

# MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

## BHOPAL

**Sub: In the matter of petition under Section 86(1) (b) & (k) of the Electricity Act, 2003, read with MPERC (Conduct of Business) Regulations, 2004 seeking approval of Draft Supplementary Agreement to PPA executed between MPPMCL and JPVL on 5<sup>th</sup> January' 2011 for procurement of 65% power generated from 2x250MW Bina TPP at Distt. Sagar (M.P.).**

**Petition No. 31 of 2020**

### **ORDER**

**(Hearing through Video Conferencing)**

**(Date of Hearing: 01<sup>st</sup> September' 2020)**

**(Date of Order: 07<sup>th</sup> September' 2020)**

**M.P. Power Management Company Ltd.,**

Block No. 7, Shakti Bhawan, Rampur, Jabalpur – 482008

- **Petitioner**

**Vs.**

**Jaiprakash Power Ventrues Ltd.,**

Complex of JP Bina Thermal Power Plant,

Sector 128, Noida, U.P.- 201 304

- **Respondent**

Shri Ashish Bernard, Advocate and Shri Ajasra Gupta, GM (Commercial) appeared for the petitioner.

Shri Venkatesh, Advocate, appeared for the respondent.

M.P. Power Management Company Ltd. has filed the subject petition under Section 86(1) (b) & (k) of the Electricity Act, 2003, read with MPERC (Conduct of Business) Regulations, 2004 seeking approval of draft Supplementary Agreement to PPA executed between the petitioner and the respondent on 5<sup>th</sup> January' 2011 for procurement of 65% power generated from the Respondent's 2x250MW Bina TPP, Distt. Sagar.

2. During the course of hearing held on 01<sup>st</sup> September' 2020, the Commission has observed the following:

- i. By affidavit dated 3<sup>rd</sup> June' 2020, the Respondent (M/s JPVL) has filed its reply to the subject petition. In its aforesaid reply, the Respondent has not accepted insertion of the Article 6.1 (C) in the draft Supplementary Agreement filed by the petitioner for approval with the subject petition. The Respondent has sought deletion of proposed Article 6.1 (C) in the draft Supplementary Agreement with the prayer that the subject petition be allowed only after considering its aforesaid reply to the subject petition.
- ii. Vide Commission's last daily order dated 10<sup>th</sup> August' 2020, the petitioner was asked to file rejoinder by 22<sup>nd</sup> August' 2020 to above reply filed by the respondent.
- iii. Subsequently, by additional affidavit dated 20<sup>th</sup> August'2020, the respondent, in addition to its above-mentioned reply dated 03<sup>rd</sup> June'2020, has filed another reply to the subject petition. In its additional submission, the respondent has sought some modification in Article 16.23 in the draft Supplementary Agreement filed by the petitioner for approval with the subject petition.
- iv. The petitioner has not filed rejoinder. Ld. Counsel for the petitioner stated that the petitioner has challenged the concerned Regulations notified by the Central Electricity Regulatory Commission to the extent of claiming compensation towards Technical Minimum before the Hon'ble High Court at Delhi. He requested that the hearing in the matter be adjourned for a month in view of Letter dated 04.08.2020 received from the Energy Department, Govt. of M.P by the petitioner.

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v. Ld. Counsel of the respondent vehemently opposed the grounds based on which the petitioner has sought one month's time extension at this stage of the case. He stated that the aforesaid grounds have no merit in law for consideration by the Commission.

3. On perusal of the response filed by the respondent, the attention of the parties in the subject matter was drawn to the provisions under Article 16.2.1 of the Power Purchase Agreement dated 05.01.2011 which provides that,

*“16.2.1. This Agreement may only be amended or supplemented by a written agreement between the parties and after duly obtaining the approval of the Appropriate Commission, where necessary.”*

It is evident from above articulation that the PPA may only be amended or supplemented by a written Agreement between the parties. However, in the instant case, the respondent in its responses on the subject petition has not agreed to with the Article 6.1(C) and has sought modification in Article 16.23 of draft Supplementary Agreement. Accordingly, it is observed that the respondent has not endorsed its agreement with the instant draft Supplementary Agreement filed before the Commission under the subject petition.

4. Let us also look into some relevant paragraphs of analysis and conclusion by the Hon'ble Appellate Tribunal for Electricity in recent judgement dated 29<sup>th</sup> July' 2020 in Appeal No. 363 of 2019 and 364 of 2019 mentioned by Learned Counsel of the petitioner during the arguments. In Para 8.6,8.10,8.11 and 8.13 of aforesaid judgment, Hon'ble Tribunal for Electricity has held the following:

*“8.6 The fundamental thing in a contract/ agreement is the free will/consent of the parties. The parties who are signing the agreement/contract should do so with free will without any compulsion or under any influence of any other party. The parties enter into a contract with open mind, taking care of their commercial interest and all other aspects, as an independent commercial entity without any influence from any third party. In Power Procurement Agreement, tariff is the most important aspect, which in this case is not known initially but will be known only after the same is determined by the State Commission at a later stage. It is because of this reason that the parties have reserved their right, regarding continuation of tariff and have included the exit option to take final decision regarding termination of PPA, within a period of 30 days after determination of tariff by the State Commission.*

*8.10 While there are no disputes about the powers of the State Commission as provided in the Electricity Act, 2003 and instant regulations on the subject, however, while exercising its powers the State Commission has to examine the PPA submitted to it from all angles of law. While examining the PPA, the State Commission has to not only ensure that the PPA is as per the Electricity Act and Regulations but also to ensure that it is by free will or consent of the parties. On the contrary, the State Commission by giving the direction to delete the 'Exit Option', mutually agreed between the parties, has conveyed that irrespective of the fact whether the parties are satisfied or not satisfied with the tariff determined by the State Commission, they will have to continue with the PPA.*

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*8.11 No doubt that the tariff will be determined by the State Commission only but, the final decision regarding signing of Power Purchase Agreement on the basis of tariff determined by the State Commission lies with the parties only. It is a commercial decision and the parties will take an independent decision taking into consideration their commercial interest in the long term during the tenure of the PPA without any influence from third party. This is an utmost important aspect. As such though the State Commission in exercise of its power under Section 62 of the Electricity Act, 2003 may determine the tariff **but it cannot force either the generating company or the licensee to enter into a contract based on such tariff against their will/consent and cannot give direction to change the terms of the contract invoking inherent jurisdiction.***

*8.13 We find that the State Commission while exercising its powers conferred to it under law has not examined the PPA submitted by the parties from all angles of law. In this case, the State Commission was fully aware that the parties have mutually agreed to include "Exit clause" but it has ignored this important aspect and directed to amend the PPA by deleting the "Exit clause". Accordingly, we are of the considered opinion that the direction passed by the State Commission in the impugned order regarding the deletion of exit option is bad in law and thus is wrong."*

5. Based on foregoing discussions, the subject petition for approval of the draft supplementary agreement is not considered by the Commission in the present form as the same is lacking of free will and consent of the respondent as per requirement under Article 16.2.1 of the PPA dated 05.01.2011 executed between the parties in the subject matter. Therefore, the subject petition is dismissed. However, the petitioner is at liberty to approach the Commission with afresh petition after fulfilling all provisions including Article 16.2.1 of PPA. With the aforesaid findings and directions, the subject petition is disposed of.

(Shashi Bhushan Pathak)  
Member

(Mukul Dhariwal)  
Member

(S.P.S. Parihar)  
Chairman