

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION  
BHOPAL**

**Sub: In the matter of Petition under Section 94(1)(f) of the Electricity Act, 2003 r/w Regulation 40 of MPERC (Conduct of Business) (Revision-1) Regulations, 2016 and section 114 r/w Order XLVII Rule 1, Code of Civil Procedure, 1908 seeking review and/or modification of the order dated 26.07.2023 passed by the Commission in Petition No 25 of 2023.**

**ORDER**

(Date of Order: 26<sup>th</sup> April, 2024)

**Petition No. 50 of 2023**

**M/s Pench Thermal Energy (MP) Ltd.**

Adani Corporate House, Shantigram,  
Near Vaishno Devi Circle, S. G. Highway,  
Khodiyar, Ahmedabad– 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, Ahmedabad – 382421
- 3. M/s Mahan Energen Ltd.,**  
Adani House, C-105, Anand Niketan,  
New Delhi- 110021

**- Respondents**

Shri Amit Kapoor, Sr. Advocate, Shri Akshat Jain, Advocate and Shri Dilip Kumar Moolchandani appeared on behalf of Petitioner.

Shri Ashish Bernard, Advocate and Shri Anindya Khare appeared on behalf of Respondent no. 1 (MPPMCL).

M/s Pench Thermal Energy (MP) Limited has filed this petition for review of the Commission's Order dated 26.07.2023 issued in petition No. 25 of 2023. Aforesaid petition No. 25 of 2023 was filed by the same Petitioner 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. Subject Petition has been filed under Section 94(1)(f) of the Electricity Act, 2003 r/w Regulation 40 of MPERC (Conduct of Business) (Revision-I) Regulations, 2016 and Section 114 r/w Order XLVII Rule 1, Code of Civil Procedure, 1908.
3. 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.
4. 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.
5. 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 owns M/s Pench Thermal Energy (MP) Limited and M/s Mahan Energen Limited wholly.
6. 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.
7. The main contention of the Petitioner is that the Commission in the impugned Order has erroneously interpreted the facts of the DB Power case which deals with reduction in 'Contracted Capacity' and applied its observations in the present case with reference to 'Installed Capacity'. It has been further contended that in the said Impugned Order, the Commission has used the term "Installed Capacity" instead of "Contracted Capacity" whereas, the APTEL's order dated 02.02.2018 in the case of DB Power talks about 'Contracted Capacity' and not 'Installed Capacity'.

8. Brief Background of the subject petition is as follows:
- I. Earlier, MPPMCL (Respondent No. 1 in subject case) initiated the bidding process for procurement of 1230 MW (net) power from thermal power stations set up on design, build, finance, own and operate (DBFOO) basis under Section 63 of the Electricity Act, 2003. In this regard, MPPMCL filed a petition No. 36 of 2019 before the Commission, seeking approval of the deviations in Model Bidding Documents.
  - II. The Commission by order dated 24.09.2019 approved deviations in RFQ. The Commission by orders dated 08.11.2019, 27.12.2019 and 14.02.2020 also 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. Thereafter, MP Power Management Company Limited issued the RFQ and RFP for long term procurement of 1230 MW (net) power. Various deviations were allowed in petition No. 36 of 2019 to MPPMCL (Respondent No. 1 in this case) which included deviations with respect to merchant and open capacity. Installed Capacity was also mentioned in bidding documents.
  - III. On 12.03.2020, a Power Supply Agreement (PSA) was executed between M/s PENCH Thermal Energy (MP) Limited and MP Power Management Company Limited for supplying 1230 MW (net) electricity to MPPMCL on "DBFOO" basis under Section 63 of the Electricity Act, 2003, by sourcing fuel from the allocated coal linkage arranged by MPPMCL as per the SHAKTI Policy, 2017.
  - IV. In terms of the bidding guidelines issued under Section 63 of the Electricity Capacity Act, 2003, MPPMCL filed Petition No. 28 of 2020 before the Commission for adoption of tariff determined through the competitive bidding process for long term procurement of 1230 MW (net) power and vide order dated 26.05.2020, the Commission adopted the tariff for procurement of power from the Project which was discovered under Section 63 of the Electricity Act, 2003.
  - V. Thereafter, M/s PENCH Thermal Energy (MP) Limited filed petition No. 25 of 2023 on 23.05.2023 seeking approval of draft Supplementary Power Supply Agreement to be executed amongst MPPMCL, PTEMPL and MEL, for assigning the Power Supply Agreement dated 12.03.2020, executed between MPPMCL and PENCH Thermal Energy (MP) Limited, to Mahan Energen Limited and

extension of time for fulfilling the Conditions precedent and achieving Financial Close.

- VI. During the proceedings of aforesaid petition No. 25 of 2023, Respondent MPPMCL raised the issue of higher installed capacity than that mentioned in PSA. While doing so, Respondent MPPMCL referred various relevant clauses of PSA. In response, the Petitioner in its rejoinder had 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.
- VII. Vide Order dated 26.07.2023, the Commission had allowed the petition No. 25 of 2023 to the extent of 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 the 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.
9. Aggrieved with the aforesaid order dated 26.07.2023, the Petitioner has filed this petition for review of the Commission's Order to the extent of aforesaid observation at Sr. No. VII (iii) only, regarding change in installed capacity of the project. The Petitioner submitted that while dealing the "installed capacity of the Power Station", the Commission has referred order of Hon'ble Appellate Tribunal for Electricity dated 02.02.2018 (Appeal no. 235 of 2015), in the matter of DB Power Ltd. and Ors v. Rajasthan Electricity Regulatory Commission and Ors. As per petitioner, order of APTEL in DB Power case deals with reduction in Contracted Capacity, whereas the Commission applied its observations in the present case with reference to "Installed Capacity" and not "Contracted Capacity".
10. In the subject petition, the Petitioner has submitted the facts of the case in the matter of DB Power Ltd. and Ors v. RERC and Ors. (Appeal no. 235 of 2015) and has presented following grounds for filing the Review Petition:
- i. *The Commission in para 38 & 39 (iii) of the Impugned order has relied upon the para 16.16 & 16.17 of the Hon'ble APTEL judgement dated 02.02.2018 wherein Hon'ble APTEL observed that once the bidding process is over, the State*

Commission cannot reduce the original contracted capacity and accordingly this Commission held that the capacity of the project should be in line with the bidding documents and the PSA.

- ii. *The Commission has ignored the view taken by the Hon'ble APTEL while rejecting the RERC order dated 22.07.2015. The Hon'ble APTEL has rejected reduction in contracted capacity from 1000 MW to 500 MW considering a view that competitive bidding under Section 63 of the Act is not only to safeguard the consumers' interests but also to maintain the balance in securing the interest of all stakeholders including the suppliers/ generators, in accordance with the GOI Guidelines.*
- iii. *In the present case, MEL has planned the higher installed capacity of the Power Station from 1320 MW to 1600 MW. However, Petitioner has filed an Affidavit dated 13.07.2023 in the Petition no. 25 of 2023 and has clarified to this Commission that MEL will supply contracted capacity of 1230 MW (net) to MPPMCL as agreed under the terms of Original PSA. Contracted Capacity under any agreement is net energy required to be supplied at the delivery point by the generator from its power station. Therefore, it is agreed position between the parties that Contracted Capacity of 1230 MW (net) under the Original PSA shall remain intact. The obligation of MPPMCL under the Original PSA is to avail 1320 MW power on gross basis from the Power Station developed by MEL and increasing the installed capacity of the Power Station to 1600 MW does not in any manner affect/hamper rights of MPPMCL under the Original PSA. Moreover, the Petitioner vide affidavit dated 13.07.2023 in the Petition no. 25 of 2023 has clarified to this Commission that any financial saving accruing due to operating a plant with higher capacity of 1600 MW as compared to 1320 MW will be passed on to the MPPMCL under PSA.*
- iv. *As per clause 1 of Annexure-I of Schedule B of the Original PSA, the installed capacity of the Power Station is mentioned as "not less than 1320 MW." The ultimate objective of mentioning "not less than 1320 MW" capacity in the PSA is just to ensure the supply of contracted capacity of 1230 MW (net) power at the delivery point to MPPMCL under the Original PSA. As MEL is proposing project having installed capacity higher than 1320 MW, the obligations of MEL to supply of 1230 MW (net) power to MPPMCL will not be impeded. Moreover, as per the bidding documents and terms of the Original PSA, the requirement is to supply 1230 MW (net) power from a newly constructed Power Station that will be established in the State of Madhya Pradesh using supercritical technology. It is*

*essential to highlight that MEL is developing new Power Station within the state of Madhya Pradesh utilizing ultra-supercritical technology which ultimately reduce the emission in environment and therefore development of power station having installed capacity of 1600 MW is not contravening to the terms and conditions of the Original PSA.*

- v. *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/ generator. In the Indian power market, there are many generators having higher installed capacity as compared to their contracted capacity under long term power sale agreement with various distribution licenses. Moreover, by the virtue of the present assignment, MPPMCL is obliged to buy power corresponding to the contracted quantum only. Therefore, restricting developer/generator by observing in the Impugned Order that the developer/generator do not allow any change to install capacity would contravene the provisions of Electricity Act, 2003.*
- vi. *In view of the above, petitioner has submitted that there will be no additional implications on MPPMCL other than what have been agreed by the parties under the Original PSA due to development of the Power Station having installed capacity higher than 1320 MW and also it is not contravening to the terms & condition of the Electricity Act as well as the Original PSA which is already approved by this Commission.*
- vii. *The Review Petitioner has mainly submitted that the Commission while giving the direction in para 38 & 39 (iii) of the Impugned Order have erroneously interpreted the facts of the DB Power case which deals with reduction in Contracted Capacity and applied its observations in the present case with reference to Installed Capacity and not Contracted Capacity. Further, in said paragraphs of the Impugned Order, this Commission has used the term “installed capacity” instead of “contracted capacity” and ignored the fact that the APTEL’s order dated 02.02.2018 only talks about the **contracted capacity**, not the **installed capacity**.*

11. With the above submissions, the Petitioner has prayed the following:

*Review and modify the Order dated 26.07.2023 passed in Petition No. 25 of 2023 to the extent stated in Para 22 of the present Review Petition;*

12. Subject petition was listed for motion hearing on 29.11.2023 and was admitted vide order dated 05.12.2023.
13. At the hearing held on 13.12.2023, Ld. Counsel appeared on behalf of the Respondent No. 1 (MPPMCL) sought time for filing response, which was allowed. Thereafter, MPPMCL filed response by affidavit dated 24.12.2023 on the subject review petition. At the hearing held on 04.01.2024, the Petitioner sought time for filing rejoinder on the response filed by MPPMCL, which was allowed. At the hearings held on 23.01.2024 and 27.02.2024, the petitioner again sought adjournment of hearing and sought time for filing rejoinder, which was allowed.
14. Meanwhile, by affidavit dated 02.04.2024, Respondent No. 1 (MPPMCL) has filed additional reply giving details of decision taken by the Government of Madhya Pradesh, conveyed through Energy Department vide letter dated 15.03.2024. Same has been taken on record by the Commission. However, during the course of hearing held on 02.04.2024, the Commission asked the relevance of the additional submission to the review petition and directed the Petitioner and Respondent No. 1 to make specific submission related to the current Review Petition within 10 days.
15. Final hearing in this matter was held on 16.02.2024 wherein arguments were completed by the Petitioner and Respondent No. 1. The Commission specifically asked the petitioner as to how a decision of State Government taken on 15<sup>th</sup> March, 2024 can have any effect on correctness or error of order of the Commission passed on 26.07.2023. Parties were allowed to file their respective written submissions within five days on the request of petitioner. With the above direction, the case was reserved for order.
16. In compliance to the above direction, the Petitioner M/s Pench Thermal Energy (MP) Limited has filed its written submission on 22.04.2024.
17. Respondent No. 1 (MPPMCL) also filed additional written submission on 23.04.2024 reiterating the contentions as submitted by affidavit dated 02.04.2024. Respondent No. 1 requested to the Commission to pass appropriate orders considering that the grievances of the review Petitioner are addressed in view of directions issued in letter dated 15.03.2024 and safeguards and development are being ensured by respondent MPPMCL.

**Responses of Respondent No. 1 (MPPMCL):**

18. By affidavit dated 24.12.2023, following submission was made by the Respondent No. 1 :

- i. The answering respondent takes a preliminary objection that the instant review petition ought to be dismissed without adverting to merits of the matter as there is no error apparent on the face of record which the review-petitioner has been able to demonstrate from the instant petition. The review petition does not make out any mistake or error apparent on the face of the record. The review petition on is argumentative in nature and raises a number of contentions which cannot be considered in a review petition and can be raised only in an appeal.*
- ii. The Hon'ble Supreme Court in its judgments of Kamlesh Verma v. Mayawati, (2013) 8 SCC 320 and S. Madhusudhan Reddy v. V. Narayana Reddy and Others, Civil Appeal No. 5505 of 2022 and has very clearly dealt the scope of review in orders passed by judicial forums and distinction between an erroneous decision as against an error on the face of record. It has been observed the Apex Court that an erroneous decision can be corrected by the Superior Court, however, an error apparent on the face of the record can only be corrected by exercising review jurisdiction. If the error has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the court to exercise its powers of review. Review would be maintainable on (i) discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the applicant or could not be produced by him when the decree was passed or the other made (ii) on account of some mistake or error apparent on the face of the record; or (iii) for any other some sufficient reason.*
- iii. From a perusal of the contentions in the review petition, it is evident that the ground on which the review is sought does not fall within the domain of error apparent on the face of the record and rather the review-petitioner is attempting to re-argue its case with respect to interpretation of the case of DB Power. Hence, on this ground alone, the present review petition deserves to be dismissed.*
- iv. Without prejudice to the aforesaid, it is submitted that as per Clause 18.1 of the Power Supply Agreement and the bidding documents, the 'Installed Capacity' of the project is clearly mentioned as 1320 MW whereas the review-petitioner is trying to have a power plant of much higher capacity i.e., 1600 MW, however, the*



*answering respondent shall only be purchasing capacity up to 1230 MW net capacity, which the review petitioner has also admitted in the instant petition. It is submitted that the review-petitioner has failed to justify any reason for which power plant of 1600 MW would be required, whereas, the review petitioner admits that the answering respondent shall only be purchasing capacity up to 1230 MW.*

- v. *It is submitted that the Review-Petitioner is attempting to confuse the Commission by contending that as per Clause 1 of Annexure-I of Schedule-B of the Original Power Supply Agreement, the 'Installed Capacity' of the Power Station is mentioned as "not less than 1320 MW" and since the ultimate objective of mentioning "not less than 1320 MW" capacity in the Power Supply Agreement is just to ensure the supply of contracted capacity of 1230 MW, the proposing project having installed capacity higher than 1320 MW will not be impede the provision of Power Supply Agreement. It is submitted that the Power Supply Agreement as per Clause 1.2(b) of Annexure-I Schedule-B also specifically lays down that the 'The nameplate capacity of each Unit shall be 660 MW', which clearly establishes the objective of the parties under the Power Supply Agreement of not having power stations above total capacity of 1320 MW. Therefore, the contention of the review-petitioner in this regard deserves to be dismissed as being misconceived.*
- vi. *The review-petitioner has also attempted to draw an incorrect analogy from the case of DB Power stating that in light of the judgment the term 'Installed Capacity' should be replaced with 'Contracted Capacity' as under the said case the Hon'ble APTEL rejected the reduction in 'Contracted Capacity' from 1000 MW to 500 MW in order to maintain the balance in securing the interest of all stakeholders including the suppliers/ generators. It is submitted that the Hon'ble APTEL relied on the judgment of DB Power to the extent that any deviation to the bidding documents or the guidelines can be permitted by the State Commission before the bidding process is initiated/completed. The same was relied by the Hon'ble Commission to rule down that since the review-petitioner has not made any prayer in the petition to amend the clauses of PSA mentioned by the Respondent in respect of installed capacity of the Power Station, no subsequent relief can be entertained in respect of the same. It is respectfully submitted that the review-petitioner has grossly misinterpreted the Impugned Order passed by the Commission and no relief as claimed by the review-petitioner ought to be entertained in view of the same.*

- vii. *It is crucial to mention that the proposed installed capacity of 1600 MW (2 x 800 MW) in place of 1320 MW (2 x 660 MW) is a post-bid modification, which affects the eligibility criteria as was sought from the bidders under the tender document and hence the same is legally impermissible under law and may result in unforeseen consequences which may be initiated from other bidders which participated under the subject tender.*
- viii. *Lastly, without prejudice to the aforesaid submissions on maintainability, it is also crucial to mention that the review-petitioner has contended that any financial saving accruing due to operation a plant with higher capacity of 1600 MW as compared to 1320 MW will be passed on to the answering respondent under the Power Supply Agreement. In this regard, it is respectfully submitted that the said contention is also completely misconceived as the review-petitioner has failed to account the scenario wherein running of power plant of higher capacity may result in incurring higher cost, and if it so does, then the extra cost borne out of the same, ultimately shall be passed on to the end consumer, which will be against the public interest and in violation of PSA between the parties.*
- ix. *In view of the above submissions, it is respectfully prayed that this Commission may be pleased to dismiss the instant review petition.*
19. By affidavit dated 02.04.2024, Respondent No. 1 made another submission in addition to the earlier submission dated 24.12.2023, which was earlier filed as a reply to the main petition on 24.12.2023. Respondent No. 1 also filed written submission on 23.04.2024 on similar line as filed by affidavit dated 02.04.2024. Respondent MPPMCL received letter dated 15.03.2024 from Govt. of Madhya Pradesh, Energy Department, wherein certain directions were given. The Respondent No. 1 broadly submitted the following:
- i. *In terms of the direction given by the Department of Energy, State of MP, in para 2(1), it has been directed that the approval to change in coal linkage from WCL to NCL and to change the capacity from 1320 MW to 1600 MW may be granted with the condition that the benefit due to change of linkage, the distance being less than the quoted 196.747 Km distance in the bid and the change in capacity from 1320 MW to 1600 MW will be passed to GoMP and MPPMCL.*
- ii. *It has been further directed that the request made by M/s Mahan Energen Limited (respondent No. 3) for change in coal linkage from WCL to NCL will be*

forwarded to Ministry of Coal, Government of India and upon transfer of the Coal Linkage an agreement shall be prepared; the same shall be executed with due approval of this Commission. Secondly, it has also been directed that an agreement shall be prepared for 1600 MW in place of 1320 MW; the same shall be executed after due approval of this Commission.

- iii. As per the letter dated 15.03.2024 and the contents mentioned in Para No. 2 of the said letter, the answering respondents is in the process of developing safeguard to ensure that all promised benefits come to the Government of Madhya Pradesh and MPPMCL.

**Petitioner's submission made on 22.04.2024:**

20. The Petitioner vide written submission dated 22.04.2024 has broadly submitted the following:

- i. During the pendency of the present Review Petition, on 15.03.2024, the Government of Madhya Pradesh ("GoMP") wrote a letter to MPPMCL and granted permission to MEL for:-
- (a) Transfer of coal linkage allocated to MEL, from Western Coalfields Ltd. ("WCL") mines to Northern Coalfields Ltd. ("NCL") mines; and
- (b) Setting up of a 1600 MW capacity thermal power project instead of a 1320 MW capacity plant.
- ii. The GoMP letter prescribed certain safeguards for ensuring that the benefits arising out of such change in installed capacity and transfer of coal linkage, are passed on to MPPMCL. The safeguards mentioned therein are summarized below:-
- (a) Any financial saving or advantage accruing to MEL due to the reduction in fuel transportation distance from 196.747 km. to 100 km. will have to be passed on to MPPMCL. This Hon'ble Commission's approval shall be needed for these modifications.
- (b) Any financial saving or advantage accruing to MEL due to operation of a plant with a higher installed capacity of 1600 MW compared to 1320 MW shall be passed on to MPPMCL. The Station Heat Rate and Fuel Cost mentioned in the bid should be applied after adjustment on account of change in installed capacity.

- (c) *For matters arising due to increase in unit size of MEL's Project from 660 MW to 800 MW, which would have additional financial burden on MPPMCL, it would be prudent to get indemnity/assurance from MEL that it will be considered that the contracted power to MPPMCL is being supplied from 660 MW units.*
  - (d) *Getting indemnity/assurance from MEL that there will be no adverse financial implications on MPPMCL due to increase in installed capacity and transfer of coal linkages.*
  - (e) *Suitable amendments would be required in the PSA with respect to power evacuation arrangement for additional capacity and treatment of merchant capacity without any financial liability on MPPMCL.*
  - (f) *Addressing the possibility of usage of SHAKTI coal for remaining capacity.*
- iii. *GoMP further decided that due to the increase in capacity:-*
- (a) *MPPMCL would have the First Right of Refusal for purchase of electricity "at an equal rate". GoMP directed MPPMCL to obtain an Order from this Hon'ble Commission allowing the same.*
  - (b) *In case of third-party sale of electricity by MEL, MPPMCL would be entitled to a reasonable share of profit, as per the decision of this Hon'ble Commission.*
- iv. *It is submitted that Section 86(1)(b) of the Electricity Act specifically vests this Commission with the power to regulate the electricity purchase and procurement process of Distribution Licensees including the price at which the electricity is to be procured from generating companies.*
- v. *It is pertinent to mention here that the Hon'ble Appellate Tribunal for Electricity in its judgment in M/s Pune Power Development Private Ltd. v. KERC & Ors. [2011 ELR(APTEL) 0303] has held that the entire process of the power procurement by a Distribution Licensee is subjected to the regulatory power of the State Commissions under Section 86(1)(b) of the Electricity Act. The review petitioner has also referred some Hon'ble Supreme Court judgments in this regard.*
- vi. *In view of the above the following position emerges:-*
- (a) *Under Section 86(1)(b) of the Electricity Act, the State Commission has been vested with the exclusive power to regulate the electricity purchase and*

*procurement process of Distribution Licensees including the price at which the electricity is to be procured from generating companies.*

- (b) The power to 'regulate' exercised by the State Commission under Section 86(1)(b) of the Electricity Act is of wide import. In exercising such power the State Commission, must take into consideration the larger public interest.*
- (c) Any alteration, modification or waiver of clauses of a PPA which affects the tariff payable by the end-consumer would have to pass the muster of the State Commission. The above principle would also apply to PPAs whose tariff were discovered under Section 63 of the Electricity Act.*

*vii. Applying the above principles to the present set of facts and circumstances makes it evident that this Commission:-*

- (a) Is under a statutory obligation to regulate the power procurement process of the Distribution Licensee i.e., MPPMCL in relation to the sourcing of power from MEL's Project, in view of Section 86(1)(b) of the Electricity Act;*
- (b) Must exercise its regulatory powers to examine and accord its approval to any proposed amendment to the existing PSAs, as directed by the GoMP vide its letter dated 15.03.2024, since there is an element of broader public interest involved.*

*viii. The present Review Petition was filed by the Review Petitioner seeking a review of the Order under Review in relation to this Commission's findings on the limited aspect of installed capacity of the Project. During the pendency of the present Review Petition however, the GoMP vide its letter dated 15.03.2024 has permitted MEL to set up power plant with an installed capacity of 1600 MW instead of 1320 MW subject to certain suitable amendments being carried out in subsisting PSA.*

*ix. Pertinently, the power to amend or modify the subsisting PSA can be traced to Article 38.9 of the PSA, reproduced below:*

***"38.9 Entire Agreement***

*This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and **no amendment or modification hereto 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 by the respective Parties.** All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Supplier arising from the Request for Qualification - DBFOO or Request for Proposal - DBFOO, as the case may be, shall be deemed to form part of this Agreement and treated as such.”

- x. In view of the above Article, it is evident that the parties are at liberty to amend or modify the PSA, provided that:
  - (a) The amendment or modification is agreed to in writing by the parties; and
  - (b) Such amendment or modification is duly executed by the persons especially empowered by the parties, in this regard.
- xi. It is submitted in view of the GoMP Letter dated 15.03.2024, the parties intend to formulate the safeguards and accordingly amend the subsisting PSA, in accordance with Article 38.9 of the PSA, which will be placed before the Commission for approval, in accordance with Section 86(1)(b) of the Electricity Act.
- xii. It is further submitted that the increase in capacity from 1320 MW to 1600 MW and the purchase of such additional capacity by MPPMCL at the same price would be in public interest as it will enable the State of Madhya Pradesh to improve its energy security at a competitive tariff already been adopted by this Commission.
- xiii. It is reiterated that this Commission has the power to approve amendments to PPAs where tariff was discovered under Section 63 of the Electricity Act. In fact, various State Commissions as well as the Central Electricity Regulatory Commission have approved modifications to the terms of the PPA qua tariff, contracted capacity, etc.
- xiv. In view of the above submissions, it is humbly prayed that this present Review Petition be kept in abeyance to enable the parties to act in furtherance of the GoMP directives and place the supplementary PSA before this Hon'ble Commission for necessary approvals. It is respectfully submitted that keeping the present Review Petition in abeyance will not prejudice MPPCML in any manner whatsoever in view of the GoMP Letter dated 15.03.2024. Once the supplementary PSA is approved, the Review Petition may be disposed of.

**Commission's Observations:**

21. The Petitioner PTEMPL has filed this petition for review of the Commission's Order dated 26.07.2023 in petition No. 25 of 2023. In the subject petition, the Petitioner has sought review of the Commission's order only on one issue of change of installed capacity of the project to 1600 MW from 1320 MW (mentioned in the PSA). The Petitioner submitted that there is sufficient cause for reviewing and modifying the impugned order to the extent of "installed capacity" of the Power Station, wherein the term "installed capacity" should be replaced with "contracted capacity". The Petitioner further submitted that while dealing the aforesaid issue, the Commission has relied on order of Hon'ble APTEL dated 02.02.2018, in Appeal no. 235 of 2015, wherein term 'contracted capacity' is used. In the opinion of the petitioner this Commission has erroneously applied its observations on 'contracted capacity' to 'installed capacity' on the ground of there being an error apparent in the impugned order dated 26.07.2023 of the Commission, the petitioner has sought review of the order.
22. The petitioner has failed to appreciate that the Commission relied on the principles laid down by Hon'ble APTEL in para 16.16 and 16.17 of its judgment and not merely on the term used in respect of capacity. These paragraphs are as follows:

*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)***

23. Subsequently, vide written submission dated 02.04.2024, the Respondent No. 1 (MPPMCL) has placed on record that Government of MP, Energy Department has issued letter dated 15.03.2024 to MPPMCL, wherein it has been approved to change in coal linkage from WCL to NCL and to change the capacity of plant from 1320 MW to 1600 MW with the condition that the benefit due to change of coal linkage, the distance being less than the quoted 196.747 Km distance in the bid and the change in capacity from 1320 MW to 1600 MW will be passed to GoMP and MPPMCL. GoMP, Energy Department has further directed Respondent No. 1 to prepare an agreement incorporating the above deviations i.e. change in coal linkage and installed capacity of the project and same shall be executed after approval of the Commission. The same issue is highlighted by the petitioner in its written submission dated 22.04.2024. Both the petitioner and Respondent No. 1 have failed to establish that the decision dated 15.03.2024 has any bearing or effect on correctness or error of order of the Commission dated 26.07.2023 passed in respect of a project under competitive bidding as per provisions of Section 63 of the Electricity Act, 2003. The Commission is not going into the details of decision of the State Government at this stage and the only issue in the present review petition is whether there was any error apparent in the order of the Commission, for which review is being sought.



24. The Petitioner vide written submission dated 22.04.2024 has also contended that GoMP has approved Transfer of coal linkage allocated to the Petitioner from WCL mines to NCL mines and Setting up of a 1600 MW capacity thermal power project instead of a 1320 MW capacity. In light of the aforesaid approval granted by GoMP, the Petitioner requested that this Review Petition be kept in abeyance to enable the parties to act in accordance with the GoMP directives and place the supplementary PSA before the Commission for necessary approvals. The Petitioner has also requested that once the supplementary PSA is approved, the Review Petition may be disposed of. The Commission has observed that the decision of GoMP regarding change in coal linkage and change in installed capacity of the project is subsequent development much after the date of impugned order. Moreover, change in coal linkage was never an issue before the Commission in petition No. 25 of 2023. The request of the petitioner to keep this review petition in abeyance till the issues of 'installed capacity' and 'Coal linkage' are resolved is not justified and therefore, not accepted by the Commission.

25. The Commission has already discussed and deliberated the issue claimed for review in the subject petition and has examined the subject review petition in accordance with Regulation 40 of the MPERC (Conduct of Business) (Revision-I) Regulations, 2016, which provides as under:

***i. Review of the decisions, directions and orders.-***

*40.1 The Commission may on its own motion or the application of any of the person or parties concerned, within 60 days from the date of making any decision, direction or order, review such decision, direction or order and pass such appropriate order as the Commission thinks fit.*

*40.2 An application for such review shall be filed in the same manner as a petition under Chapter II of these Regulations subject to fulfillment of the following conditions, namely:-*

- (a) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was passed or;*
- (b) On account of some mistake or error apparent on the face of the record;  
or*
- (c) Any other sufficient reason.*

26. Section 114 of the Code of Civil Procedure, 1908, provides for the power to review court's own judgment or order. The section empowers the court to review any judgment pronounced by it, for the purpose of correcting any errors or mistakes that may have occurred, either on account of some accidental slip or omission or on account of some mistake or error apparent on the face of the record. The section also allows the court to review its own order if it is satisfied that there is some new and important matter or evidence which was not within the knowledge of the party seeking the review at the time of the original hearing, or that there was some mistake or error which needs to be rectified.
27. The powers of review under Section 114 are not unlimited. The court cannot review its own judgment or order merely because the parties are dissatisfied with it or because it has been discovered that another view could have been taken on the same facts and evidence. The power of review can only be exercised in cases where it is found that there was some error or mistake that needs to be rectified. As per submission of the Petitioner in this case, another view could have been taken by the Commission on the basis of the judgement dated 02.02.2018 of Hon'ble APTEL and "contracted capacity" should have been used in place of "installed capacity". In a way, "Appeal" is submitted by the Petitioner in the grab of "review petition" and the same cannot succeed as a review petition. There is no error apparent in the impugned order of the Commission dated 26.07.2023 in petition No. 25 of 2023 as raised by the Petitioner in this review petition.
28. The Hon'ble Supreme Court of India in its judgment dated 17.02.2022 in Civil Appeal No. 4124 of 2009 (Ajmer Vidyut Vitran Nigam Ltd. Vs. Hindustan Zinc Ltd. 2022) has dealt the general principle for changes in any agreement/commercial transitions as follows:
- "24. Although, we cannot lay down a straight-jacket principle as to what is to be considered a clarification or what may tantamount to a substantial change or modification but if we take note of the guiding principles from Section 152 of the Code of Civil Procedure, 1908 in a way where there is an unintentional omission or mistake or an arithmetic or typographical error, if any, while drafting the agreement that may have been permissible to give an effect at a later stage from its inception but, at the same time, where there is a substantial amendment/alteration in the conditions of agreement, if taken place with its inception, may certainly cause prejudice to the rights of the parties inter se financially or otherwise.*

*As we are dealing with the commercial agreement, if any modification, that too substantial is being permitted to be altered under the agreement executed between the parties at a later stage with retrospective effect even by the statutory authority in the garb of correction or mistake or any typographical error, if any, that may, if prejudicial to the interest of the parties inter se in law be neither permissible nor advisable to give effect anterior to the date of modification/altercation in terms and conditions of the agreement.”*

29. Hon'ble High Court, Madhya Pradesh in case of Chandralata Vs Umesh Kumar 2012 (2) MPLJ 547 dealt the scope of review in orders passed by judicial forums and distinction between an erroneous decision as against an error on the face of record as follows:

*“----Further, there is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction.*

*Thus, even if it is assumed, for the sake of argument, that order dated 15-2-2010 was erroneous in law; setting at naught the same would be beyond the scope of review jurisdiction. ----“*

30. In view of the foregoing observations and on perusal of the reasons/grounds mentioned by Petitioner for review in this matter, the Commission has observed that such grounds do not fall under the circumstances provided for review under Regulation 40.2 of the MPERC (Conduct of Business) (Revision-I) Regulations, 2016 and also articulated under Rule 1 Order 47 of the Code of Civil Procedure (CPC) for review in the instant case. Hence, subject review petition dismissed and disposed of accordingly.
31. The Petitioner is at liberty to approach the Commission on any issues, which are specifically provided for in the PSA entered into between the Petitioner and Respondent No. 1, and do not fall under the category of deviation from the bidding documents, through a separate petition.

**(Prashant Chaturvedi)**  
**Member**

**(Gopal Srivastava)**  
**Member (Law)**