

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

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



Petition No. 44 of 2016 (re-open)

PRESENT:

Mukul Dhariwal, Member

Shashi Bhushan Pathak, Member

In the matter remitted back by Hon'ble Appellate Tribunal for Electricity vide Order dated 29.10.2018 in Appeal No. 42 of 2017 filed by M.P. Power Management Company Limited against the Commission's order dated 21st September' 2016, in petition No. 44 of 2016 regarding dispute for amendment in 'due date' in the PPA dated 5th January' 2011.

AND IN THE MATTER OF:

M.P. Power Management Company Limited

Block No. 16, Shakti Bhawan,
Rampur, Jabalpur – 482008

- **Petitioner**

//Versus//

1. **M/s Jaiprakash Power Ventures Ltd.**
Sector 128, Noida-201304, UP
2. **M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.**
Shakti Bhawan, Rampur, Jabalpur – 482008.
3. **M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.**
Nishtha Parisar, Govind pura, Bhopal – 462023
4. **M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.**
GPH Compound, Polo ground, Indore – 452003

- **Respondents**

ORDER

(Passed on this day of 25th September' 2020)

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

Shri Venkatesh, Advocate, Ms. Nishtha Kumar, Advocate and Shri Ajeya Kumar Tripathi, DGM, appeared on behalf of the Respondent No. 1.

Shri G.R. Patele, GM and Shri H. Saxena, AO appeared on behalf of the Respondent No. 3.

Background in the subject matter:

1. M.P. Power Management Company Limited (hereinafter called 'the petitioner' or 'MPPMCL') had filed the subject petition No. 44 of 2016 under Section 86(1)(f) of the Electricity Act, 2003 for adjudication on dispute between M.P. Power Management Company Ltd. and M/s Jaiprakash Power Ventures Ltd. (hereinafter called 'Respondent No. 1' or 'JPVL' who is an independent power producer operating its 2x250 MW coal based thermal power plant at Bina in Madhya Pradesh) regarding the definition of '**due date**' mentioned in Power Purchase Agreement (herein after called 'PPA') which triggers applicability for '**Late Payment Surcharge**'.
2. In the subject petition, the petitioner requested to issue binding order/directions to all the parties for amending Article 1.1 of the PPA dated 05.01.2011, to change the definition of 'Due Date' to mean 'sixtieth (60th) day' in place of 'twenty first' (21st) day' to align the PPA with the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations (hereinafter called 'the Tariff Regulations') and to execute amendment agreement effective from 05.01,2011, i.e. the date of signing the original PPA. Vide Commission's order dated 21st September'2016, this petition was not found maintainable and disposed of.
3. The petitioner (MPPMCL) challenged the above order of the Commission in Appeal No. 42 of 2017 before the Hon'ble Appellate Tribunal for Electricity (hereinafter called 'the Tribunal'). Vide Judgment dated 29th October' 2018, Hon'ble Appellate Tribunal for Electricity remitted the matter back to the Commission with the directions to dispose of the petition on merits after hearing all the parties. In the aforesaid Judgment, Hon'ble Tribunal without expressing any opinion on merits of the controversy between MPPMCL and M/s JPVL has mentioned the following:

- 5.2 *“Though the Commission has filed a lengthy written submission but in the impugned order dated 21- 9-2016 in last seven paragraphs as stated above, the matter came to be disposed of. In the impugned order, Commission never referred to several points submitted by the Appellant/Petitioner except pointing out that Appellant/Petitioner seeking amendment to the PPA with regard to number of days with reference to due date and the same being resisted by first Respondent herein. The order does not spell out the reasons why it cannot be allowed. It further proceeds to say that there has to be a written agreement between the parties in order to seek amendment to the terms of PPA that is prior to approaching the appropriate Commission, totally ignoring the fact that dispute has arisen between parties with regard to number of days so far as ‘due date’. After referring to contentions raised in the petition and submissions made by the petitioner without even calling upon the Respondents to respond to the petition, has proceeded to pass the impugned order as stated above. We are of the opinion that the impugned order is non-speaking order; in other words, in order to arrive at the conclusion, there is no discussion what so ever with regard to all the points raised by the petitioner in the petition except stating that there is no difference in interpretation of provisions between the parties.*
- 5.3 *In the impugned order, Commission has not directed its mind to consider why and how the 21 days have to be the due date and beyond that a surcharge should be levied which is in contradiction of model PPA as well as MPERC Tariff Regulations of 2009. It is also not stated why the existing terms in the PPA with regard to due date should not be brought in anomaly with subsequent Regulations of 2012 and 2015. At Article 16.2, it clearly says parties can seek amendment or supplement to the PPA by written agreement between the parties. If dispute has arisen between the parties with regard to due date to be brought in line with the existing Regulations, it was incumbent upon the State Commission to give reasons and say why such term in the agreement in consonance with the Regulations should not be incorporated between the parties. Dismissing the petition before even hearing the Respondents therein, Commission ought not to have disposed of the matter opining that it was not maintainable, whether Respondents have appeared or not or filed objections or not, nothing is reflected in the order. In fact, Commission has filed detailed objections in the appeal which is much elaborated than the impugned order. Since the impugned order is without any reasoning, we set aside the same.*

5.4 ***Make it clear that we have not expressed any opinion on merits of the controversy. All contentions are kept open.***

5.5 ***The matter is remitted back to the State Commission to dispose of the petition on merits by reasoned order after hearing all the parties.***

(Emphasis Supplied)

4. In view of aforesaid and findings and directions of the Hon'ble Tribunal in its judgment dated 29th October' 2018, the Commission has re-opened the original petition No. 44 of 2016.

Petitioner's submission:

5. In the subject petition, the petitioner broadly submitted the following:

(i) *The existing provision of "Due Date" of 21st Day read with Article 10.4.2 regarding Late Payment Surcharge in the PPA is repugnant to the provisions of the Tariff Regulations, the former, by operation of law is relegated to otiose and cannot be permitted to be continued. Therefore, in the wake of the Tariff Regulations, 2015 (and also the Tariff Regulations 2009 and 2012), it is crystal clear that the Regulation 46 thereof (also Regulation 30 of Tariff Regulations 2009 and Regulation 32 of Tariff Regulations 2012) would override and is required to be read into Article 1.1 and Article 10.4.2 of the PPA.*

(ii) *The 21st day "due date" read with Article 10.4.2 regarding Late Payment Surcharge under the existing PPA, which is in contravention to the Regulatory mandate of 60th day "due date", is resulting in increase in cost of power purchase and higher Retail Tariff for the common Consumers.*

(iii) *Therefore, the Petitioner is suffering grave prejudice due to wrong provision of "Due Date" read with Article 10.4.2 regarding Late Payment Surcharge in PPA which is palpably repugnant to the Tariff Regulations.*

(iv) *When under Article 13.5.2 of PPA, the Respondent No. 1 was approached for seeking its consent for making appropriate amendments in the relevant Article in PPA, so that the provisions of the PPA are made compliant with the relevant provisions of the Tariff Regulations.*

- (v) *Regretfully, the Respondent No. 1 has declined to execute the proposed amendment agreement and is not willing to abide by the provisions of the Tariff Regulations. Therefore, the dispute has arisen between the Petitioner and the Respondent No. 1.*
- (vi) *It was found that certain existing provisions of the PPA are repugnant to the Tariff Regulations notified by this Hon'ble Commission. More specifically, the definition of term "Due Date" of 21th Day read with Article 10.4.2 regarding Late Payment Surcharge given in the PPA, which triggers applicability of "Late Payment Surcharge", is expressly at variation with the mandate of the Tariff Regulations, that is 60th Day.*
- (vii) *Also a simple comparison of the relevant provisions of Tariff Regulations and the clauses of PPA, make quite apparent that there is an inconsistency between the provisions of the two as regards the applicability of Late Payment Surcharge. Article 1.1 of the PPA provides for a 21st Day due date as trigger, while Regulation 46 of Tariff Regulation 2015 (and Regulation 30 of Tariff Regulations 2009 and Regulation 32 of the Tariff Regulation, 2012), provides for a 60th Day due date as trigger. The latter being mandate of Statutory Regulation, the same shall prevail over the provision of the PPA.*
- (viii) *Therefore, the definition of "Due Date" is required to be corrected as "60th Day" in place of "21st Day" in Article 1.1 of the PPA to align it with the Tariff Regulation.*
- (ix) *This inconsistency is causing grave prejudice to the Petitioner leading to increase in the Power Purchase cost of the Petitioner, in turn making power costlier for the common consumers.*
- (x) *That, three letters dated 09-06-2015, 12-06-2015 and 24-06-2015 were written to the Respondent No. 1 for seeking consent for executing amendment agreement to incorporate appropriate changes to make the relevant provisions of the PPAs compliant with the Tariff Regulations, i.e., to correct the meaning of "Due Date" from 21st Day to 60th Day in accordance with the Tariff Regulations.*
- (xi) *That, the Respondent No. 1 has categorically declined the above said proposal of the Petitioner for amendment of the PPA through its replies dated 12-06-2015 and 30-06-2015 respectively and, therefore, is not willing to abide by the provisions of the Tariff Regulations. Therefore, the dispute has arisen between the Petitioner and the Respondent No. 1 (M/s JPVL).*

6. With the above submissions, the petitioner had sought the following relief in the subject petition:

- i. To issue binding order/ directions to the all the parties in the present Petition to amend Article 1.1 of the Power Purchase Agreement (PPA) dated 05-01-2011, executed between the Respondent No. 1 and the Petitioner along with Respondent No. 2 to 4 as confirming parties, to correct the definition of "Due Date" to mean "sixtieth (60th) day" in place of "twenty first (21st) day" to align the PPA with the Tariff Regulations and execute amendment agreement effective from 05-01-2011, the date of original PPA;*
- ii. To direct the Respondent No. 1 to remit back to the Petitioner, the amount already paid by the Petitioner, as Late Payment Surcharge;*
- iii. To direct the Respondent No. 1 to pay to the Petitioner, the interest corresponding to 39 days (60 days minus 21 days) @ 18% p.a. on the bill amount already paid by the Petitioner since start of supply.*
- iv. To quash the Supplementary Bills, if any, issued by the Respondent No. 1 in terms of existing impugned PPA;*
- v. In the interim, to direct Respondent No. 1 not to issue Supplementary Bills for "Late Payment Surcharge", if any, on the basis of 21st day Due Date but to issue Supplementary Bills for "Late Payment Surcharge", if any, only on the basis of 60th Day Due Date.*

Procedural history:

7. The original petition No. 44 of 2016 was re-opened and hearing was held on the 28th May' 2019 wherein, the petitioner was asked to serve copy of petition on all Respondents in the matter within weeks' time. The Respondents in this matter were also asked to file their reply to the aforesaid petition by the 22nd June' 2019 after serving a copy of the same on other side also.
8. By affidavit dated 14th June' 2019, the petitioner filed a copy of the updated petition along with an additional submission raising some additional grounds in the subject petition. During the course of hearing held on the 25th June' 2019, the Respondent No. 1 sought four weeks' time for filing response on the subject petition as well as the

additional submission filed by the petitioner. The Respondent No. 1 was allowed to file the same by the 15th July' 2019.

9. By affidavit dated 24th July' 2019, the Respondent No. 1 (M/s JPVL) filed its response on the subject petition and the additional submission filed by the petitioner. During the course of hearing held on the 30th July' 2019, the petitioner was asked to file its rejoinder by the 24th August' 2019.
10. By affidavit dated 21st August' 2019, the petitioner filed its comprehensive rejoinder to the reply filed by the Respondent No. 1.
11. During the course of hearing held on the 15th October' 2019, it was observed that the petitioner (MPPMCL) and the Respondent No. 1 (JPVL) have filed their respective submissions. It was also observed that the issue involved in the subject petition pertains to amendment in PPA in line with the provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations and the MPERC Tariff Regulations for new control period which was under the process of notification after seeking comments on the draft Regulations and holding public hearing.

Subsequently, MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 for new control period of FY 2019-20 to 2023-24 was notified in Gazette of Madhya Pradesh on 28th February' 2020.

12. During the hearing held on the 14th May' 2020, Counsels for the petitioner and the Respondent No. 1 taking into cognizance the above-mentioned notification of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 for new control period of FY 2019-20 to FY 2023-24 have placed their final arguments and sought time for filing their respective written submissions. Vide Commission's order dated 19th May' 2020, both the parties were directed to file their written submissions by the 5th June' 2020.
13. On 3rd June' 2020 and 4th June' 2020, the Respondent No. 1 (M/s JPVL) and the petitioner (MPPMCL) filed their written submissions, respectively.

Reply of Respondent No. 1 to the subject petition:

14. By affidavit dated 24th July' 2019, the Respondent No. 1 (M/s JPVL) has broadly submitted the following in its reply to the subject petition:
- i. *MPPMCL in filing the instant Petition has not disclosed some crucial facts pertaining to the PPA between MPPMCL and JPVL. The alleged repugnant 'terms and conditions' now being assailed by MPPMCL were mutually agreed and accepted during the proceeding of Petition No. 11 of 2012, wherein the PPA was being approved by the Commission.*
 - ii. *The Commission during the said proceedings specifically sought comments from MPPMCL as to why the terms and conditions of Billing and Payment are distinct from the 'terms and conditions' as provided under the Model PPA. Notably, MPPMCL, vide its Affidavits dated 19.07.2012 and 16.08.2012, had specifically averred that the case of JPVL is unique as **Bina Project was a revival project and hence certain 'terms and conditions' including 'billing and payment' are distinct** due to the said reason. The Commission after considering the submissions of JPVL, at length, was pleased to pass a detailed Order approving the PPA between MPPMCL and JPVL.*
 - iii. *None of the above facts are even pleaded or produced before the Commission. Therefore, JPVL is placing on record the Affidavits dated 19.07.2012 and 16.08.2012 filed by MPPMCL in Petition 11 of 2012.*
 - iv. *Further, since MPPMCL, of its volition, had sought such amendments from the applicable Regulations/ PPA at the time of approval of the same, MPPMCL cannot now after a lapse of almost 7 years be permitted to withdraw from the same, especially when the PPA approval Order has been passed on the prayer of MPPMCL and the same has now attained finality.*
 - v. *It is pertinent to mention that Regulation 33 of the 2012 Tariff Regulations provides for a rebate of only 2% if payment is made by the Distribution Licensee within period of one month of presentation of bill. However, the PPA provides for a rebate of 2.25% on Provisional Bill, which is 0.25% higher than what is provided under the Regulation. In view of the above it is submitted that even, Article 10.4.1 of the PPA is at variant with Regulation 33. However, MPPMCL has cherry picked the issue of 'Due Date' and consciously chosen not to agitate the rebate clause, as the PPA, which provides for a higher rebate, is more beneficial to MPPMCL.*

- vi. *The rebate of 2.25% as provided under the PPA was also agreed mutually between the parties during the PPA approval proceedings. As a matter of fact, the efficient norms qua Due Date of 21 days and a higher rebate of 2.25% was an act of give and take between MPPMCL and JPVL. Therefore, since both the parties have mutually agreed to better and more efficient norms under the PPA qua billing and payment, it is not open to either of the parties to agitate the same at a belated stage on the pretext of it being contrary to the Regulations.*
- vii. *With utmost respect and humility, it is submitted that MPPMCL, in filing Petition before the Commission has not even whispered about the PPA approval Order wherein such specific deviation was sought by MPPMCL itself. The same amounts to a material concealment of fact and for this reason only the instant Petition is liable to be dismissed.*
- viii. *Keeping in mind the foregoing principle, it would be relevant to examine the facts of the present case. The following facts establish that MPPCL intended to be bound by the terms and conditions of the PPA:*
- (a) *Firstly, by way of Petition No. 11 of 2012 dated 12.01.2012, MPPMCL had sought approval of the PPA by this Commission. In Paragraph 12 of the said Petition, MPPMCL, on Affidavit, stated that the PPA is in line with the Model PPA approved by the State Government.*
- (b) *Secondly, this Commission by Order dated 30.06.2012 observed that the provisions of the PPA relating to billing and payment (including the 21 day Due Date clause) were at variance with the Model PPA. Accordingly, the Petitioner and the Respondents were directed to file their response regarding the same. The Petitioner/MPPMCL through its response dated 19.07.2012 stated that the commercial terms relating to billing and payment were different because there was substantial progress in the construction of JB TPP and because M/s. Bina Power Supply Co. Ltd (A wholly owned subsidiary of JPVL) had already invested considerable amount. It is submitted that the Petitioner's response indicates that it was a conscious decision to keep 'Due Date' as 21 days, and they did not raise an opposition to the variance even when it was pointed out to them. Therefore, MPPMCL should not be permitted to renege on a response they submitted on affidavit to this Hon'ble Commission, especially at this belated stage.*

- (c) *Thirdly, the 2009 Tariff Regulations prescribed a 'Due Date' of 60 days. The PPA was executed during the subsistence of the said 2009 Tariff Regulations. This fact unequivocally establishes that it was a conscious and mutual decision taken by the MPPCL and JVCL to keep the 'Due Date' as 21 days.*
- (d) *Lastly, it is submitted that MPPCL was making its payments of LPS bills in accordance with the Terms and Conditions of PPA for a period of nearly 6 years which also unequivocally establishes that MPPCL on its own volition decided to keep the time period for the Due Date and the LPS as 21 days. This sudden realisation by MPPCL that the 'Due Date' in the PPA dated 05.01.2011, triggering the applicability of LPS, is at variance with the mandate of the 2009, 2012 and 2015 Tariff Regulations, does not and ought not to give them a right to retract from the commitment made under the PPA.*
- ix. *In the first instant, it is pertinent to note that after notification of the 2009 Tariff Regulations and during its subsistence, even though the same contained a provision to the contrary, MPPCL and JPVL had mutually agreed to sign the PPA dated 05.01.2011, for supply of 65% power from 2x250 MW (installed capacity of JBTTP, consciously including the clause pertaining to "Due Date" and "LPS".*
- x. *In fact, the said PPA was duly approved by the Commission vide Order dated 07.09.2012 in Petition No. 11 of 2012. Notably, the clause pertaining to "Due Date" and "LPS", even though the same were a departure from the existing regulations, were also approved as is, without any change or modification. The said departure was in fact intentional as the State of Madhya Pradesh was facing acute power shortage and the present project was languishing for years. Therefore, JPVL based on the assurances given by the Petitioner in the PPA had sought to revive the project.*
- xi. *Keeping in mind the foregoing, it is submitted that the instant Petition is not maintainable as:*
- (a) *MPPMCL consciously entered into PPA dated 05.01.2011 and urged before the Commission that the said PPA in its existing form may be approved. The approval was duly accorded by the Hon'ble Commission vide Order dated 07.09.2012. Therefore, MPPMCL is now estopped from taking a different position and assailing the provisions of the PPA which it consciously sought to be approved by the Hon'ble Commission previously.*

- (b) *The terms and conditions of the PPA dated 05.01.2011 were mutually negotiated, accepted and then approved by the Hon'ble Commission. Therefore, MPPCL cannot go behind its earlier position and seek to assail the provisions of the PPA dated 05.01.2011.*
- (c) *MPPCL failed to challenge the Order dated 07.09.2012 of this Hon'ble Commission despite having sufficient time. That by way of the instant petition, it is seeking to circumvent the aforesaid Order which has already attained finality.*
- (d) *After a lapse of almost 6 years, MPPCL is seeking to withdraw from Terms and Conditions of the PPA, it had agreed on its own volition. Resultantly, MPPMCL, at this belated stage is trying to wriggle out of its obligations under the PPA, simply because it would now have to suffer the consequences of LPS. MPPCL in the garb of the present Petition is seeking to assail the Order dated 07.09.2012 passed by this Hon'ble Commission which is impermissible in law.*
- (e) *MPPMCL did not agitate any issue qua the variance between the Regulations and the terms and conditions of the PPA during the currency of the said Regulations, i.e. the 2009 Tariff Regulations, despite the fact that the PPA was in fact signed and approved after the notification of the 2009 Tariff Regulations. It is, therefore, submitted that now this sudden realisation by MPPCL that the definition of "Due Date" in the PPA dated 05.01.2011, triggering the applicability of LPS, is at variance with the mandate of the 2009, 2012 and 2015 Tariff Regulations, should not give them a right to retract from the commitment they made under the PPA, benefits under which they have been enjoying for over 8 years.*

Additional submission filed by the Petitioner:

15. By affidavit dated 14th June' 2019, the petitioner filed an additional submission referring the Judgment passed by Hon'ble Supreme Court in case of All India Power Engineers Federation V/s Sasan Power Limited and Other, (2017) 1 SCC 487. The petitioner submitted that the Hon'ble Supreme Court has held that Regulated Entities in the Power Sector cannot deviate from the provision of Regulations and mutually agree to a term different from that provided in the Regulations, if the same is detrimental to the Public Interest. The relevant portion of the judgment is extracted by the petitioner as given below:

"21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Indian Contract Act governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right

*that is fully known to a party, a party cannot be said to waive it. **But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.-----"***

16. Apart from above, the petitioner also mentioned that Article 16.21.1 of PPA provides that if any provision of the PPA is in deviation or inconsistent with the provisions in the Act, or any rules or regulations made thereunder, such provisions of the PPA shall be deemed to be amended to the extent required to bring it into compliance with such provisions. The petitioner has further stated that Article 16.21.1 of the PPA necessitates compliance with the law, rules and regulations, which obviously have a higher precedence over Article 16.2. requiring mutual consent/written agreement of parties for effecting change or amendment in the PPA.
17. By affidavit dated 24th July' 2019, the Respondent No. 1 (M/s JPVL) filed the following response on the additional ground raised by the petitioner:
 - i. *That the contents of Para 15(iii) rely upon All India Power Engineers Federation vs Sasan Power Limited and Other, (2017) 1 SCC 487. It is submitted that the application of the aforementioned case to the facts of the present case is erroneous. In the case of All India Power Engineers Federation, the Hon'ble Supreme Court held that if a waiver is claimed of certain provisions of a PPA which affect tariff that are ultimately payable by the consumer i.e. they affect public interest, then the waiver would have to be approved by the Appropriate Commission under Section 61 to 63 of the Act.*
 - ii. *It is submitted that, in contradiction, the present case is concerned with the definition of "Due Date" in the PPA. The said definition is a mutually agreed departure from the Regulations and norms and not a waiver of any contractual obligation. Further, such deviation from the norms has in fact already been approved by this Hon'ble Commission vide an Order the dated 07.09.2012. Hence, evidently, the case of All India Power Engineers Federation (Supra) cannot be applied to the facts of the present case, as being out of context and the ratio being read in isolation, which is wholly impermissible. In this regard, reliance is placed on the settled position of law that a Judgment ought not to be read as a statute, and must be read in the context of the facts of the case involved and the questions of law*

raised therein, as has been laid down by the Hon'ble Supreme Court in the several cases.

- iii. In addition to the foregoing submissions, it may also be borne in mind that the issue of Due Date does not even arise when the Petitioner pays the Monthly Bill in time. Hence, Due Date is essentially a disincentive to ensure that discipline is maintained by the Petitioner/ MPPMCL. The definition of 'Due Date' therefore has no impact on the Tariff payable by the Petitioner, and is based on commercial principles of providing performance better than the norms. Hence, the reliance placed on the All India Power Engineers Federation Judgment of the Supreme Court is entirely misplaced.*

Rejoinder filed by the petitioner:

18. By affidavit dated 21st August' 2019, the petitioner filed its rejoinder to the reply filed by the Respondent No. 1. The petitioner in its Rejoinder broadly submitted the following:
- (i.) Amendment in 21st day Due Date agreed in PPA Dated 05.01.2011 to align it with 60 days payment period provided in Tariff Regulations is based on concrete evidence in the form of Performance Report prepared by AG (ERSA) observing that there is an instance of additional outgo of LPS due to Petitioner agreeing to 21st day Due Date in variance to 30 days payment period (compared with Model PPA) provided in Tariff Regulations. On the contrary there is no evidence to suggest that Respondent has been actually suffered due to 0.25% higher rebate applicable to early payment of Provisional Bills.
 - (ii.) Hon'ble Apex Court has treated PPAs as special contracts, which are governed by provisions of Electricity Act 2003 and Regulations made thereunder. Therefore, the doctrine of "Acquiescence" and "Estoppel", commonly applicable to ordinary contracts governed by the provisions the of Indian Contract Act 1872, will not be a bar when statutory provisions contained in the Tariff Regulations made under Electricity Act 2003 are sought to be implemented in the PPA.
 - (iii.) The "Operational Norms" provided Tariff regulations are ceiling norms. Parties are permitted to agree to such "more efficient norms", which should necessarily result in lower cost of power, saving of precious natural resources such as fossil fuel etc. However, 21st Day Due Date is not at all a more efficient norm, a commercial arrangement in deviation to that prescribed in Tariff Regulations and is eventually resulting in costlier power at the hands of Consumers.

- (iv.) Accountant General (Economic & Revenue Sector Audit), Bhopal [AG (ERSA)], is a part of the Indian Audit & Accounts Department functions under the Comptroller and Auditor General of India (CAGI), which is a Constitutional Body, mandated by the Constitution of India, to promote accountability, transparency and good governance through high quality auditing and accounting and provide independent assurance to the stakeholders, the legislature, the Executive and the Public, that public funds are being used efficiently and for the intended purposes. Therefore, the observations made by AG (ERSA) in its titled – *“Performance Audit on “Power Purchase Agreements entered into by MP Power Management Company Ltd -----.*

Hon’ble Supreme Court had clearly observed in Para 25 of its judgment in All India Power Engineers Federation (Supra), that if there is an element of “public interest” involved, the court steps in to thwart any waiver which may be contrary to such public interest. There is no applicability of Para 30 and 31 of the said judgment to the facts of the present case. In the present case there is a clear evidence in the form of Audit Report, that there is actually an additional outgo of avoidable LPS, due to agreeing to a shorter Due Date of 21st Days in PPA as compared to 60 days payment period provided in the Tariff Regulations. The same is adversely affecting the cost of procurement of power and consequently the tariff. Therefore, there is clearly an element of public interest involved.

19. Vide submission dated 3rd June’ 2020 and dated 4th June’ 2020, the Respondent No. 1 (M/s JPVL) and the petitioner (MPPMCL) filed their final comprehensive written submissions. The parties have reiterated the contents which were filed by them in their earlier submissions. The Respondent No. 1 has cited some orders/Judgments passed by the Hon’ble Appellate Tribunal for Electricity and Hon’ble Apex court on similar issues related to the present petition.

Observations and findings:

20. The Power Purchase Agreement (PPA) was executed on 05.01.2011 between the Petitioner and the Respondent No. 1, with all three Distribution Companies (Respondent Nos. 2 to 4 in the Petition), as confirming parties, for supply of 65% power from 2x250 MW (Phase-I) Jaypee Bina Thermal Power Plant (JBTPP) for a period of 25 years at the tariff approved by this Commission. The said PPA was approved by the Commission by an order dated 07.09.2012 passed in Petition No. 11 of 2012 filed by the petitioner.

21. The petitioner has filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute with the respondent No. 1 (M/s. Jaiprakash Ventures Pvt. Ltd.) The petitioner has sought to amend the Article 1.1 of the PPA with regard to the definition of "Due Date". The petitioner while seeking relief to execute amendment in the PPA in respect of "Due Date" has also sought recovery of amount already paid on account of late payment surcharge to Respondent No. 1 due to delay payment for past period.
22. The petitioner has stated that an Audit Report was prepared by Accountant General (Economic and Revenue Sector Audit), Madhya Pradesh, Bhopal on 30.8.2013. In this Audit Report, it was pointed out that due to reduction of payment period from 30 days (which was provided in model PPA) to 21 days in executed PPA, Late Payment Surcharge was of Rs.39.19 Lakhs between the period from August 2012 and May 2013. After receiving and analysis of the said Audit Report, the petitioner wrote letters to Respondent No. 1 seeking its consent for amending the "due date" in the PPA from 21 days to 60 days and to also incorporate graded rebate calculated on day to day basis up to last day of the due date. The Respondent No. 1 vide its letter dated 12.06.2015, agreed to graded rebate calculated on day to day basis, however, it refused to amend the due date from 21 days to 60 days. Therefore, the petitioner has filed the subject petition contending that there is a dispute in interpretation of the term 'due date' under section 86(1)(f) of the Electricity Act, 2003.
23. The petitioner (MPPMCL) has contended that certain existing provisions of the PPA dated 05.01.2011 are repugnant to the MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2009, MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations 2012 and MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations 2015 notified by this Commission. More specifically, the petitioner has contended that the definition of the term 'Due Date' as envisaged in Article 1.1 of the PPA which triggers the applicability of 'Late Payment Surcharge' ("LPS"), is at variance/ repugnant to the provisions under aforesaid Regulations.
24. The Commission issued and notified the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations 2009 ("Tariff Regulations, 2009") on **8th May' 2009**. Regarding the Late Payment

Surcharge and Rebate, the Regulation 30.1 and 31.1 of the aforesaid Regulations provided as under:

Late Payment Surcharge:

30.1 In case payment of bills is delayed beyond a period of 60 days from the date presentation of bills, Generating Company may levy a late payment surcharge at the rate of 1.25% per month for each day of delay of payment.

Rebate

31.1 For payment of bills of capacity charges and energy charges through a letter of credit on presentation, a rebate of 2% shall be allowed. If the payment is made by any other mode but within a period of one month of presentation of bills by the Generating Company, a rebate of 1% shall be allowed."

25. The above-mentioned provisions in MPERC Tariff Regulations were subsisting at the time of signing the PPA on the 05.01.2011 between the Petitioner and the Respondents. Subsequently, the MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2012 and Regulations, 2015 were notified by the Commission on the 12th December' 2012 and the 1st January' 2016, respectively which also provided similar provisions for Late Payment Surcharge and Rebate as contained in above mentioned MPERC Tariff Regulations, 2009.
26. The Model Power Purchase Agreement (PPA) was prepared by the Energy Department, Government of Madhya Pradesh for procurement of power from power projects under MoU route on regulated tariff basis. The petitioner (M.P. Power Management Company Ltd.) and three Distribution Companies of the State jointly executed Power Purchase Agreements with the six numbers Independent Power Producers (IPPs) including the Respondent No. 1 in the subject matter. In the Model PPA, the due date for payment of monthly bills was thirtieth (30th) day from the receipt of monthly bill and the petitioner signed the PPA with all IPPs except Respondent No. 1 i.e. M/s Bina Power Supply Company Ltd. with the same due date (30th day) as mentioned in Model PPA. However, the PPA with Respondent No.1 was signed with the respondent No.1 with variation in due date i.e. 21st day instead of 30th day in Model PPA.
27. The petitioner and the Respondent No. 1 entered into a long term Power Purchase Agreement (PPA) on 5th January' 2011 for supply of 65% of power from 2x250 MW installed capacity of the respondent's thermal power project at Bina for a period of 25 years. The payment related terms as defined in the said PPA are reproduced below:

- The term 'due date' has been defined in Article 1.1 of PPA as under:
'Due Date' shall mean the twenty first (21st) day after a Monthly Bill or a Supplementary Bill is delivered to and its receipt is acknowledged by the Procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such Monthly Bill or Supplementary Bill is payable by the Procurer;

- "Rebate" has been defined in Article 10.4.1 of PPA as under:
'Rebate' against payment of Monthly Bills/ Provisional Bills shall be allowed to the Procurer in terms as mentioned below:
 - (a) *The Provisional Bill shall be raised by the Company on the last Business Day of the supply Month where the Capacity Charges shall be based on the Declared Capacity for the entire month and the Variable Charges shall be based on the final implemented Scheduled Energy upto 25th Day of the Month. **Rebate Shall be payable at the rate of two point two five percent (2.25%) of the amount (which shall be the full amount due under the Provisional Bill) credited to the Company's account of first day of the next month.***
 - (b) *For payment of Bills of the Company within **three (3) days of the presentation of the monthly bill, a rebate of two percent (2%) of the amount paid shall be allowed by the Company.***
 - (c) *Where payments are made after the period mentioned in clause [(a) and (b)] above and by the Due date, **a rebate of one percent (1%) of the amount paid shall be allowed by the Company.***

The procurer shall be authorized to make adjustment of rebate from the amount of the bills paid.

- "Late Payment Surcharge" has been provided in Article 10.4.2 of PPA as under:
*"In case the payment of any Bill for charges, payable under this Agreement is delayed by the Procurer beyond the **Due Date** thereof, a Late Payment Surcharge shall be payable by the Procurer to the Company at the rate of 1.25% per Month on the amount of outstanding payment, calculated on day to day basis for each month or the day, compounded on monthly basis. Late Payment Surcharge shall be claimed by the Company or Procurer through Supplementary Bills."*

28. The petitioner had filed a petition (registered as Petition No. 11 of 2012) seeking approval of PPA dated 05.11.2011 signed with the respondent No.1 i.e. M/s Bina Power

Supply Co. Ltd., along with several other petitions for approval of PPAs executed with other IPPs also. In the aforesaid petition No. 11 of 2012, it was mentioned that the PPA is in line with the Model PPA approved by the State Government. However, while examining the said petition, it was observed that some of the provisions under PPA were at variance with the provisions under Model PPA. The issue of variation in definition of "Due date" along with some other issues were conveyed to all the parties including the petitioner to explain the reasons for deviations from model PPA and applicable Tariff Regulations.

29. In response to the above issue, the petitioner (MPPMCL) had submitted the following:
"As regards the Power Purchase Agreement dated 05.01.2011 signed with M/s Bina Power Supply Company Limited is concerned, it is submitted that the Memorandum of Understanding and matters relating to the development of the Project of Bina Power Supply Company Ltd. and procurement of power from the said Company have been in vogue since the year 2008. The principal terms with the Bina Power Supply Company Ltd. was deliberated and finalized much earlier to the other Companies dealt in the Record of Proceedings dated 30.06.2012 and much before the Notification of the Standard Bid Documents. The Govt. of Madhya Pradesh vide its letter No.3517/13/2011, Bhopal Dated 16th April, 2011 had approved the PPA for 70% instead of 42% of the installed capacity of 2x250 MW of Phase-1 of Bina Power Supply Co. Ltd. The quantum of supply from the Bina Power Supply Company Ltd. at 70% of the installed capacity inclusive of 5% to the State Government share at variable cost was pursuant to these earlier discussions and is, therefore, at variance with the other projects wherein 30% of the quantum of the installed capacity inclusive of 5% to the State Government share at variable cost have been finalized. The project being in advanced stage and as assured by developer, provision for change in Scheduled CoD was not considered. The first unit is expected to get commissioned by 31st July, 2012."
30. Vide submission dated 19th July' 2012, the Petitioner (MPPMCL) further submitted the following:
*"The contract with Bina Power Supply Company Ltd. was a continuation of the past and further that there was substantial progress in the construction of the power plant as compared to the other projects, the provisions of the clauses relating to the contract, performance guarantee and escrow mechanism are different. **Similarly, the commercial terms relating to rebate in billing payment and third-party sales provisions are different. The petitioner mentioned that M/s Bina Power Supply Co. Ltd. has already***

invested considerable amount on its revival as mentioned in Clause No.3.3.1 of the PPA.”

(Emphasis Supplied)

31. From the above, it is evident that the petitioner was specifically asked as to why the terms and conditions of billing and payment were distinct from the terms and conditions as provided under the Model PPA. The petitioner by affidavit dated 19th July' 2012 and 16th August' 2012, had specifically submitted that the case of Respondent No. 1 is unique as Bina Project was a revival project and hence certain terms and conditions including billing and payment are distinct due the said reason. After considering the above submissions and justification of the petitioner in respect of deviation in PPA, vide order dated 7th September' 2012, the Commission accorded approval to the Power Purchase Agreement executed between MPPMCL and JPVL. The clause pertaining to due date and late payment surcharge, was departure from the existing Regulations and Model PPA with free will/consent of all parties in the contract.
32. The Commission has noted that the MPERC Tariff Regulations 2009 were subsisting as on the date of signing of PPA with the provisions of 'due date' and 'late payment surcharge'. During the proceedings for approving the said PPA, the petitioner by affidavits dated 19.7.2012 and 16.8.2012 explicitly submitted that the case of the Respondent No. 1 is unique as Bina Project was a revival project and hence certain terms and conditions including billing and payment are distinct from the provisions of Regulations and Model PPA due to the said reason with their consent and mutual understanding. Only after considering the said submissions of the Appellant, a detailed order approving the present PPA was passed by the Commission.
33. The Commission has observed that the Tariff Regulations 2009 provides for a rebate of only 2% in case of payment is made by the Distribution Companies within a period of one month of presentation of bill through letter of credit and by any other mode, the rebate of 1% shall be allowed. However, the PPA provides for a rebate of 2.25% on provisional Bill which is higher than what is provided under the Tariff Regulations. Even though the Article 10.4.1 of the PPA is at variance with provision for rebate in Tariff Regulations, the petitioner has preferred to raise only the issue of 'Due Date' in the present petition and has not sought amendment in clause of rebate in the PPA, which provides for a higher rebate.

34. The Respondent No. 1 has cited the Judgment dated 24.01.2016 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 82 and 90 of 2012 in the matter of BSES Rajdhani power Ltd. and CERC wherein it has been concluded that the aspects of payment mechanism is not an integral part of tariff and same can be deviated from the norms prescribed in Regulations. It was further held that the Tariff Regulations would not determine aspects of payment security mechanism and hence contracts deviated from the Regulations would not have to be aligned and modified thereof. However, in order to protect their commercial interest, the parties may negotiate and mutually agree on the terms and conditions other than the Tariff Regulations.
35. The Commission has observed from the records of proceedings held and affidavits filed by both the parties in Petition No. 11/2012 for approval of the subject PPA that the provision of due date as 60 days was existing in the Tariff Regulations, 2009 however, the petitioner and the respondent No.1 have mutually decided to keep the time period for due date and late payment surcharge as 21 days. Therefore, the petitioner had consciously entered into PPA dated 05.01.2011 with variance in aforesaid provisions under Regulations with free will/consent and mutual understanding between petitioner and Respondent No. 1. Accordingly, payments were made by the petitioner for about 7 years without any dispute in this regard. The petitioner has now sought amendments in the definition of 'due date' in PPA in line with the Regulations after the lapse of more than 7 years and requested for recovery of late payment surcharge for past period paid by the petitioner as per the PPA. However, the petitioner has not sought amendment in 'rebate' clause which is also at variance from the provisions of rebate under Tariff Regulations as it is beneficial for the petitioner.
36. In support of its contention, the petitioner has cited the Judgment of Hon'ble Supreme Court of India in the case of PTC India Limited v/s Central Electricity Regulatory Commission [(2010) 4 SCC 603]. On the other side, the Respondent No. 1 in its response dated 24th July' 2019, has submitted that the issue of whether regulatory framework overrides existing contracts is no longer res integra, in as much as the law as settled in the case of PTC vs. CERC & Ors., (2010) 4 SCC 603, has to be read in conjunction with the law as clarified in the Judgment dated 24.01.2013 passed by the Hon'ble APTEL in BSES Rajdhani Power Ltd. Vs CERC, in Appeal No. 82 & 90 of 2012. According to aforesaid Judgment, it is concluded that Tariff Regulations would not determine aspects of payment security mechanism and hence contracts deviating from the Regulations would not have to be aligned and modified thereof. It was also held that aspects of payment

mechanism is not an integral part of tariff and the same can be deviated from the norms prescribed in Regulations, which are not mandatory in nature of payments.

37. In the aforesaid Judgment in the matter of PTC India Limited vs CERC, the Hon'ble Supreme Court was approached to decide whether the Hon'ble APTEL had jurisdiction under Section 111 of the Electricity Act, 2003 to examine the validity of Regulations framed by the CERC under Section 178 of the EA 2003.
38. In the aforesaid judgment, the Hon'ble Supreme Court noted that the Central Commission made the Trading Margin Regulations knowing that it has general application and will also override existing and future PPAs. The Trading Margin Regulations was made with the intention of bringing a change across the board. Also, in the PTC India case the Trading Margin Regulations were made after execution of concerned PPAs.
39. The petitioner in its additional affidavit dated 14th June' 2019 has also cited the judgment passed by Hon'ble Supreme Court of India in the case of All India Power Engineers Federation vs Sasan Power Limited [(2017) I SCC 487]. On the other side, the Respondent No. 1 submitted that in the case of All India Power Engineers Federation, the Hon'ble Supreme Court held that if a waiver is claimed of certain provisions of a PPA which affect tariff that are ultimately payable by the consumer i.e. they affect public interest, then the waiver would have to be approved by the Appropriate Commission under Section 61 to 63 of the Act.
40. The present case is concerned with the definition of "Due Date" in the PPA. The said definition is a mutually agreed departure from the Regulations and norms and not a waiver of any contractual obligation. Further, such deviation from the norms has in fact already been approved by the Commission vide an Order the dated 07.09.2012. Hence, evidently, the aforesaid case cannot be applied to the facts of the present case, as being out of context and the ratio being read in isolation, which is wholly inapplicable.
41. The Tariff Regulations containing the provisions with respect to 'due date' and 'late payment surcharge' were in existence prior to execution of the PPA. The MPERC Tariff Regulations, 2009 provided that *'in case of payment of bills delayed beyond a period of 60 days from the date of presentation of bills, Generating Company may levy a late payment surcharge at the rate of 1.25% per month for each day of delay of payment'*.

42. Similarly, Tariff Regulations, 2012 notified on 12.12.2012 after the execution of PPA, also provided for 60 days as the due date and late payment surcharge at the rate of 1.25% per month for each day of delay of payment. The same provision has also been adopted in the Tariff Regulations, 2015 notified on 1st January' 2015. From the aforesaid provisions of various Tariff Regulations, the Commission has observed that the provision of 'Late Payment Surcharge' has always been same before execution of the PPA. At the time of signing the PPA, the petitioner did not consider to incorporate the provision of 'Late Payment Surcharge' in line with the Tariff Regulations.
43. The Commission has further observed that the provisions of 'Late Payment Surcharge' and 'Due Date' are enabling provisions which become applicable in case the procurer delays in making payment for the energy supplied to it. Thus, it was open to the generator and the procurer to negotiate and decide on the time limit they want to prescribe after which the provision of late payment surcharge will be triggered. In the subject matter, despite Tariff Regulations 2009 providing for a time limit of 60 days, the petitioner and Respondent No. 1 opted for 21 days and for this variation, they had got approval of the Commission also in the PPA.
44. It is also noted from the submission of the respondent No.1 that the petitioner was making its payments of LPS bills in accordance with the Terms and Conditions of PPA for a period of nearly 6 years which also unequivocally establishes that MPPMCL on its own volition decided to keep the time period for the Due Date and the LPS as 21 days. This contention of MPPMCL at this stage that the 'Due Date' in the PPA dated 05.01.2011, triggering the applicability of LPS, is at variance with the mandate of the 2009, 2012 and 2015 Tariff Regulations, does not confer an open ended right to the petitioner to retract from the commitment made under the PPA with full will/consent and mutual understanding between the parties in that PPA. It is an important fact in the subject matter that the respondent No.1 vide its letters written to the petitioner in June'2015 has declined the MPPMCL's proposal for amending the Due Date/Payment Period as specified under the PPA. Therefore, the proposal/request of the petitioner to amend the said article in the approved PPA, particularly when the parties have been abiding for about six years by their obligations thereunder, is without the free will/consent of the other party in PPA.
45. In the above circumstances, we look into some relevant paragraphs of analysis and conclusion by the Hon'ble Appellate Tribunal for Electricity in recent judgement dated 29th

July' 2020 in Appeal Nos. 363 of 2019 and 364 of 2019. 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.

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 form 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."*

46. The Commission has now issued and notified MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 on the 28th February' 2020 for the period of five years commencing 1st April 2019. Regulation 1.3 of the Tariff Regulations, 2020 states that 'these Regulations shall come into force with effect from 01.04.2019, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of five years i.e. upto 31.03.2024'. With regard to 'Late Payment Surcharge', Regulation 55.1 of the aforesaid Regulations provides as under:

'in case the payment of any bill for charges payable under these Regulations is delayed beyond a period of 45 days from the date of presentation of bills or the due date as mentioned in power purchase agreement whichever is earlier, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company'.

47. On notification of the above MPERC Tariff Regulations,2020, the issues under dispute in the subject petition are settled from 01.04.2019 onwards in terms of provisions under the Regulations.

48. Based on the foregoing observations and findings, the subject petition is not allowed being devoid of merits hence, disposed of.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

Date: 25th September' 2020