and may recommend grant of these linkages to successful bidders.

7. On 05.03.2019, Ministry of Power (MoP), issued the Model Bidding Documents viz. Model Request for Qualification (RFQ), Model Request for Proposal (RFP) and Model Power Supply Agreement (PSA) for the long term procurement of electricity from thermal power stations set up on design, build, finance, own and operate (DBFOO) basis and sourcing fuel as provided under the Model Bidding Documents including allocation of coal under Para B(I), B(III) and B(IV) of the SHAKTI Policy.
8. MoP, in exercise of powers under Section 63 of Electricity Act, 2003 by resolution dated 06.03.2019, issued the Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO basis and sourcing fuel as provided under Model Bidding Documents including allocation of coal under B(I), B(III) and B(IV) of Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (SHAKTI) Policy.
9. In terms of Clause 4 of the Guidelines issued by MoP for procurement of power under DBFOO competitive bidding process, approval of the Appropriate Commission is required in case any deviations are made to the Model Bidding Documents,
10. Accordingly, MPPMCL filed a petition No. 36 of 2019 before the Commission, seeking approval of the deviations in Model Bidding Documents for long term procurement of electricity from thermal power stations set up on DBFOO basis. The Commission by order dated 24.09.2019 approved deviations in RFQ and orders dated 08.11.2019, 27.12.2019 and 14.02.2020 approved deviations in the RFP and PSA documents in accordance with Clause 4 of the Guidelines for long term procurement of electricity from thermal power stations set up on DBFOO basis.
11. Accordingly, MP Power Management Company Limited issued the RFQ and RFP for long term procurement of 1230 MW (net) electricity, sourcing fuel under Para B(iv) of SHAKTI Policy on DBFOO basis.
12. On 20.02.2020, M/s Adani Power Limited submitted its bid and selected as successful bidder (L1) and was accordingly issued Letter of Award by MPPMCL on 09.03.2020. Vide letter dated 09.03.2020, APL provided its unconditional acceptance to the LoA and intimated MPPMCL that as per Clause 2.2.6 of the RFQ and Clause 1.1.2 of the RFP, the power supply agreement may be executed by a special purpose vehicle (SPV) of the successful bidder and accordingly, informed that the power supply

agreement will be executed by M/s PENCH Thermal Energy (MP) Limited, which is a 100% owned subsidiary of APL.

13. On 12.03.2020, a Power Supply Agreement was executed between M/s PENCH Thermal Energy (MP) Limited (petitioner) and MP Power Management Company Limited (Respondent No. 1) for implementation of a power station in Madhya Pradesh for supplying 1230 MW (net) electricity to MPPMCL on “design, build, finance, own and operate” (“DBFOO”) basis by sourcing fuel from the allocated coal linkage arranged by MPPMCL as per the SHAKTI Policy, 2017 (“Original PSA”).
14. Thereafter, MPPMCL filed a petition before the Commission for adoption of tariff determined through the competitive bidding process for long term procurement of 1230 MW (net) power, being Petition No. 28 of 2020. Accordingly, the Commission vide order dated 26.05.2020, adopted the tariff for procurement of power by MPPMCL from the Project.
15. Earlier, Respondent No. 1 (MPPMCL) had filed a petition before the Commission, (Petition No. 18 of 2023) seeking approval of the draft Supplementary PSA along with extension of time for achieving Financial Close and fulfilment of Conditions precedent by 3 (three) months from the date of order of the Commission approving the draft Supplementary PSA. However, the said petition was subsequently withdrawn by MPPMCL by way of its letter dated 15.05.2023, on the contention that as the change in name was being sought by PTEMPL, therefore, it would be appropriate that the application/petition is filed by PTEMPL itself.
16. As per Article 4.1.3 of the Original PSA, Conditions precedent are required to be satisfied/fulfilled by PTEMPL within a period of 24 months from the date of the Original PSA. Meanwhile, due to nationwide lockdown on account of COVID-19, MPPMCL vide its letter dated 22.07.2020 granted extension of 105 days to PTEMPL by invoking force majeure clause 28.5.1 of the Original PSA, for achievement of Financial Close and fulfilment of Conditions precedent. The extension period of 105 days was worked out by MPPMCL by considering the lockdown period plus 30 days and accordingly, the revised date for achieving Financial Close and fulfilment of Conditions precedent revised to 25.06.2022.
17. In the subject petition, the petitioner has broadly submitted the following:

- i. *The present Petition is being filed by PTEMPL, seeking approval of the draft Supplementary PSA for assignment of Original PSA from PTEMPL to MEL. In addition to the same, by way of the present Petition, extension of time is also being sought for achievement of Financial Close and fulfilment of Conditions Precedent by 6 (six) months from the date of the Commission's order approving the draft Supplementary PSA. In that view, all other timelines mentioned in the draft Supplementary PSA will be deemed to be extended by 6 (six) months mutatis mutandis to the extension for achievement of Financial Close and fulfilment of Conditions Precedent.*
- ii. *It is pertinent to highlight herein that the location of power station was not required to be disclosed either during the bidding process nor before executing the Original PSA; as per Article 4.1.3(F) of the Original PSA, PTEMPL was required to acquire the real estate/land for the power station in the State of Madhya Pradesh within a period of 24 (twenty-four) months from the date of Original PSA.*
- iii. *Accordingly, PTEMPL by way of its letter dated 02.03.2022, informed MPPMCL that it has identified the land for development of the Project, which is located at Village Bandhaura, Tehsil Mada, Dist. Singrauli, Waidhan -486686, MP.*
- iv. *However, since the abovementioned land is owned by MEL, which is also a 100% subsidiary of Adani Power Limited, APL vide its letter dated 19.04.2022, requested MPPMCL to provide its consent for transfer of the Original PSA from PTEMPL to MEL.*
- v. *This Commission, in exercise of its power under Section 181 read with Section 86(1)(b) of the Electricity Act, notified the MPERC (Power Purchase and Procurement Process) Regulations, 2023 on 24.02.2023 which is applicable to all purchases of power by all distribution licensees in the State of Madhya Pradesh from conventional and renewable sources of energy made or proposed to be made by the distribution licensee. As per Regulation 4.24 of the Power Purchase Regulations 2023, any amendments to the existing long/medium term power sale/supply agreement entered into by the distribution licensee, is subject to the prior approval of this Commission.*
- vi. *On 14.03.2023, **MPPMCL, after lapse of approximately 1 year** from APL's request, granted its consent for change in name of supplier in Original PSA from PTEMPL to MEL, subject to certain terms and conditions, which are as follows:*

- a. *A declaration to be provided by MEL to the effect that MPPMCL and its officers/employees shall remain indemnified for any consequential legal or financial implication or otherwise, caused due to such name change and the sole responsibility will vest with MEL. Further, any savings obtained by MEL by this step will be passed on to MPPMCL and MEL to demonstrably ensure that the power supply agreement is being met by the power generated from the newly constructed plant.*
- b. *Change in the name of supplier, from PTEMPL to MEL, in the Original PSA, will be incorporated by way of execution of a supplementary power supply agreement, without encashment of bank guarantee submitted by PTEMPL.*
- c. *MEL to submit a fresh bank guarantee for Rs. 123 Crores towards performance security and the bank guarantee for Rs. 123 Crores submitted by PTEMPL will be returned to PTEMPL after receipt of fresh bank guarantee from MEL. Further, other terms and conditions of the Original PSA will remain unchanged.*
- vii. *Pursuant to the same, MEL vide its letter dated 15.03.2023 provided the requisite declaration to MPPMCL in terms of its letter dated 14.03.2023.*
- viii. *Thereafter, in continuation of MEL's letter dated 15.03.2023, APL vide its letter dated 16.03.2023, provided the requisite declarations to MPPMCL for the change in the name of supplier in the Original PSA along with draft Supplementary PSA and requested MPPMCL to expedite the execution of draft Supplementary PSA.*
- ix. *On 31.03.2023, APL, in light of necessary declarations provided by APL and MEL, once again requested MPPMCL to expedite the execution of the draft Supplementary PSA.*
- x. *Thereafter, on 17.04.2023, MPPMCL informed APL that in light of the Power Purchase Regulations 2023, the amendment to the Original PSA requires approval from this Commission and accordingly, Supplementary PSA will be executed after approval of this Commission.*
- xi. *Accordingly, on 05.05.2023, MPPMCL preferred a petition before this Commission, being Petition No. 18 of 2023, for change/substitution of name of supplier in the Original PSA from PTEMPL to MEL and accordingly transfer & assignment of the rights and obligations of the supplier in the Original PSA in the name of MEL from PTEMPL. Further, MPPMCL also sought extension of time period of deemed termination as per Article 4.5 of the Original PSA, to be three*

- months from the date of order of approval of amendments to the Original PSA by this Commission, in order for MPPMCL and MEL to fulfil conditions precedent mentioned in Article 4.1.2 and Article 4.1.3 of the Original PSA, or waiver of them in writing, by MPPMCL and MEL and achievement of Financial Close by MEL.
- xii. However, the said petition came to be withdrawn by MPPMCL on the pretext that the change in name is something that PTEMPL wants to undertake and therefore, it would be appropriate that the suitable application/petition is filed by the power producer/PTEMPL itself. Accordingly, MPPMCL vide its letter dated 15.05.2023, sought permission of this Commission to withdraw Petition No. 18 of 2023, which was listed for hearing on 23.05.2023 and the same was forwarded to APL by way of email dated 15.05.2023.
- xiii. Accordingly, the present Petition is being filed by PTEMPL, seeking approval of this Commission of the draft Supplementary PSA for assignment of Original PSA from PTEMPL to MEL. In addition to the same, by way of the present Petition, extension of time is also being sought for achievement of Financial Close and fulfilment of Conditions Precedent by 6 (six) months from the date of this Commission's order approving the draft Supplementary PSA. In that view, all other timelines mentioned in the draft Supplementary PSA will be deemed to be extended by 6 (six) months *mutatis mutandis* to the extension for achievement of Financial Close and fulfilment of Conditions Precedent.
- xiv. It is submitted that in terms of Article 33.1.1 of the Original PSA, the Original PSA can be assigned by the Supplier to any person with the prior written consent of the utility, i.e., MPPMCL and MPPMCL will be entitled to decline such consent without assigning any reason. Accordingly, as MPPMCL has provided its consent by way of its letter dated 14.03.2023, the requirements/essentials to invoke Article 33.1.1 stands fulfilled, and the Original PSA can be assigned to MEL from PTEMPL in terms of Article 33.1.1 of the Original PSA.
- xv. In addition to the same, as per Article 33.5.1 of the Original PSA, any assignment under Article 33 of the Original PSA is subject to the approvals and consents required under Applicable Laws, including approval of this Commission. In that view, in terms of Article 33.1.1. of the Original PSA, PTEMPL is seeking assignment of the Original PSA from PTEMPL to MEL and in terms of Article 33.5.1 of the Original PSA, the approval of this Commission is required to the draft Supplementary PSA, in order for it to take effect.

- xvi. *Furthermore, as per Article 38.9 of the Original PSA, no amendment or modification to the Original PSA shall be valid and effective unless such modification or amendment is agreed to in writing by the parties and duly executed by persons especially empowered in this behalf. Accordingly, PTEMPL is submitting a draft Supplementary PSA for approval of this Commission in terms of Article 33.1.1, Article 33.5.1 and Article 38.9 of the Original PSA read with Regulation 4.24 of the Power Purchase Regulations 2023.*
- xvii. *In addition to the above, it is respectfully submitted that the approval of the amendment to the Original PSA for the purpose of assigning the Original PSA from PTEMPL to MEL by way of Supplementary PSA is a mere formality/ministerial compliance to vest the various rights and obligations of PTEMPL under the Original PSA to MEL. In this regard, reliance is placed on Hon'ble Appellate Tribunal for Electricity ("APTEL") Judgment dated 16.12.2011 in the matter of Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, [2012 ELR (APTEL) 0182] (Para 158 and 159).*
- xviii. *In addition to the same, it is pertinent to highlight herein that Article 4 of the Original PSA provides for Conditions Precedent to be fulfilled by MPPMCL and PTEMPL. Further, Article 4.5 of the Original PSA, specifically provides that if the Appointed Date (the date on which all the Conditions Precedent specified in Clause 4.1 are satisfied or waived, as the case may be, shall be the Appointed Date and Contract Period shall commence with effect from the Appointed Date), does not occur for any reason whatsoever, before the 3rd (third) anniversary of the date of execution of the Original PSA or the extended period provided in accordance with Original PSA, all rights, privileges, claims and entitlements of the supplier/PTEMPL under or arising out of Original PSA will be deemed to have been waived by, and to have ceased with the concurrence of the supplier/PTEMPL, and the Original PSA shall be deemed to have been terminated by mutual agreement of the Parties.*
- xix. *Since the 3rd (third) anniversary of the execution of Original PSA was on 12.03.2023 and with time extension of 105 days provided by MPPMCL by way of its letter dated 22.07.2020, due to lockdown on account of COVID-19, the Appointed Date is to occur on or before 25.06.2023, in order to avoid deemed termination of the power supply agreement.*
- xx. *In terms of the above facts and circumstances, the present Petition is being filed by PTEMPL under Section 86(1)(b) of the Electricity Act read with Regulation 4.24*

of the Power Purchase Regulations 2023, for approval of the draft Supplementary PSA along with extension of time period for achievement of Financial Close and fulfilment of Conditions Precedent by 6 (six) months from the date of order by this Hon'ble Commission granting its approval to the draft Supplementary PSA. Accordingly, all other timelines mentioned in the Original PSA will be deemed to be extended by 6 (six) months mutatis mutandis to the extension for achievement of Financial Close and fulfilment of Conditions Precedent.

xxi. It is submitted that the Commission has jurisdiction to approve the draft Supplementary PSA and grant the consequent reliefs sought herein. PTEMPL craves leave of the Hon'ble Commission to add/alter/amend or vary this Petition and the grounds set out and produce, submit and rely on additional documents as and when necessary.

18. With the above submissions, the petitioner has prayed the following:

- i. Approve the draft Supplementary PSA to be executed amongst PTEMPL, MPPMCL and MEL, annexed as Annexure P-18 along with this Petition;*
- ii. Declare that the Original PSA dated 12.03.2020 stands assigned to MEL in terms of Article 33.1.1 of the Original PSA;*
- iii. Hold and declare that MEL shall be responsible for the achievement of Financial Close & fulfilling the Conditions Precedent as per Article 4.1.3 of the Original PSA dated 12.03.2020 and MPPMCL shall be responsible for fulfilling the Conditions Precedent as per Article 4.1.2 of the Original PSA dated 12.03.2020, within a period of 6 (six) months from the date of order of this Commission approving the draft Supplementary PSA;*
- iv. Hold and declare that all other timelines mentioned in the Original PSA shall be deemed to be extended by 6 (six) months mutatis mutandis to the extension for achievement of Financial Close and fulfilment of Conditions Precedent, including the timeline prescribed in Article 4.5 and Article 20.1 of the Original PSA.*

19. The subject petition was admitted in motion hearing held on 13th June, 2023. Vide order dated 13th June, 2023, the petitioner was directed to serve copy of petition to all Respondents within three days. The Respondents were directed to file their responses on the petition within a week, thereafter. A copy of aforesaid responses be served to

the petitioner simultaneously. Thereafter, the petitioner was directed to file rejoinder within a week.

20. M.P. Power Management Co. Ltd. (Respondent No. 1) vide letter dated 22nd June, 2023 submitted its reply to the subject petition. By affidavit dated 27.06.2023, the petitioner has filed rejoinder to the reply filed by MPPMCL.
21. During the course of the next hearing in this matter held on 11th July, 2023, the Commission raised some queries and same were conveyed to parties through order dated 11th July, 2023. Parties were directed to address the Commission on aforesaid questions and the case was fixed for further hearing on 19.07.2023.
22. By affidavit dated 13.07.2023, the petitioner has filed reply to the queries raised by the Commission. By affidavit dated 19.07.2023, MPPMCL has also filed reply to the queries raised by the Commission.
23. At the hearing held on 19th July, 2023, the parties concluded their arguments and the case was reserved for order.
24. M.P. Power Management Co. Ltd. in its reply dated 22nd June, 2023 reiterating background of the subject petition has broadly submitted the following:
 - i. *MPPMCL conducted a bidding process during September 2019 to March 2020 as per Model Bidding Documents and Guidelines issued by Ministry of Power in March 2019, for procurement of 1,230 MW (net) of electricity on a long term basis from a new Power Station to be set up in the state of Madhya Pradesh on Design, Build, Finance, Own and Operate (“DBFOO”) basis; by sourcing fuel from the allocated coal linkage under Para B (iv) of SHAKTI Policy of Government of India.*
 - ii. *Upon successful completion of competitive bidding process, Adani Power Limited (“APL”), Respondent no.2, has emerged as the Successful Bidder and a Power Supply Agreement dated 12.03.2020 (hereinafter referred to as “Original PSA”) executed between MPPMCL and PENCH Thermal Energy (MP) Limited (“PTEMPL”), a wholly owned SPV of APL, for implementation of new Power Station on DBFOO basis for supply of 1,230 MW net power to MPPMCL.*
 - iii. *Further, the answering Respondent has filed Petition No. 28 of 2020 before MPERC under Section 86(1) and Section 63 of the Electricity Act, 2003, for*

adoption of Tariff determined through transparent process of bidding for long term procurement of 1230 MW Electricity from a new Thermal Power Station to be set up on Design, Build, Finance, Own and Operate (DBFOO) basis in accordance with the Guidelines issued by Ministry of Power on 5th March' 2019.

- iv. The Commission vide its order dtd 26.05.2020 has disposed of the said Petition no. 28 of 2020, mentioning in Para 41 that:

“the Commission has noted that the tariff has been discovered by the petitioner through a transparent process of competitive bidding in accordance with the guidelines issued by the Central Government. Therefore, the Commission hereby adopts the tariff of Rs. 4.790/kWh in terms of Section 63 of the Electricity Act' 2003 for long term procurement of 1230 MW from thermal power station of 1320 MW to be set up on Design, Build, Finance, Own and Operate (DBFOO) basis in accordance with the Guidelines issued by the Central Government on 5th March' 2019. The aforesaid tariff is adopted by the Commission in accordance with the terms and conditions in the Power Supply Agreement dated 12.03.2020 executed between M.P. Power Management Company Ltd., Bhopal and M/s PENCH Thermal Energy (MP) Ltd. and filed with the subject petition as Annexure - 6.”

- v. The location of Power Station was not a requirement to be disclosed at the time of Bidding as well as at the time of signing of PSA. Post signing of the Original PSA, **PTEMPL vide its letter dated 02.03.2022** informed MPPMCL that required land for the Power Station is available at Village Bandhaura, P.O. Karsualal, Tehsil Mada, District Singrauli, Waidhan – 486686, Madhya Pradesh..
- vi. APL vide letter dated 19.04.2022, informed MPPMCL that abovementioned site identified for the power station is owned by Mahan Energen Limited (“MEL”), which is a 100% owned subsidiary of APL, similar to PTEMPL and since the site is owned by MEL, APL vide the said letter dated 19.04.2022 requested MPPMCL’s consent for the transfer of Original PSA to MEL. The letter of APL dated 19.04.2022 shall form a part of the Agreement.
- vii. **After examination, the request of APL to provide consent for transfer of the PSA from PTEMPL to MEL, was put up in 105th Board Meeting of MPPMCL held on 03.01.2023 and the Board accorded consent for transfer of PSA with following observations:**

- *to change the name of Supplier in Power Supply Agreement (PSA) dated 12.03.2020 from M/s. Pench Thermal Energy (MP) Ltd. (PTEMPL) to M/s. Mahan Energen Ltd (MEL) subject to a declaration to be received from MEL that MPPMCL and its officers / employees shall remain indemnified for any consequential legal or financial implication or otherwise caused due to such name change and the sole responsibility shall vest with MEL.*
 - *Any savings obtained by MEL by this step will be passed on to the procurer, MPPMCL. MEL will demonstrably ensure that the PSA is being met by the power generated from the newly constructed plant.*
 - *Energy Department, GoMP, be requested to give concurrence / approval for change of name of Supplier in PSA dated 12.03.2020 from PTEMPL to MEL.*
 - *after receiving concurrence / approval of Energy Department, GoMP for change of name of Supplier in PSA dated 12.03.2020, the same be incorporated in the said PSA by way of execution of a Supplementary Agreement.*
 - *Energy Department has conveyed the administrative approval to change the name of supplier from M/s Pench Thermal Energy (MP) Ltd. to M/s Mahan Energen Ltd. in the PSA dtd. 12 3.2020.*
- viii. *Recently, MPERC has notified MPERC (Power Purchase and Procurement Process) Regulations, 2023, on 24.02.2023. As per the Regulation 4.24 of the said Regulations, inter-alia, any new power purchase agreement for long / medium-term or amendments to existing long / medium-term Power Purchase Agreements (PPA's) / Power Sale Agreement (PSA) entered into by the Distribution Licensee shall be subject to the prior approval of the Commission.*
- ix. *MPPMCL vide letter dated 14.03.2023 has given consent to change the name of Supplier in the Original PSA from PTEMPL to MEL subject to certain conditions as contained in letter which are self-explanatory and form the firm basis of approval. Based on the letter of MPPMCL dated 14.3.2023, the Respondent no.2, (APL) submitted its undertaking/declaration to MPPMCL on 15.3.2023.*

- x. *It is submitted that, as settled in catena of judgments by the Hon'ble Apex Court and the Hon'ble APTEL, this Commission has the regulatory jurisdiction for approval of power purchase U/s 86 (1) (b) and as this was a competitive bidding it is imperative to note that, the regulatory jurisdiction U/s 63 is also there with this Commission.*
- xi. *Now as per the said Clause 4.24 of the MPERC (Power Purchase and Procurement Process) Regulations, 2023 Regulations, approval of amendment to the PSA dtd 12.03.2020 for transfer of PSA from PTEMPL to MEL (petitioner to Respondent no.3) shall be required.*
- xii. *Article 4 of the PSA dtd 12.03.2020 is Regarding Conditions Precedent to be fulfilled by Utility and Supplier. Since the PSA is to be transferred to a new entity MEL as the Supplier and transfer of PSA to MEL shall take place only after execution of an Amendment to the PSA.*
- xiii. *Agreement for Transfer of PSA shall require prior approval of the Commission as per MPERC (Power Purchase and Procurement Process Regulations 2023, for which this Petition has been filed. Approval of MPERC for amendment of PSA will require some time. Thereafter, for fulfilment of Condition Precedent's some time will be required.*
- xiv. *It is also pertinent to mention herein that the original PSA dated 12.3.2020 required in clause 11.2.1 and other clauses a construction of 2 units of 660 MW (1320 MW), however the Assignee entity (MEL) is learned to be trying to have a power plant of **much higher capacity i.e., 1600 MW**, however, the answering Respondent shall only be purchasing capacity upto 1230 MW net capacity. It is also to be noted that the Answering Respondent has accorded its approval for the transfer based on the conditions mentioned in the letter dated 14.3.2023 and the conditions mentioned therein and the same being accepted and declaration/undertaking given by Respondent no.2 (APL) on 15.3.2023. Therefore, any benefits accruing to petitioner from lower costs in transportation of coal due to proximity to the coal mine should ensure to the favour of the answering Respondent (MPPMCL). Similarly, any financial benefit accruing to the petitioner by operating a plant of higher capacity than the one originally of PTEMPL should also enure in favour of the answering Respondent. Lastly, during the entire period of the power supply, there shall be no cost escalation, except as per the PPA.*

- xv. *The content of draft as annexed by M/s PTEMP for obtaining approval of Commission has certain inherent inconsistency with respect to deliberation held in the matter, therefore a draft of Supplementary Agreement for change/substitution of name of Supplier in the PSA dtd 12.03.2020 from M/s PTEMPL to M/s MEL and accordingly transfer & assignment of the rights and obligations of the Supplier in the original PSA in the name of M/s MEL from M/s PTEMPL as also for extending the time period of Deemed Termination of the Original PSA as per article 4.5 of the PSA, to be **three months from the date of order of approval of amendments to the PSA by MPERC**, to fulfill conditions precedent mentioned in Article 4.1.2 and 4.1.3 of the Original PSA dtd 12.03.2020, or waiver of them in writing, by MPPMCL and MEL and achievement of Financial Closure by MEL.*
- xvi. *The Commission may also examine if any damages are payable by the Petitioner for the delay in fulfillment of conditions precedent beyond 25.6.2022 as per Article 4.1.3 of the Original PSA.*
25. The petitioner in its rejoinder dated 27th June, 2023, has broadly submitted the following:
- i. *The contents of Para 1 to 21 & Para 23 to 27 of the Reply are a matter of fact and record, and therefore no specific reply for the same is warranted.*
- ii. *In Para 22 the Reply, MPPMCL may mistakenly mentioned that the said declaration in letter dated 15.03.2023 has been submitted by the Respondent no. 2 (i.e., APL). However, this is to bring to your kind notice the declaration dated 15.03.2023 has been provided by Respondent no 3 (i.e., MEL). The Respondent no. 2 (i.e., APL) has submitted MEL's declaration to MPPMCL vide letter dated 16.03.2023.*
- iii. *In Para 28 of the Reply, it has mentioned that any benefits accruing to the Petitioner from lower costs in transportation of coal due to proximity to the coal mine should ensure to the favour of MPPMCL. Similarly, any financial benefit accruing to the Petitioner by operating a plant of higher capacity than 1320 MW should also ensure in favour of MPPMCL. In response, the Petitioner hereby submits that MEL has already provided its declaration to MPPMCL to this effect in its letter dated 15.03.2023.*
- iv. *In para 29 of the Reply, MPPMCL has proposed the draft Supplementary Agreement for change/substitution of name of Supplier in the Original PSA from*

PTEMPL to MEL and accordingly for transfer & assignment of the rights and obligations of the Supplier in the Original PSA to MEL. In this regard, **the Petitioner hereby submits that we have no objection to the contents of the Para 28 of reply filed by MPPMCL as well as draft Supplementary Agreement proposed by MPPMCL except following request:**

- a) *It is observed that MPPMCL has proposed **time period of 3 (Three) months from the date of the approval of Supplementary Agreement by Commission**, to fulfil Conditions Precedent mentioned in Article 4.1.2 and 4.1.3 of the Original PSA, or waiver of them in writing, by MPPMCL and MEL and achievement of Financial Closure by MEL, instead of 6 (Six) months as proposed by the Petitioner in its Main Petition as well as its draft Supplementary PSA.*
- b) *It is to be noted that post approval of the Petition by the Commission, both the parties have to execute the Supplementary Agreement. MEL and MPPMCL will be able to fulfil its Conditions Precedent under the Original PSA only after the execution of the Supplementary Agreement. The Commission would appreciate that the execution of Supplementary Agreement may take some time to complete the operational formalities post approval of the draft Supplementary Agreement by the Commission. It is pertinent to note that any delay in execution of Supplementary Agreement, would eventually reduce the time period available for both the parties for fulfilment of its respective Conditions Precedent.*
- c) *Considering the above facts, it is submitted that as the extension of time period is given for the purpose of fulfilment of Conditions Precedent by both the parties, which is only possible after execution of the Supplementary Agreement, the proposed time period as decided by the commission should be considered from the date of execution of the Supplementary Agreement instead of the date of order of approval of the approval of the Supplementary Agreement by Commission. Accordingly, the clause of 6 (a) of Supplementary Agreement on Page 4 of draft Supplementary Agreement, may be read as under:*
 - “ (a) **the time period shall be of three months from the date of execution of the Supplementary Agreement** among MPPMCL, PTEMPL & MEL, to fulfil conditions precedent or waiver of them in writing, by both the parties and achievement of Financial Closure by*

MEL, without any liability on either side. Beyond that period, provisions of Article 4.2, 4.3 and 4.5 shall come into operation, unless time period is extended by MPERC.”

- d) *Thus, **the Petitioner request the Commission to approve the draft Supplementary Agreement proposed by MPPMCL** after duly considering submissions made by the Petitioner in Para 4.4 (a), (b) & (c) of this rejoinder.*
- v. *MPPMCL has requested Commission to examine if any damages payable by Petitioner for the delay in fulfilment of Conditions Precedent beyond 25.06.2022 as per Clause 4.1.3. of the Original PSA dated 12.03.2020. In this regard, it is most respectfully submitted that Petition has been filed for seeking approval of the draft Supplementary PSA to be executed amongst MPPMCL, PTEMPL & MEL, for assignment of the Original PSA to MEL. Therefore, the content of the Para 30 of the Reply is not in the scope of the Main Petition (25 of 2023).*
- a) *It is pertinent to be noted that as per the Clause 36.1 of the Original PSA, any dispute, difference, or controversy in relation to the Original PSA shall be resolved amicably by both the parties in accordance with the conciliation procedure set forth in Clause 36.2 of the Original PSA. The relevant extract is reproduced as below*

“36.1 Dispute resolution

- 36.1.1 *Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 36.2....”*
- b) *Accordingly, the petitioner hereby most respectfully submits that the matter raised by the MPPMCL in Para 30 of the Reply may not be entertained by the Commission.*
- vi. *In view of the submissions made hereinabove, the Commission may note that apart from minor differences as highlighted in Para 4.4 of this rejoinder, both the parties are agreed to execute the Supplementary Agreement, which is the sole*

purpose of filing the Main Petition. Thus, the Petitioner request the Commission to approve the draft Supplementary Agreement after duly considering the submissions made by the Petitioner in Para 4.4 of this rejoinder. Even if the Commission would like to examine the request made by MPPMCL in Para 30 of the Reply, the Petitioner requests the Commission to approve the draft Supplementary Agreement as interim relief and direct MPPMCL and MEL to execute the same so that both MPPMCL and MEL can fulfil their respective Conditions Precedent under the Original PSA for the completion of the Project in time bound manner

26. Vide order 11th July, 2023, some queries were conveyed to the parties and parties were asked to file their responses. The petitioner and Respondent No. 1 have responded on the queries raised by the Commission. The query-wise responses filed by the petitioner and Respondent No. 1 is summarized as given below:

Query No. i:

Whether the Supplementary Agreement is for novation or assignment of the work to other party i.e. MEL, as article 33 of PSA provides for assignment only.

Petitioner's Reply:

*It is submitted that the draft Supplementary Agreement is for assignment of the Power Supply Agreement dated 12.03.2020 ("Original PSA"), executed between PTEMPL and Madhya Pradesh Power Management Company Limited ("Respondent No. 1"/"MPPMCL"), from PTEMPL to M/s Mahan Energen Limited ("Respondent No. 3"/"MEL"), in terms of Article 33.1.1 of the Original PSA. As per Article 33.1.1 of the Original PSA, the Original PSA can be assigned from PTEMPL to MEL with prior written consent of the utility, i.e., MPPMCL. Accordingly, Adani Power Limited had requested MPPMCL vide its letter dated 19.04.2022, to provide its consent for transfer of Original PSA from PTEMPL to MEL, **as the land identified for setting up of the Project was owned by MEL.***

It is submitted that, MPPMCL granted its consent for change in the name of supplier in the Original PSA from PTEMPL to MEL vide its letter dated 14.03.2023 subject to certain terms and conditions, which were agreed by MEL by way of its letter dated 15.03.2023. Accordingly, since MPPMCL has provided its consent in writing for assigning the Original PSA from PTEMPL to MEL, the same needs to be

approved by the Commission in terms of Article 33.5.1 of the Original PSA, for the assignment to take effect.

MPPMCL's Response:

It is submitted that the Adani Power Limited ("Respondent no. 2" / "APL") vide letter dated 19.04.2022 informed MPPMCL that site identified for the power station is owned by ("Respondent No. 3"/"MEL"), which is a 100% owned subsidiary of Adani Power Limited, similar to petitioner i.e., PTEMPL and since the site is owned by MEL, APL vide the said letter dated 19.04.2022 requested MPPMCL for their consent for the transfer of Original PSA from PTEMPL to MEL.

It is pertinent to note that pursuant to APL's request for transfer of PSA to MEL, MPPMCL has examined the provisions of the PSA and it is seen that Article 33.1.1 of the PSA expressly provides that the PSA can be assigned by the Supplier (i.e., PTEMPL) to any person, provided prior consent of MPPMCL is received. After examination of all facts & circumstances, it is seen that Original PSA can be assigned to MEL provided there is prior consent of MPPMCL.

Therefore, it is submitted that since MPPMCL has provided its consent for assigning the Original PSA from PTEMPL to MEL, the same needs to be considered by this Hon'ble Commission in terms of Article 33.5.1 of the Original PSA, which allows assignment of the PSA with prior approval of this Commission. Accordingly, it is humbly submitted that the draft Supplementary Agreement is to be considered by the Commission for assignment of Original PSA from PTEMPL to MEL. Therefore, the Supplementary Agreement is an assignment as per the terms of PSA.

Query No. ii:

Section 86 (1) (b) of the Electricity Act, 2003 and Regulation 4.24 of MPERC (Power Purchase and Procurement Process) Regulations, 2023 have been invoked in the petition, whereas the bidding was made under Section 63 of the Electricity Act, 2023. Petitioner is required to clarify, whether, in the cases finalized under Section 63, changes/ modifications can be made under section 86 (1) (b), overriding provisions of Section 63.

Petitioner's Reply:

I state that the captioned Petition has been filed by the Petitioner for approval of the draft Supplementary PSA, in order to assign the Original PSA to MEL from

PTEMPL. Further, this Commission vide its order dated 26.05.2020 in Petition No. 28 of 2020 (annexed as Annexure R-8 to MPPMCL's Reply) has already adopted the tariff for the Project under Section 63 of the Electricity Act, whilst noting that the tariff has been discovered through a transparent process of competitive bidding in accordance with guidelines issued by Ministry of Power, Govt. of India ("MoP") on 06.03.2019, namely Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO basis and sourcing fuel as provided under Model Bidding Documents including allocation of coal under B(I), B(III) and B(IV) of Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (SHAKTI) Policy.

I state that there is no adversarial position between the parties and the approval of draft Supplementary PSA, for assignment of Original PSA from PTEMPL to MEL, will in no manner have an impact on the tariff for the Project in accordance with the Original PSA, so as to invoke the provisions of Section 63 of the Electricity Act.

I state that Section 63 of the Electricity Act, only pertains to 'determination' of tariff, whereas under Section 86(1)(b) of the Electricity Act, this Commission has the general regulatory power to 'regulate' tariff, which includes the power to determine or adopt tariff, i.e., to regulate electricity purchase and procurement process. Therefore, under Section 86(1)(b) of the Electricity Act, this Commission has wider source of power, in comparison to Section 63 of the Electricity Act, which only pertains to determination of tariff, which has been duly determined and adopted by this Commission vide its order dated 26.05.2020 in Petition No. 28 of 2020. Accordingly, there arises no occasion to attract the provisions of Section 63 of the Electricity Act, in the present facts and circumstances of the case. In this regard, reliance is placed on Hon'ble Supreme Court's Judgment dated 11.04.2017 in the matter of Energy Watchdog v. CERC & Ors., (2017) 14 SCC 80 [Para 19 & 20].

In addition, this Commission, on 24.02.2023, in exercise of its power under Section 181 read with Section 86(1)(b) of the Electricity Act, notified the Madhya Pradesh Electricity Regulatory Commission (Power Purchase and Procurement Process) Regulations, 2023, which is applicable to all purchases of power by all distribution licensees in the State of Madhya Pradesh. As per Regulation 4.24 of the Power Purchase Regulations 2023, any amendments to the existing long/medium term power sale/supply agreement entered into by the distribution licensee, is subject to

the prior approval of this Commission.

Accordingly, since there is no change/impact on the tariff adopted by this Commission for the Project, this Commission may approve the draft Supplementary PSA under section 86(1)(b) of the Electricity Act read with Regulation 4.24 of the Power Purchase Regulations 2023.

MPPMCL's Response:

Since, the present petition is filed by petitioner, the respondents have no submissions regarding the same.

Query No. iii :

As per Clause 4.1.2 of PSA the supplier may in its discretion, grant extension of time for fulfillment of “Conditions precedent” to the utility. Clause 4.1.3 of PSA provides that the utility, may in its discretion, grant waiver of any “Conditions precedent” to the supplier. The Petitioner and Respondent should clearly state the provisions, which empower the Commission to grant extension in time lines for completion of “Conditions Precedents” in light of specific provisions under the PSA.

Petitioner's Reply:

As per proviso to Article 4.1.2 of the Original PSA, PTEMPL may in its discretion, grant extension of time, not exceeding 180 (one hundred and eighty) days, for fulfillment of the Conditions Precedent by MPPMCL, as set forth in Article 4.1.2. Furthermore, as per proviso to Article 4.1.3 of the Original PSA, MPPMCL, in its discretion, may waive any of the Conditions Precedent to be fulfilled by PTEMPL, set forth in Article 4.1.3. In addition, MPPMCL, in its sole discretion, may grant waiver with such conditions as it may deem fit.

Furthermore, Article 4.1.4 of the Original PSA, provides that the parties, i.e., MPPMCL and PTEMPL shall make all endeavours to satisfy the Conditions Precedent and shall provide the other party with such reasonable cooperation as may be required to assist that party in satisfying the Conditions Precedent for which that party is responsible.

Accordingly, in terms of the Original PSA, the parties, i.e., PTEMPL and MPPMCL, have the right to grant extension of time to other party for fulfillment of the Conditions

Precedent as set out in Article 4.1.2 (for MPPMCL) and Article 4.1.3 (for PTEMPL) of the Original PSA. PTEMPL hereby concurs and mutually consents with MPPMCL for extension of 3 (three) months' time from the date of approval of the draft Supplementary PSA by this Commission, for fulfilment of respective Conditions Precedent by MPPMCL and MEL, in terms of the provisions of the Original PSA.

In accordance with the provisions of the Original PSA, both the parties, i.e., PTEMPL and MPPMCL, are required to execute an amendment to the Original PSA for extension of timeline to fulfil their respective Conditions Precedent under the provisions of the Original PSA. In that view, in terms of Regulation 4.24 of the Power Purchase Regulations 2023, approval of this Commission is required for execution of the draft Supplementary Agreement.

Accordingly, this Commission is empowered under the Power Purchase Regulations 2023, to grant permission for execution of draft Supplementary Agreement for extension of timelines under the Original PSA.

In view of the above, I humbly request this Commission to approve the draft Supplementary Agreement (annexed as Annexure R-14 to MPPMCL's Reply to the captioned Petition) at the earliest.

MPPMCL's Response:

It is submitted that upon execution of Supplementary Agreement for the assignment of PSA from PTEMPL to MEL, some time will be required by both Parties for fulfilment of their respective Conditions Precedent under Original PSA. Accordingly, MPPMCL has agreed for extension of 3 months' time for fulfilment of respective Conditions Precedent by MPPMCL and MEL, in terms of provisions of the Original PSA. Supplementary Agreement is required to be executed for extension of timeline as under the PSA, any modification or amendment shall be only valid and effective if it is agreed to in writing by both the parties.

As per the Regulation 4.24 of the Madhya Pradesh Electricity Regulatory Commission (Power Purchase and Procurement Process) Regulations, 2023, any amendments to the existing long term power sale agreement entered into by the distribution licensee of the Madhya Pradesh, shall be subject to the prior approval of this Commission.

Therefore, it is most respectfully submitted that in accordance with the MPERC

Power Purchase Regulations 2023, this Commission is empowered to grant the approval for the amendment in the Original PSA for the assignment of PSA to MEL and to extend the time period of 3 (three) months, for fulfilment of their respective Conditions Precedent of both the parties from the date of approval by the Commission.

Query No. iv:

As per clauses 18.1 of the PSA and the bidding documents, the installed capacity of the project is clearly mentioned as 1320 MW. The Petitioner should submit the details of the capacity of power plant being built by MEL and both the Petitioner and Respondent should state the legal provisions under which the capacity specifically mentioned in the bidding documents can be changed, post bid.

Petitioner's Reply:

I state that as per the Electricity Act, 2003, generation activity is delicensed activity, and finalization of installed capacity of the Project is the sole discretion of the developer. The installed capacity of the Project is proposed to be increased from 1320 MW to 1600 MW, by setting up of 2 (two) units of 800 MW each in place of 2 (two) units of 660 MW each. In this regard, reference is made to Clause 1 of Annexure-I of Schedule B of the Original PSA, which provides that the power station shall have a generating capacity of not less than 1320 MW. Accordingly setting up the Project having installed capacity higher than 1320 MW is not contravening to the terms and conditions of the Original PSA.

I state that in terms of Article 18.2 of the Original PSA, the only obligation on the supplier, i.e. MEL is to supply 1230 MW to MPPMCL and increasing the Installed Capacity of the Project to 1600 MW, does not in any manner affect/hamper the obligations of MEL/PTEMPL nor the rights of MPPMCL under the Original PSA. Furthermore, as per the provisions of the Original PSA, there is no embargo on the supplier, i.e., MEL, to supply the additional quantum of power to any third party.

I further state that, MPPMCL in para 28 of its Reply has stated that MEL is developing Project having higher installed capacity i.e., 1600 MW, however MPPMCL shall only be purchasing net capacity up to 1230 MW. Moreover, MPPMCL has also stated that any financial benefit accruing due to operating a plant of higher capacity than 1320 MW, ought to be passed in favour of MPPMCL.

It is pertinent to highlight that MEL has already provided an undertaking to MPPMCL, by way of its letter dated 15.03.2023.

Therefore, I hereby submit that there is (a) as per Electricity Act 2003, generation being delicensed activity, freedom is provided to generator to install additional capacity at its own discretion (b) no embargo on MEL to supply the additional quantum of power to any third party and (c) MPPMCL has also taken cognizance of the fact that MEL is installing capacity of 1600 MW for supply of 1230 MW net capacity to MPPMCL under the Original PSA. Accordingly, the development of Project having installed capacity of 1600 MW is in line with the provisions of the Original PSA. Reliance is placed on Hon'ble Supreme Court's Judgment dated 19.06.2017 in the matter of Kanchan Udyog Limited v. United Spirits Limited, (2017) 8 SCC 237 [Para 22-24] and Judgment dated 06.04.2022 in the matter of Mahima Datla v. Dr. Renuka Datla & Ors., (2022) 10 SCC 258 [Para 30-31].

MPPMCL's Response:

It is humbly submitted that the original PSA dated 12.3.2020 required in clause 11.2.1 and other clauses a construction of 2 units of 660 MW (1320 MW), however the Assignee entity (MEL) is learned to be trying to have a power plant of much higher capacity i.e., 1600 MW, however, the answering Respondent shall only be purchasing capacity upto 1230 MW net capacity. It is also to be noted that the Answering Respondent has accorded its approval for the transfer based on the conditions mentioned in the letter dated 14.3.2023 and the conditions mentioned therein and the same being accepted and declaration/undertaking given by Adani Power Ltd. on 15.3.2023. Therefore, any benefits accruing to Petitioner from lower costs in transportation of coal due to proximity to the coal mine should ensure to the favour of the MPPMCL. Similarly, any financial benefit accruing to the Petitioner by operating a plant of higher capacity than the one originally of PTEMPL should also ensure in favour of the answering Respondent. Lastly, during the entire period of the power supply, there shall be no cost escalation, except as per the PPA.

Further the Commission may also consider article 13.6 and 18.1 of the PSA.

Query No. v:

On the issue of date of commencement of the project and on the period of extension, Petitioner and Respondent No. 1 have different views. Both the

parties may submit their final views and mutual consent on these issues, if any.

Petitioner's Reply:

As already stated in Para 15 of this Affidavit, PTEMPL concurs and mutually consents with MPPMCL for extension of 3 (three) months' time from the date of approval of the draft Supplementary PSA by the Commission, for fulfilment of respective Conditions Precedent by MEL and MPPMCL, in terms of the provisions of the Original PSA. Accordingly, there is no dispute and difference between the parties in respect of matter stated in the query.

MPPMCL's Response:

MPPMCL humbly submits that an extension of 3 (three) months' time from the date of approval of the draft Supplementary PSA may be granted by the Commission, for fulfilment of respective Conditions Precedent by MEL and MPPMCL, in terms of the provisions of the Original PSA.

27. The subject Petition has filed by PTEMPL, seeking approval of the Commission of draft Supplementary PSA for assignment of Original PSA from PTEMPL to MEL. In addition to the same, extension of time is also sought for achievement of Financial Close and fulfilment of Conditions precedent by 6 (six) months from the date of the Commission's order approving the draft Supplementary PSA.
28. Before proceeding to analyse the issues that fall for consideration, it is important that the Commission lays out the legal and regulatory framework regarding matters pertaining to adoption of tariff determined under Section 63 of the Electricity Act.
 - i. Section 63 of the Electricity Act, 2003 provides for procurement of power and determination of tariff by a transparent competitive bidding process. Once this is done, the appropriate Commission is to "adopt" the tariff which is accepted in the competitive bid subject to guidelines that are made by the MoP. Section 63 of the Act provides as under:

63. Determination of tariff by bidding process:

"Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined

through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

- ii. The subject petition is filed under Section 86(1)(b) of the Electricity Act, 2003, which provides the general regulatory powers to the Commission as follows:

86(1) The State Commission shall discharge the following functions, namely:

(a) -----

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

- iii. As per clause 4 of the Guidelines issued by MoP for procurement of power under DBFOO competitive bidding process under Section 63 of the Electricity Act, 2003, approval of the Commission is required in case any deviations are made in the Model Bidding Documents. Clause 4 of the Guidelines is reproduced below:

“4. Any deviation from the Model Bidding Documents shall be made only with the prior approval of the Appropriate Commission. Provided, however, that any project specific modifications expressly permitted in the Model Bidding Documents shall not be construed as deviations from the Model Bidding Documents”

- iv. Regarding approval of amendment in long/medium term PPA/PSA, Regulation 4.24 of the MPERC (Power Purchase and Procurement Process) Regulations, 2023 provides as under:

“4.24 Any new power purchase agreement for long/medium term or amendments to existing long/medium term Power Purchase Agreements (PPA’s)/ Power Sale Agreement (PSA) entered into by the Distribution Licensee shall be subject to the prior approval of the Commission:

Provided that in case of short-term purchases, the Licensees shall submit details within 45 days of such procurement for information of the Commission”

29. Subject petition has been filed by M/s Pench Thermal Energy (MP) Limited under section 86(1) (b) of the Electricity Act, 2003 read with Regulation 4.24 of the MPERC (Power Purchase and Procurement Process) Regulations, 2023 seeking approval of the draft Supplementary Power Supply Agreement to be executed amongst MP Power Management Company Limited, Pench Thermal Energy (MP) Limited and Mahan Energen Limited, for assigning the Power Supply Agreement dated 12.03.2020, executed between MP Power Management Company Limited and Pench Thermal Energy (M.P.) Limited, to Mahan Energen Limited.

30. On perusal of the submissions filed by parties, the Commission has observed that the petitioner has revised its prayers which were made earlier in the subject petition. The petitioner in its rejoinder dated 27th June, 2023 has submitted that it has no objection to the contents of draft Supplementary Agreement proposed by MPPMCL with its reply dated 22nd June, 2023 subject to modification in clause 6 (a) of the draft Supplementary Agreement for grant of time from the date of order of approval of the Commission.

31. On perusal of the aforesaid clause 6 (a) of the draft Supplementary Agreement filed by MPPMCL, the Commission has observed that MPPMCL has proposed time period of three months from the date of order of approval of Supplementary Agreement by the Commission, to fulfil condition precedent or waiver of them in writing, by both the parties. However, the petitioner has proposed time period of three months from the date of execution of the Supplementary Agreement. With this modification in clause 6(a), the petitioner was agreed with the draft supplementary agreement submitted by MPPMCL.

32. Further, in response to the queries raised by the Commission, the petitioner in its reply dated 13.07.2023 has submitted that it concurs and mutually consents with MPPMCL for extension of 3 (three) months' time from the date of approval of the draft Supplementary PSA by the Commission, for fulfilment of respective Conditions precedent by MPPMCL and MEL, in terms of the provisions of the Original PSA.

33. In the backdrop of factual position and legal framework, the following issues fall for the consideration of the Commission:

- i. Whether the Commission can exercise powers under Section 86 (1) (b) in the matter pertaining to adoption of tariff under Section 63 of the Electricity Act, 2003 and if so, what could be the extent and scope of such powers?
- ii. Whether a “Transfer and Assignment Agreement” proposed jointly by the Petitioner (Supplier) and Respondent MPPMCL (Utility) is to be approved by the Commission?
- iii. Whether the Commission can allow relaxation in timelines mentioned in the original PSA for achievement of financial close and fulfilment of Conditions precedent?

Findings and Analysis

34. Commission’s Findings and Analysis on the issues involved in the subject matter are dealt with as under:

I. Issue: Whether the Commission can exercise powers under Section 86 (1) (b) in the matter pertaining to adoption of tariff under Section 63 of the Electricity Act, 2003 and if so, what could be the extent and scope of such powers?

- i. It is pertinent to note that the bidding process in the subject matter was executed under the guidelines for DBFOO issued by MoP under section 63 of the Electricity Act, 2003, whereas, the petitioner has filed this petition under Section 86(1)(b) of the Electricity Act, 2003.
- ii. The petitioner has submitted that in exercise of its power under Section 181 read with Section 86(1)(b) of the Electricity Act, the Commission notified the Power Purchase Regulations 2023, which is applicable to all purchases of power by all distribution licensees in the State of Madhya Pradesh. As per Regulation 4.24 of the Power Purchase Regulations 2023, any amendment to the existing long/medium term power sale/supply agreement entered into by the distribution licensee, is subject to the prior approval of the Commission. The petitioner further submitted that in terms of Section 86(1)(b) of the Electricity Act read with Regulation 4.24 of the Power Purchase Regulations, 2023, this Commission, has the jurisdiction to approve the draft Supplementary PSA and grant consequent

relief in terms of extension of time for achieving Financial Close and fulfilment of Conditions precedent by MPPMCL and MEL.

- iii. Further, in response to the queries raised by the Commission, the petitioner submitted that Section 63 of the Electricity Act, only pertains to 'determination' of tariff through transparent process of bidding, whereas under Section 86(1)(b) of the Electricity Act, this Commission has the general regulatory power to 'regulate' tariff, which includes the power to determine or adopt tariff, i.e., to regulate electricity purchase and procurement process. Therefore, under Section 86(1)(b) of the Electricity Act, this Commission has wider source of power, in comparison to Section 63 of the Electricity Act, which only pertains to determination of tariff, which has been duly determined and adopted by this Commission vide its order dated 26.05.2020 in Petition No. 28 of 2020. According to the petitioner, no occasion arises to attract the provisions of Section 63 of the Electricity Act, in the present facts and circumstances of the case. The petitioner has also referred Hon'ble Supreme Court's Judgment dated 11.04.2017 in the matter of Energy Watchdog v. CERC & Ors., (2017) 14 SCC 80 [Para 19 & 20].
- iv. The Commission has gone through the judgement of Hon'ble Supreme Court cited by the petitioner. The Judgment does not help the petitioner. It is observed by the Commission that its general regulatory powers under Section 86 (1) (b) and under its own Regulations can be exercised only where the bidding guidelines of Government of India issued under Section 63 of the Electricity Act, 2003, do not deal with a given situation. The Commission also observes that model drafts of RFQ, RFP and PSA are also part of bidding guidelines. Deviations can be permitted to these bid documents only by way of prior approval by the appropriate Commission. It is thus concluded that the Commission can exercise powers under Section 86 (1) (b) in the matter of bidding guidelines under Section 63 of the Electricity Act, 2003, where these guidelines do not deal with the given situation. If the given situation is dealt within the pre-approved PSA, the Commission has no jurisdiction to exercise general regulatory powers.

II. Issue:- Whether a transfer and assignment agreement proposed jointly by the Petitioner (Supplier) and Respondent MPPMCL (Utility) is to be approved by the Commission?

- i. Regarding the assignment of PSA to another subsidiary of APL, the petitioner submitted that the draft Supplementary Agreement is for assignment of the PSA dated 12.03.2020 executed between PTEMPL and MPPMCL, from PTEMPL to M/s Mahan Energen Limited, in terms of Article 33.1.1 of the Original PSA.
- ii. The Commission has noted that vide its letter dated 19.04.2022, the petitioner requested MPPMCL to provide its consent for transfer of the Original PSA from PTEMPL to MEL and vide letter dated 14.03.2023, **MPPMCL, after lapse of approximately 1 year from APL's request**, granted its consent for change in name of supplier in Original PSA from PTEMPL to MEL, subject to certain conditions.
- iii. MPPMCL has submitted that the transfer of PSA to MEL is for assignment in accordance to clause 33.1.1 of the PSA, which provides that the PSA can be assigned by the Supplier to any person and same has been examined by it in light of the provisions of the PSA. MPPMCL has further submitted that after examination of all facts & circumstances, MPPMCL has provided its consent for assigning the Original PSA from PTEMPL to MEL and same needs to be considered by the Commission in terms of Article 33.5.1 of the Original PSA, which allows assignment of the PSA with prior approval of the Commission.
- iv. Since, the original PSA is proposed to be assigned to MEL under clause 33.1.1 of the PSA and Commission's approval has been sought to the assignment/ transfer agreement under clause 33.5.1 of the PSA, relevant clauses of the original PSA runs under as follows:

Clause 33.1.1:

"Subject to Clauses 33.2 and 33.3, this Agreement shall not be assigned by the Supplier to any person, save and except with the prior consent in writing of the Utility, which consent the Utility shall be entitled to decline without assigning any reason.

.....

Clause 33.5.1:

Any assignment under this Article 33 shall be subject to the approvals and consents required therefor under Applicable Laws, including approval of the Commission. Provided, however, that the grant of any consent or approval under Applicable Laws shall not oblige the Utility to grant its approval to such assignment, save and except as provided herein."

- v. The Commission observes that as per the clauses mentioned above, the Original PSA can be assigned to any person with prior consent of utility, which is MPPMCL in this case. The proposed assignment/ transfer agreement stipulates changes in the original PSA in terms of fulfilment of Conditions precedent. Approval to such changes in exercise of general regulatory powers is beyond the jurisdiction of this Commission, even if both the parties have jointly proposed such transfer and assignment agreement. However, approval to assignment of original PSA dated 12.03.2020 from PTEMPL to MEL can be given by this Commission with the prior consent of MPPMCL as per provisions of Clause 33.1.1 and 33.5.1 of the PSA. The Commission therefore grants approval to assignment of original PSA from PTEMPL to MEL in view of the consent of MPPMCL and also based on MPPMCL's submission on affidavit that such consent is provided after examination of all facts & circumstances. For the purpose of assignment, all the parties may enter into an enforceable agreement, which assigns the original PSA, but does not alter or change the conditions of original PSA.

III. Issue: Whether the Commission can allow relaxation in timelines mentioned in the original PSA for achievement of financial close and fulfilment of Conditions precedent?

- i. In the subject petition, the petitioner originally requested the Commission to extend the time period for achievement of Financial Close and fulfilment of Conditions precedent by a period of 6 (six) months from the date of order of the Commission of approval of the draft Supplementary PSA. Subsequently, by affidavit dated 13.07.2023, the petitioner concurred with MPPMCL for extension of 3 (three) months' time from the date of approval of the draft Supplementary PSA by the Commission.
- ii. In response to queries raised by the Commission in its daily order dated 11.07.2023, by affidavit dated 13.07.2023, the petitioner has submitted the following:

“As per proviso to Article 4.1.2 of the Original PSA, PTEMPL may in its discretion, grant extension of time, not exceeding 180 (one hundred and eighty) days, for fulfilment of the Conditions Precedent by MPPMCL, as set forth in Article 4.1.2. Furthermore, as per proviso to Article 4.1.3 of the Original

PSA, MPPMCL, in its discretion, may waive any of the Conditions Precedent to be fulfilled by PTEMPL, set forth in Article 4.1.3. In addition, MPPMCL, in its sole discretion, may grant waiver with such conditions as it may deem fit.

Furthermore, Article 4.1.4 of the Original PSA, provides that the parties, i.e., MPPMCL and PTEMPL shall make all endeavours to satisfy the Conditions Precedent and shall provide the other party with such reasonable cooperation as may be required to assist that party in satisfying the Conditions Precedent for which that party is responsible.

Accordingly, in terms of the Original PSA, the parties, i.e., PTEMPL and MPPMCL, have the right to grant extension of time to the other party for fulfilment of the Conditions Precedent as set out in Article 4.1.2 (for MPPMCL) and Article 4.1.3 (for PTEMPL) of the Original PSA.

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(Emphasis supplied)

- iii. In view of the above, it is observed by the Commission that specific provisions are there in PSA in terms of clauses 4.1.2 and 4.1.3. Waiver/ extension of time for Conditions precedent can be given by one party to the other as per PSA.
- iv. The petitioner and MPPMCL in their respective submissions have referred the Regulation 4.24 of Power Purchase Regulations, 2023 and requested for approval time extension of three months, for fulfilment of their respective Conditions precedent from the date of approval of supplementary agreement by the Commission.
- v. As concluded earlier by this Commission in view of judgment dated 11th April, 2017 of Hon'ble Supreme Court of India in the matter of *Energy Watchdog v. CERC & Ors.*, (2017), the general regulatory powers under Section 86(1)(b)) and under its own Regulations can be exercised only where the bidding guidelines of Government of India issued under Section 63 of the Electricity Act, 2003 do not deal with a given situation. In the subject petition, the relaxation for fulfillment of the Conditions precedent is already dealt in PSA prescribed under bidding guidelines. Therefore, the prayer of the petitioner for extension of timelines for fulfilling the Conditions precedent is beyond the jurisdiction of the Commission, hence not considered in this order.

Regarding Capacity of the Project:

35. During the proceeding of the subject matter, MPPMCL has raised the issue of higher project capacity than that mentioned in PSA. MPPMCL in its reply dated 22nd June 2023 mentioned that the original PSA dated 12.3.2020 required in clause 11.2.1 and other clauses a capacity of 2 units of 660 MW (1320 MW), however the assignee entity is learned to be trying to have a power plant of much higher capacity i.e. 1600 MW. However as per MPPMCL, it shall be purchasing capacity upto 1230 MW. MPPMCL again vide written submission made on 19th July 2023 raised this issue and further mentioned two more clauses of PSA, namely 13.6 and 18.1 of PSA, wherein installed capacity of the power station is indicated. MPPMCL by way of their written submission sought that any financial benefits accruing to the Petitioner by operating a plant of higher capacity than the one originally of PTEMPL be ensured in favour of MPPMCL.
36. The petitioner in its response to the queries raised by the Commission has submitted that the installed capacity of the Project is proposed to be increased from 1320 MW to 1600 MW, by setting up of two units of 800 MW each in place of two units of 660 MW each. In this regard, the petitioner has referred clause 1 of Annexure-I of Schedule B of the Original PSA, which provides that the power station shall have a generating capacity of not less than 1320 MW. The petitioner has also mentioned that the generation activity is delicensed activity, and finalization of installed capacity of the Project is the sole discretion of the developer.
37. The Commission observes that the Petitioner has not made any prayer to amend the clauses of PSA mentioned by the Respondent in respect of installed capacity of the Power Station. The Petitioner has only mentioned that it is proposed to increase installed capacity of the project from 1320 MW to 1600 MW. The law is well settled on this point. In case of M/s D B Power Ltd., vs. RERC Appeal No. 235 of 2015, Hon'ble APTEL had held as under:

16.16 According to the Respondents No. 2 to 5, the signed PPA may be valid and enforceable only when it is approved by the Commission. It is noted that the draft PPA was duly approved by the State Commission by its Order as early as on 23.03.2011 and therefore, there does not appear any further necessity for a separate approval required for the approval of the PPA. In the present case, it is

*not disputed that the draft PPA had already been approved by the State Commission and only after the approval of the said draft PPA, bidding process has to begin and in that process, the tariff has to be determined through the competitive bidding process. The fact that the tariff was discovered in a transparent manner by following the guidelines issued by the Central Government is evident from the report of the Evaluation Committee. Only on the basis of this report, RRVPN (R-2) filed petition before the State Commission for adoption of the tariff quoted by the Appellant(s). Para 2.3 of the guidelines provides that unless explicitly specified, the provisions of these guidelines shall be binding on the procurer. Therefore, the mandatory nature of the guidelines cannot be questioned by the parties. **Any deviation to the bidding documents or the guidelines can be permitted by the State Commission that too, before the bidding process was initiated/completed.** In the present case, the bidding process was over and after it was over, the RRVPN decided to accept the offer as recommended by the Evaluation Committee and accordingly, filed a petition for approval of the said tariff under Section 63 of the Act. Thus, once the RRVPN filed the petition to the Commission for the adoption of tariff, the bid process got concluded. Thereafter, jurisdiction of the State Commission under Section 63 is limited to find out only two aspects: (a) To verify as to whether the tariff has been adopted through transparent bidding process; (b) Whether the bidding process has been in accordance with the guidelines issued by the Central Government.*

*16.17 If the State Commission is satisfied on the above aspects, it has to mandatorily adopt the tariff determined through the competitive bidding accepted by the procurer. In the process of adoption of tariff under Section 63, **the Commission cannot entertain any fresh deviation to the bidding documents viz. reduction in capacity, etc. which stand approved by it before the beginning of the bid process.***

(Emphasis Supplied)

38. In view of the above, the Commission neither has the jurisdiction at this stage to allow any change in installed capacity specifically mentioned in bidding document, nor by way of this order it is allowing any change to capacity, which is not in line with the bidding documents. For removal of doubts, it is hereby made clear by the Commission that the installed capacity of the project has to be in line with the bidding documents and PSA.

Summary:

39. Resultantly, Commission hereby allows the petition in following terms:

- i. Assignment of the original PSA from PTEMPL to MEL is allowed subject to observations of the Commission in its findings in para (v) on issue II in this order.;
- ii. Commission has no jurisdiction to interfere regarding waiver/ extension of timelines of Conditions precedent. Parties may take their own course as per provisions under PSA dated 12.03.2020;
- iii. The installed capacity should be in line with bidding documents and PSA.

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

(Prashant Chaturvedi)
Member

(Gopal Srivastava)
Member (Law)