

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject: In the matter of Petition under section 86(1)(b) and section 86 (1) (f) of the Electricity Act 2003, read with Regulation 45 of the MPERC (conduct of business) (revision-I) Regulations, 2016 seeking direction against MP Power Management Company Limited to execute a Supplementary Power Purchase Agreement with the petitioner.

ORDER

(Date of Order: 25th August' 2022)

M/s Jaiprakash Power Ventures Limited,
(Unit : Jaypee Bina Thermal Power Plant)
JA House 63, Basant Lok
Vasant Vihar, New Delhi-11057

- **Petitioner**

V/s

- 1. M.P. Power Management Company Ltd.**
Shakti Bhawan, Rampur Jabalpur
- 2. M.P Madhya Kshetra Vidyut Vitaran Co. Ltd.,**
Nishtha Parisar, Govindpura, Bhopal
- 3. M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd,**
GPH Campus, Polo Ground, Indore
- 4. M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd.**
Block No-07, Shakti Bhawan, Rampur, Jabalpur

- **Respondents**

Shri Venkatesh, Advocate and Shri Ajeya Kumar Tripathi appeared on behalf of petitioner.
Shri Arpan Behl, Advocate and Shri Nitin Khatri appeared on behalf of Respondent No. 1.

M/s Jaiprakash Power Ventures Ltd. (JPVL) filed the subject petition seeking direction against MP Power Management Company Ltd. (MPPMCL) to execute a supplementary power purchase agreement to the PPA dated 05.01.2011 executed between the petitioner and MPPMCL, to compensate the petitioner for losses caused due to erratic scheduling. The subject petition has been filed under Section 86(1)(b) and section 86 (1)(f) of the Electricity Act 2003, read with regulation 45 of the MPERC (Conduct of Business) (Revision-I) Regulations, 2016.

2. The petitioner is a generating company and it has set up 2X250 MW (Phase-I) Coal Based Thermal Power Station at Bina, Madhya Pradesh. Date of Commercial Operation of both the Units were 31.08.2012 and 07.04.2013, respectively. The Petitioner has executed a PPA dated 5th January, 2011 with MP Power Management Company Ltd. for sale of

electricity equivalent to 65% of Power Stations' installed capacity on the tariff determined by the Commission. On 20.07.2011, the Petitioner executed another PPA with GoMP for sale of 5% of net power on Variable Charges only to be determined by the Commission. GoMP has nominated MPPMCL to receive aforesaid 5% net power.

3. The Commission while exercising its powers under section 86 (1)(h) of the Act, notified Madhya Pradesh Electricity Grid Code (MPEGC) 2019 on 21.06.2019, wherein certain provisions regarding Technical Minimum Scheduling and compensation thereof were envisaged. Regarding the compensation, clauses 8.8 (4) and 8.8 (6) of the MPEGC provides as under:

8.8 (4) In case of generating stations other than SSGS, wherein the 100% installed capacity is not tied up with MPPMCL/ Discoms of MP through a long term power purchase agreement or whose tariff for only partial/contracted capacity is determined by the Commission, such generating station/ company may have to appropriately factor in the above provisions in the PPAs entered into by it with M.P. Power Management Company/ Discoms for sale of power, in order to claim compensations for operating at the technical minimum schedule.

8.8 (6) "SLDC shall prepare a Detailed Operating Procedure in consultation with the generators and beneficiaries at OCC forums within 3 months' time and submit to the Commission for approval. The Detailed Operating Procedure shall contain the role of different agencies, data requirements, procedure for taking the units under reserve shut down and the methodology for identifying the generating stations or units thereof to be backed down up to the technical minimum in specific Grid conditions such as low system demand, Regulation of Power Supply and incidence of high renewable etc., based on merit order stacking.

4. Vide order dated 29.01.2020, the Commission approved Detailed Operating Procedure (DOP) and compensation mechanism in terms of Clause 8.8 (6) of the MPEGC, 2019. In the DOP, it is mentioned that in case of Generating Stations, wherein 100% installed capacity is not tied up with MPPMCL through a long term PPA and whose tariff for only partial/contracted capacity is determined/adopted by this Commission, such Generating Station shall have to appropriately factor in such provisions in the PPAs, in order to claim compensations for part load operation and multiple start/stop under Reserve Shutdown. In the subject matter, the petitioner submitted that after number of reminders, MPPMCL has not executed supplementary agreement to PPA to compensate the petitioner for the losses caused due to the erratic scheduling.

5. Earlier, MPPMCL filed Petition No. 31 of 2020 before the Commission seeking approval of draft Supplementary Agreement to PPA dated 05.01.2011 executed between MPPMCL and Petitioner in this matter. The Commission vide Order dated 07.09.2020, dismissed the aforesaid Petition with the observations that the draft supplementary agreement was lacking of free will and consent of Respondent as per requirement under Article 16.2.1 of the PPA dated 05.01.2011 executed between the parties.
6. The petitioner broadly submitted following in the subject petition:
 - 1.1 *On 25.09.2019, pursuant to the notification of MPEGC 2019, the Petitioner issued a letter to MPPMCL intimating as follows:*
 - (a) *Petitioner as per Clause 8.8(4) of the M.P Grid Code with partial tie up of 70% of regulated power is entitled to claim compensation for operating plant at Technical Minimum Schedule.*
 - (b) *Petitioner further requested MPPMCL to amend the PPA as per the provisions of the M.P Electricity Grid Code at the earliest.*
 - 1.2 *On 04.11.2019, MPPMCL issued a letter to Petitioner informing that as per Clause 8.8(6), DOP had to prepared by SLDC and same was yet to be issued. Therefore, any further action by MPPMCL can only be taken once DOP is issued.*
 - 1.3 *Thereafter, on 29.01.2020, this Commission vide its Order approved the DOP and the compensation mechanism in terms of Clause 8.8 (6) of the MPEGC, 2019.*
 - 1.4 *It is not out of place to mention that in case of Generating Stations, wherein 100% installed capacity is not tied up with MPPMCL through a long term PPA and whose tariff for only partial/contracted capacity is determined/adopted by this Commission, such Generating Station shall have to appropriately factor in such provisions in the PPAs, in order to claim compensations for part load operation and multiple start/stop under Reserve Shutdown.*
 - 1.5 *On 31.01.2020, the petitioner issued a letter to MPPMCL thereby requesting to amend the PPA dated 05.01.2011 and send the draft amended PPA in line with the MPEGC, 2019 and the DOP at the earliest.*
 - 1.6 *Owing to no response from MPPMCL, Petitioner in February 2020 filed an application being I.A No. 244 of 2020 in Appeal No. 282 of 2017 before the Hon'ble*

Tribunal, seeking directions against MPPMCL to take steps and appropriately factor the provisions of the DOP in the PPA dated 05.01.2011.

- 1.7 *On 11.02.2020, the Hon'ble Tribunal passed an order in Appeal No. 282 of 2017 & IA No. 734 of 2017 & IA No. 485 of 2018 & IA No. 244 of 2020 wherein MPPMCL undertook that the Draft Agreement in terms of DOP would be furnished within a week's time to the Petitioner.*
- 1.8 *On 16.03.2020, MPPMCL filed Petition No. 31 of 2020 before this Commission seeking approval of Draft Supplementary Agreement to PPA dated 05.01.2011 executed between MPPMCL and Petitioner for procurement of 65% power generated from 2x250 MW Bina TPP. It is pertinent to mention herein that during the course of proceedings, MPPMCL sought an adjournment/abeyance of the Petition on the ground that **MPPMCL has challenged the IEGC Fourth Amendment before the Hon'ble High Court of Delhi** to the extent of claiming compensation towards Technical Minimum. Although the Writ Petition was filed, it was yet to be numbered as it was filed in defects at that point of time.*
- 1.9 *This Commission vide its Order dated 07.09.2020, dismissed the aforesaid Petition being Petition No. 31 of 2020 on the following counts:*
- (a) *The Petition in the present form **lacks free will and consent of the Petitioner as per requirement under Article 16.2.1 of the PPA** dated 05.01.2011, executed between the parties.*
 - (b) *Liberty was granted to MPPMCL to approach the Commission with afresh petition after fulfilling all provisions including Article 16.2.1 of PPA.*
- 1.10 *On 04.05.2021, after more than 8 months of filing the Writ under defects, the same was finally listed and the Hon'ble Delhi High Court vide its order was pleased to issue notice in the matter. **It is pertinent to mention here that there is no stay on the operation of the said Regulations.***
- 1.11 *On 19.06.2021, Petitioner issued another reminder letter to MPPMCL to amend the PPA dated 05.01.2011 in line with the MPEGC 2019 and DoP at the earliest. In response to the above letter, on 02.07.2021, MPPMCL informed the Petitioner that until the Writ Petition filed by MPPMCL challenging Regulation 6.3B of the IEGC (Fourth Amendment) is decided, no SPPA to incorporate the provisions of the DoP and MPEGC, 2019 will be signed.*

- 1.12 *Thereafter, on 12.07.2021, the Petitioner issued another letter to MPPMCL thereby requesting MPPMCL to amend the PPA dated 05.01.2011 in line with the MPEGC, 2019 and the DoP. In light of no response to the requests made qua execution of supplementary PPA, Petitioner again on 18.12.2021 & 01.01.2022 addressed request letters to MPPMCL to enter into Supplementary PPA on the same lines as the Commission has approved PPA's for MB Power (Madhya Pradesh) Limited and Jhabua Power Limited.*
- 1.13 *MPPMCL as on date has failed to respond to the request of the Petitioner or agreed to the request of the Petitioner to consider entering into SPPA and has adopted to delaying tactics, thereby evading its responsibility of providing Technical Minimum Schedule of the Petitioner's Project, which is in gross violation of the MPEGC 2019 and the DoP. Even as on date in spite of notification of MPEGC 2019, MPPMCL is giving erratic schedule, even below technical minimum limit and ranges from 0 MW to 156 MW for each unit of 250 MW.*
- 1.14 *Due to the erratic scheduling, Petitioner has been constrained to sell the Power in Open market at unremunerative prices to operate the plant at technical minimum and in order to comply with the schedule provided by MPPMCL. Since MPPMCL has itself delayed the execution of SPPA, the same entitles petitioner to claim Compensation as per the Compensation Mechanism notified on 29.01.2020 to the tune of Rs. 8.59 Crores plus LPS, as applicable, for FY 2019-20 only.*
- 1.15 *The petitioner mainly raised the following ground in the subject petition:*

Incorporation of provisions of MPEGC, 2019 and the DoP:

- i. This Commission while exercising its powers under section 86 (1)(h) of the Act, notified the MPEGC, 2019. In the aforesaid MPEGC, 2019, provisions regarding Technical Minimum Scheduling and compensation thereof have been envisaged in the MPEGC, 2019 under Clause 8.8 (4). However, the scope and ambit of the same was confined to State owned Generating Stations. Thereafter on 29.01.2020, this Commission vide its Order approved the DOP and the compensation mechanism in terms of Clause 8.8 (6) of the MPEGC, 2019.*
- ii. With the DOP and the MPEGC, 2019 now being approved by this Commission, it is mandatory for MPPMCL to incorporate the applicable provisions of the MPEGC, 2019 and the DOP in the PPA and thereby providing adequate compensation to the Petitioner in case of its operation below its optimum levels.*

However, till date MPPMCL, despite numerous requests has failed to incorporate the said provisions in the PPA.

- iii. *It would not be out of place to mention herein that the petitioner and MPPMCL have been engaged in long term protracted disputes qua erratic scheduling and Reserve Shutdown of Thermal Generating Station in case the schedule being given by the procurer is below Technical Minimum. Due to the erratic scheduling, the Petitioner is forced to sell substantial quantum of power on exchange at price which is less than the actual cost of generation. Resultantly, the Petitioner is not able to recover its actual cost of generation, which is against the principles of Section 61 of the Act as the actual cost of generation can only be recovered by way of selling power as per the Tariff determined under the PPA by this Commission.*
- iv. *Pursuant to the issuance of the DoP, the Petitioner filed an I.A. being I.A. No. 244 of 2020 before the Hon'ble Tribunal in Appeal No. 282 of 2017 during the course of which MPPMCL undertook that it would take steps to ensure that the terms of the DoP are complied with. The same is evident from the Order dated 11.02.2020 passed by the Hon'ble Tribunal and for ease of reference, the relevant extract of the same is reproduced hereunder:

"Respondent/Discom submitted that a draft agreement in terms of detailed operating procedure would be furnished within a week's time to the Appellant"*
- v. *Pursuant to the aforesaid, on 16.03.2020 a Petition bearing no. 31 of 2020 for approval of the Amended PPA was also filed before this Commission by MPPMCL. However, owing to the lack of free will and consent amongst the parties, this Commission was pleased to disallow the said Petition.*
- vi. *It is imperative to mention that MPPMCL has delayed the aforesaid process by almost 3 years, which in turn has financially prejudiced the Petitioner. On this count alone, the Petitioner is entitled for Compensation as per the DoP approved by this Commission.*
- vii. *This is to submit that the above requirement is only procedural as the PPA itself at Article 4.1.1 (iii) mandates that the Petitioner is obligated to ensure the operation and maintenance of the Plant in accordance with the Grid code. Hence, since the Grid Code by its very definition applies to all generating companies who are constituents of the grid. However, since the MPEGC, 2019 as well as the DoP mandate that a separate PPA is to be signed between the Petitioner and MPPMCL, despite numerous letters issued by the Petitioner in this regard, MPPMCL has failed to amend the PPA.*

- viii. *It is a settled position under law that all PPAs ought to be aligned with the Regulations specified by the Commission. In this regard, reliance is placed upon the Judgment of Hon'ble Supreme Court in PTC India Limited v. CERC (2010) 4 SCC 603, wherein it was held that both existing and future contracts of the regulated entities must be in accordance with the Regulations made by Central Commission under Section 178 of the Act and there cannot be any deviation from the same. The relevant extracts of the Judgment are herein reproduced below :*

“92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.”

- ix. *It is apposite to mention that both MPEGC, 2019 and DoP is a delegated legislation by this Commission notified as a part of the regulatory framework, can intervene and even override concluded contracts to align them with the regulatory regime. In this regard reliance is placed on the Judgment passed by Hon'ble Tribunal in North-Eastern Electric Power Corpn. Ltd. v. Tripura State Electricity Corporation Ltd., [2006] APTEL 148 wherein it was held Regulations has statutory force and is binding on all regulated entities. Neither the Commission nor the parties have any right or authority to deviate from the same. The relevant extracts of the judgment are reproduced herein below:*

“18. It is well settled law that a statutory notification as well as regulations cannot be deviated nor the field covered by the statutory regulations and notification can be deviated at the discretion of the CERC merely because in its view hardship is caused to the beneficiaries. Statutory Regulations framed by CERC is not an executive instruction but it is a law by the legislature and it derives sanction from the legislative power vested in the legislature. CERC, a statutory authority having framed regulations and issued notification shall not refuse to follow the regulations or notification or it can adopt a new formula not provided nor contemplated by Regulations in its application to any given

situation or case. A Statutory Rule or Regulation or notification shall be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act. The Statutory Rules made pursuant to the power entrusted by Parliament are law made by Parliament as has been held by the Supreme Court in *State of Tamil Nadu v. Hind Stone* reported in 1981 (2) SCC 205.

19. By an ad-hoc approach the statutory rule and tariff notification cannot be whittled down nor by such an approach, right which has crystallized in favour of appellant, could be defeated or taken away. **When once Notification and regulations have prescribed the tariff, which rate of tariff the CERC is bound to implement and it has no authority or discretion to deviate and resort to any other ad-hoc procedure not found in the regulations.”**

- x. It is further submitted that the Petitioner is a stressed asset as a lot of expenses are incurred on account of fuel purchase and other necessary expenses essential for smooth and continued operations of a power plant. Therefore, in case of lack of finances and MPPMCL's denial on executing the supplementary PPA with Petitioner, thereby not providing a compensation mechanism for erratic scheduling, it will become difficult for the petitioner to continue its operations.
- xi. Therefore, in the above circumstances it is prayed that the Amendments as agreed between parties ought to be directed to be incorporated in the provisions of the PPA dated 05.01.2011 as such amendments emanate from the Regulations framed by the Commission.

A party cannot take advantage of its own wrong

- i. It is submitted that MPPMCL has delayed signing of the SPPA (albeit for compensation only) and hence cannot take advantage of its own wrong. This is borne out of the following facts:-
 - (a) MPEGC 2019 was notified on 12.06.2019 and the DOP Order was approved on 29.01.2020.
 - (b) To incorporate the Compensation Mechanism the Petitioner on 25.09.2019, 04.11.2019, 31.01.2020, 19.06.2021, 12.07.2021, 18.12.2021, 01.01.2022 and 03.03.2022 issued several correspondences to MPPMCL to sign the PPA.
 - (c) Pursuant to the issuance of the DoP, the Petitioner filed an I.A. being I.A. No. 244 before the Hon'ble Tribunal in Appeal No. 282 of 2017 seeking directions

against MPPMCL to take steps to appropriately factor the provisions of the DoP in the PPA dated 05.01.2011.

- (d) *The Hon'ble Tribunal by way of passed an Order in the aforesaid I.A. wherein it is categorically recorded that MPPMCL undertook that the Draft Agreement in terms of DOP would be furnished within a week's time to the Petitioner.*
 - (e) *In fact, on 16.03.2020 a Petition bearing no. 31 of 2020 for approval of the Amended PPA was filed before this Commission. However, MPPMCL changed its stand that it has challenged the IEGC 4th amendment before the Hon'ble Delhi High Court. Further due to lack of free will and consent between MPPMCL and the Petitioner qua clauses pertaining to amendment, this Hon'ble Commission was pleased to disallow the said Petition.*
 - (f) *Even as on 08.09.2020, no Writ Petition had been filed by MPPMCL challenging the said Regulations or perhaps was at a premature stage/under defects. The said Writ Petition only came to be listed after more than 8 months i.e. in May 2021.*
 - (g) *Till date MPPMCL has not challenged the DOP Order dated 29.01.2020 or MPEGC, 2019 specified by this Commission. Therefore, on the specious argument that MPPMCL has challenged the CERC Regulations, the Petitioner has been denied applicability of Compensation Mechanism. In fact as on date MPPMCL is violating the Regulations of this Commission and is seeking to illegally gain from it.*
 - (h) *Thus, MPPMCL on account of pendency of Writ Petition (which does not even challenge the Regulations of this Commission) is delaying the process to undertake amendment of PPA, which has further prejudiced the financial position of the Petitioner.*
- ii. *The Hon'ble Supreme Court in a catena of Judgments has upheld the legal maximum commodum ex injuria sua nemo habere debet which mandates that party cannot take advantage of its own wrong. In this regard, reliance is placed upon the following Judgments of the Hon'ble Supreme Court:*
- (a) *Nirmala Anand v. Advent Corpn. (P) Ltd., (2002) 5 SCC 481*

"45. The appellant has always been ready and willing to perform her part of the contract at all stages. She has not taken any advantage of her own wrong. The appellant is in no way responsible for the delay at any stage of the

proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant.”

- (b) *Kusheshwar Prasad Singh vs. State of Bihar, (2007) 11 SCC 447*

In Union of India v. Major General Madan Lal Yadav [(1996) 4 SCC 127 : 1996 SCC (Cri) 592] the accused army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court (at SCC p. 142, para 28) referred to Broom’s Legal Maxims (10th Edn.), p. 191 wherein it was stated:

“It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, “a wrongdoer ought not to be permitted to make a profit out of his own wrong”.

MPPMCL cannot approbate and reprobate:

- (i) *It is submitted that MPPMCL since the inception of the entire erratic schedule dispute inter se parties, has all along taken a stand that IEGC Regulations notified by the Hon’ble CERC and MPEGC, 2019 are distinct from each other and no reliance can be placed upon IEGC in so far as the dispute between MPPMCL and the Petitioner is concerned. The same is evident from Reply filed by MPPMCL in Appeal No. 282 of 2017.*
- (ii) *However, once the MPEGC, 2019 and the DoP were notified thereby incorporating a compensation mechanism when the plant operates at part load, MPPMCL took*

a volte face by contending that it has challenged the IEGC Fourth amendment before the Hon'ble Delhi High Court and therefore, no amendment shall be carried out until the aforesaid Writ Petition is finally decided. The same is evident from the following Order/correspondence:

(a) *Order dated 07.09.2020 passed by this Commission in Petition No. 31 of 2020:*

"The petitioner has not filed rejoinder. Ld. Counsel for the petitioner stated that the petitioner has challenged the concerned Regulations notified by the Central Electricity Regulatory Commission to the extent of claiming compensation towards Technical Minimum before the Hon'ble High Court at Delhi. He requested that the hearing in the matter be adjourned for a month in view of Letter dated 04.08.2020 received from the Energy Department, Govt. of M.P by the petitioner"

(b) *MPPMCL's letter dated 02.07.2021 issued to the Petitioner:*

"In above context it is to further inform that the MPPMCL has filed a Writ Petition before the Hon'ble Delhi High Court with the request to set aside the provisions regarding compensation provided in the Regulation 6.3 B of the 4' IEGC amendment which has been admitted and the matter is now subjudice. Accordingly, it has been decided that any action in the matter will only be taken after the final outcome in the Petition."

(iii) *Thus, as is evident from the aforesaid, MPPMCL has been taking contrary stands to suit its own cause which is impermissible in law. It is trite law that a party cannot be allowed to approbate and reprobate on the same facts and take inconsistent stands. In this regard the reliance is placed on the judgment passed by the Hon'ble Supreme Court in Suzuki Parasrampuria Suitings (P) Ltd. vs. Official Liquidator, (2018) 10 SCC 707.*

(iv) *It is also apposite to mention herein that this Commission, while disposing Petition No. 29 of 2020 vide its Order dated 02.11.2020 in the matter of MPPMCL Vs Jhabua Power Ltd Petition seeking approval of Draft Supplementary Agreement to PPA itself did not find the above said contention qua pendency of Writ Petition before Delhi tenable. The relevant extracts of the judgment are reproduced below:-*

"8. Vide order dated 5th September' 2020, the Commission closed the subject petition and reserved it for final orders with the following observations:

i.

iii. The Commission observed that, at this stage, while no order of Hon'ble Delhi High Court, exists in this regard, nor it can be anticipated that what orders, regarding the aforesaid challenge of CERC Regulations, is likely to be passed by Hon'ble Delhi High Court. Therefore, we are of the considered view, that such type of findings cannot be endorsed in orders. So, the submission of Learned Counsel appearing on behalf of petitioner is not sustainable in the interest of justice.

- (v) *Further, the aforesaid view of this Commission was further strengthened by its order dated 07.12.2021, passed in Petition No. 31 of 2021 in the matter of Jhabua power Ltd Vs MPPMCL. The relevant extracts of the judgment are reproduced below:*

“16. During proceedings in Petition No.29 of 2020 also, the Respondent submitted the above issue of challenging the vires of Regulation 6.3 B in fourth amendment to Indian Electricity Grid Code before the Hon'ble High Court of Delhi by way of Writ Petition No. 4777/2021. The Commission in its order dated 05.09.2020 in Petition No. 29 of 2020 did not found the aforesaid submission sustainable in the interest of justice with the observations that “at this stage, while no order of Hon'ble Delhi High Court, exists in this regard, nor it can be anticipated that what orders, regarding the aforesaid challenge of CERC Regulations, is likely to be passed by Hon'ble Delhi High Court.” No change in the status of aforesaid Writ Petition is informed by the parties during proceedings in the subject matter. Therefore, the aforesaid argument by the Respondent is still not sustainable in this petition also.”

Petitioner is entitled for Compensation from the date of DoP being approved

- i. As highlighted above, it is solely due to the inactions/omissions on part of MPPMCL that the SPPA till date has not been executed. The Petitioner at para 12.1 has also relied on various judgments of the Hon'ble Supreme Court which categorically hold that a party cannot take advantage of its own wrong. Admittedly, in the present case, on a specious ground that MPPMCL has challenged Hon'ble CERC's Regulations before the Hon'ble Delhi High Court, MPPMCL has refused to execute a SPPA with the Petitioner.*
- ii. In contending and in doing so, MPPMCL has lost sight of the fact that it has never challenged the DoP Order dated 29.01.2020 and/or the MPEGC 2019. Therefore, as on date, MPPMCL is in non-compliance of the provisions of the Regulations as well as Order passed by this Commission.*

- iii. *Even otherwise, it is imperative that the SPPA is signed, and the amendment is carried out thereby incorporating the compensatory mechanism. This Commission in Petition No. 31 of 2021 in the matter of M/s. Jhabua Power Limited Vs. MPPMCL has categorically held that in case there is no provision for compensatory mechanism in the PPA, the same ought to be incorporated as per the DoP issued by this Commission and can in no manner be deviated from.*
7. With the aforesaid submissions, the petitioner prayed the following in the subject matter:
- i. *Direct MPPMCL to execute a 'Supplementary Power Purchase Agreement' (as per the draft since approved by the Commission) to the PPA dated 05.01.2011, with the Petitioner for its Jaypee Bina Thermal Power Plant and incorporate the Compensation Mechanism as prescribed under Madhya Pradesh Electricity Grid Code, 2019 and the Detailed Operating Procedure dated 29.01.2020.*
- ii. *Direct MPPMCL to compensate the petitioner from the date of the Notification of the Detailed Operating Procedure, i.e. 29.01.2020 on account of delay in execution of the Supplementary PPA by MPPMCL.*
8. At the motion hearing held on 24.5.2022, Ld. Counsel who appeared for the petitioner explained genesis of the petition. The petition was admitted and petitioner was directed to serve copy of the petition to Respondents within seven days. The Respondents were also directed to file response on the subject petition within two weeks, thereafter. The petitioner was asked to file rejoinder within one week.
9. At the next hearing held on 12.07.2022, the Commission noted that by affidavit dated July 4, 2022, Respondent No. 1 (MPPMCL) has filed reply to the petition. As requested, the petitioner was asked to file its written submission within a week. Having heard the petitioner and Respondent No. 1, case was reserved for order.
10. By affidavit dated 4th July' 2022, the Respondent No 1 broadly submitting the following in reply to the subject petition:
- (i) *It is submitted that the petitioner in the captioned Petition has primarily sought to incorporate the applicable provisions of the Compensation Mechanism as approved in terms of the Detailed Operating Procedure ('DoP') in the PPA. Furthermore, the Petitioner is seeking compensation allegedly under the Madhya Pradesh Electricity Grid Code (Revision -II), 2019 ('MPEGC 2019') and the DoP approved by the Commission. Considering the scope of the relief(s) sought, the Respondent is filing*

a short reply limiting its response only to the untenability of the relief(s) sought. The Respondent reserves its right to file a detailed reply at a later stage and seeks indulgence from Commission in this regard.

- (ii) *At the outset, it is pertinent to mention here that Respondent No.1 has primarily challenged by way of Writ Petition being W.P. (Civil) No. 4777 of 2021 before the High Court of New Delhi, the legal validity and vires of sub-clause (3), sub-clause (6) and sub-clause (7) of Clause 6.3 B of CERC (IGEC) Regulations, 2010 – introduced on 6th April 2016 ('Fourth Amendment'). Sub-clause 3 of Clause 6.3B of the CERC (IEGC) Regulations, 2010 provides that when Generating Stations operate at a schedule lower than the Normative Plant Availability factor (85% of the installed capacity), but at or above the technical minimum (55% of installed capacity), the Generating Stations' must be compensated by its beneficiaries (such as the Respondent). The High Court has already issued a notice in the Petition.*
- (iii) *It is respectfully submitted that vide the above regulations challenged before the High Court of Delhi, the beneficiaries (such as Respondent No.1) of generating stations are required to compensate the generating station for causing the plant to be operated at a schedule lower than the corresponding normative plant availability factor up to the technical minimum. The compensation is computed based on the mechanism provided in the DoP, prepared by National Load Dispatch Centre, and approved by CERC vide Order dated 05.05.2017.*
- (iv) *Pertinently, the DoP mechanism approved by the Ld. Commission is guided by the one approved by CERC (a matter of challenge before the High court of Delhi) which is clear from Clause 8.8 (6) of MPEGC, 2019 which specifically state that SLDC was required to give DoP for backing down of coal-based Generating Units and mechanism for compensation due to part load operation and multiple start/stop of units in line with the Detailed Operating Procedure of the CERC.*
- (v) *The DoP provides for a technical minimum scheduling limit of 55% and provides for compensation to the coal-based and gas-based generating stations on account of partial loading of the units. This compensation is allowed in the form of degradation of the operational norms such as Heat Rate and Auxiliary Power Consumption in various ranges up to 55%. The approved procedure contains the process and methodology for calculation of the compensation amount for a station based on the Average Unit Loading %. The approved procedure also provides that the compensation amount so calculated is to be paid along with the monthly bills raised on the distribution utilities.*
- (vi) *It is respectfully submitted that DoP compensates the generator against any*

increase in the cost of generation, which cannot be covered within the Operating norms fixed in the Tariff Regulations. It is submitted that at the time of signing PPA, a risk was accepted by the generator (such as the petitioner) and changing the Regulation through the Impugned Amendment results in unjust enrichment of the generator and tantamount to change in the terms and conditions of PPA, which is impermissible in law.

- (vii) *It is submitted that the compensation mechanism provided under the DoP approved by MPERC and the one approved by CERC (and challenged by the Respondent in the Writ Petition) suffers from serious infirmities as: -*
- a) *The factors that are considered by DoP's while computing the compensation payable to Generating Stations includes the average unit loading duly taking into account the forced outages, planned outages, Plant Load Factor (PLF), generation at generator terminal, energy sent out ex-bus, number of start-stop, secondary fuel oil consumption and auxiliary energy consumption, in due consideration of actual and normative operating parameters of station heat rate, auxiliary energy consumption, and secondary fuel oil consumption, etc. Pertinently, the liability imposed by the DoP on the beneficiaries to compensate the Generating Stations is distinct and in addition to the liability of paying the fixed charge/capacity charge for the un-requisitioned/idle contracted capacity under the PPAs;*
 - b) *The liability to pay compensation is in addition to the liability of paying the fixed charge/capacity charge even for the un-requisitioned/idle contracted capacity, the same is beyond the terms of the PPA and the agreed arrangement between the Petitioner and the Respondent No.1 and hence the same is arbitrary, exorbitant and ultra vires the provisions and the object of the Electricity Act, 2003 thereby causing unjust enrichment to the generator.*
 - c) *Although the DoP lays down that the compensation shall be borne by entities that have caused the plant to be operated at a schedule lower than the Normative Annual Plant Availability Factor ('NAPAF') up to the Technical Minimum (TM), the injection of "Must-run Plants" has not been included in the Detailed Operating Procedure for fixing the liability on the entity which caused the plant to be operated at a schedule lower than the NAPAF. The entire liability has been saddled on the beneficiaries, de facto, without testing and establishing, causation and a resulting breach, of the PPA or the applicable laws.*

- d) *The DoP fails to consider the hardship and financial constraints that would result for the distribution licensees/ beneficiaries (such as the Respondent) and the consumers.*
- e) *The DoP fails to consider that the beneficiaries (such as the Respondent) are compelled to back down cheaper round-the-clock power from their own conventional generating stations and purchase intermittent costly power from renewable sources of energy. The financial implication of such purchase along with the compensation obligated causes a double burden on the Petitioner.*
- f) *Furthermore, the DoP fails to consider that the consumers are bearing an extra burden for the power not scheduled on account of surplus capacity and backing down of power in Madhya Pradesh. The State of Madhya Pradesh remains power surplus at some seasons and at different times of day which implies low utilization of generation assets as the full quota of allotted and available power is not scheduled and is required to be backed down. The answering Respondent has surplus power when the availability of contracted power is higher than the demand it caters to on a sustained basis, and unless it can find a buyer for the contracted surplus power, it is stuck with idle capacity. In an ideal scenario, this implies that power is dispatched based on its variable cost such that the cheapest power is first used to meet demand. Generators with a higher variable cost of power are lower down in the merit order stack MOD and would not be scheduled if there is no demand. This is called back down. If power is un-requisitioned despite being available, the DISCOMS bear the fixed charges as per the contract.*
- g) *Importantly, the compensation mechanism will put a huge financial impact on the consumers. The Respondent estimates that just from the plant of the petitioner, the financial burden put on the consumers will be approximately INR 30 crores per year from a generator i.e. INR 450 crores for the remaining period of the PPA(PPA period is 25 yrs for JPVL Bina unit). It is submitted that the terms and conditions of the PPA cannot be changed between its term to prejudice of the consumers and cause financial loss the consumers.*
- (viii) *It is submitted that the compensation mechanism provided by MPEGC and DoP share its genesis from the amendments and regulations which are the subject matter of challenge by Respondent No. 1 before the High Court of Delhi. **It is submitted that it is the Respondent's plea that the captioned petition should be kept in abeyance till the time Respondent's Petition is pending before the High Court of Delhi.** It is submitted that any order arising out of the Writ Petition pending before*

the High Court of Delhi is likely to have a bearing on the compensation mechanism approved by the Ld. Commission.

11. By affidavit dated 16th July' 2022, the petitioner filed rejoinder to the reply filed by Respondent No, 1 broadly submitting the following:

Re: *The Compensatory Mechanism stipulated in the MPEGC and the DoP approved by this Hon'ble Commission is guided by the IEGC which is a subject matter of challenge before the Hon'ble High Court of Delhi.*

Re: *The Present Petition is liable to be kept in abeyance in as much as the dispute forming part of the present petition has a direct bearing on the subject matter of challenge before the Hon'ble High Court of Delhi.*

- i. Vide its Reply, MPPMCL has contended that since the validity and vires of sub-clause (3), sub-clause (6) and sub-clause (7) of Clause 6.3(B) of CERC (IEGC) Regulations, 2010('Fourth Amendment') is a subject matter of challenge before the Hon'ble High Court of Delhi in W.P.(C) No. 4777 of 2021, and has a direct nexus with the dispute raised in the present petition i.e. the incorporation of applicable provisions of MPEGC and DoP vis-à-vis the Technical Minimum Scheduling and Compensation in respect thereof, it is appropriate that the present petition be kept in abeyance till the time the final outcome of the writ petition pending before the High Court of Delhi is decided.*
- ii. It is respectfully submitted that the contentions raised by MPPMCL are wholly misconceived and denied in toto. MPPMCL by way of raising such specious contentions is attempting to digress from the subject matter of dispute raised in the present petition.*
- iii. In the present case at hand, the subject matter of dispute which warrants adjudication by this Hon'ble Commission is the execution of the SPPA between the Petitioner and MPPMCL in order to incorporate the applicable provisions vis-à-vis the Technical Minimum Scheduling and compensation in respect thereof as stipulated in the MPEGC and DoP approved by this Hon'ble Commission.*
- iv. The issue involved in the present petition has no bearing whatsoever with the subject matter of challenge pending before the Hon'ble High Court of Delhi in W.P.(C) No. 4777 of 2021 preferred by MPPMCL, which is admittedly in respect of IEGC Regulations 2010 ("Fourth Amendment") and not the MPEGC and DoP approved by this Hon'ble Commission.*
- v. Assuming for the sake of arguments (whilst denying the same), the subject matter of challenge before the Hon'ble High Court of Delhi has a bearing on the issues involved in the present petition, it is respectfully submitted that there is no stay granted and/or*

directions issued by the Hon'ble High Court of Delhi which restricts MPPMCL from executing the SPPA. As a logical sequitur, the SPPA which warrants execution, needs to be done in accordance with the MPEGC and the DoP approved by this Hon'ble Commission and not under the 4th Amendment to the IEGC.

- vi. Furthermore, the scope of the DoP approved by this Commission clearly mandates the Generators to factor in the provisions of the MPEGC in the PPAs entered into by it with MPPMCL for the sale of power. It is relevant to draw attention to the relevant extract of the DoP, which is extracted hereinbelow for the sake of reference:

“3. Scope

*This DOP shall be applicable to SLDC, MPPMCL, Distribution License in state and State Sector Generating Stations (SSGS) having 100% installed capacity tied up with MP Power Management Co. Ltd./Discoms of MP and for IPPs as per provisions in PPA with MPPMCL, whose tariff is determined/adopted by the MPERC. **In case of IPPs wherein 100% installed capacity is not tied up with MPPMCL/Discoms of MP through a long term power purchase agreement and whose tariff for only partial/contracted capacity is determined/adopted by the Commission, such generating station/company shall have to appropriately factor in the provisions in the PPAs entered into by it with MPPMCL/Discoms for sale of power, in order to claim compensations for operating at part load or taking unit under RSD.**”*

- vii. At this stage, it is also relevant to state that the contention of the MPPMCL qua the IEGC (4th Amendment) which is a subject matter of challenge before the Hon'ble High Court of Delhi, has a direct bearing on the present case at hand, is contrary to the stand maintained by MPPMCL before the Hon'ble Appellate for Electricity in its Reply to the Appeal No. 282 of 2017 preferred by the Petitioner, the relevant extract whereof is reproduced hereinbelow for the sake of reference:

*“9. Without prejudice to the above, the Answering Respondents are reiterating the following submissions in regard to the scope and implication of the PPA entered into between the parties, the aspect of **Technical Minimum and implication of Merit Order Despatch. The provisions of the Central Electricity Regulatory Commission (Indian Electricity Code)** notified by the Central Electricity Regulatory Commission (hereinafter referred to as **‘the Central Commission’**) has no application to the present case....”*

- viii. In fact, during the course of the adjudication of the aforesaid Appeal, the Petitioner had filed an I.A. No. 244 of 2017 seeking directions qua MPPMCL to take appropriate steps to factor in the provisions of the DoP in the PPA dated 05.01.2011. Basis, the Order

dated 11.02.2020 passed by the Hon'ble Tribunal, MPPCL undertook to furnish the draft SPPA in terms of the DoP, within a week's time. The relevant extract of the order dated 11.02.2020, is reproduced hereinbelow for the sake of reference:

“Respondent/Discom submitted that a draft agreement in terms of detailed operating procedure would be furnished with a week's time to the Appellant.”

- ix. *From the aforesaid submissions, it is clear that MPPMCL since the inception of the entire erratic schedule dispute inter-se parties, has all along taken a stand that IEGC Regulations notified by the Hon'ble CERC and MPEGC, 2019 are distinct from each other and no reliance can be placed upon IEGC in so far as the dispute between MPPMCL and the Petitioner is concerned. However, after the approval of MPEGC Regulations and the DoP, duly notified by this Hon'ble Commission, MPPMCL has taken a volte face by contending that it has challenged the IEGC Fourth Amendment before the Hon'ble High Court of Delhi and therefore, no amendment can be carried out until the aforesaid Writ Petition is finally decided. MPPMCL has taken such contrary stands to suit its own cause which is clearly impermissible in law and such approach cannot be countenanced in any given scenario.*
- x. *Even otherwise, the contrary stands adopted by MPPMCL in this regard, has been brushed aside by this Hon'ble Commission vide its order dated 02.11.2020 in Petition No. 29 of 2020 titled as “MPPMCL vs. Jhabua Power Limited” and order dated 07.12.2021 in Petition No. 31 of 2021 titled as “Jhabua Power Limited vs. MPPMCL”.*
- xi. *Therefore, in light of the aforesaid, the contentions raised by the Petitioner that the IEGC (4th Amendment) which is a subject matter of challenge before the Hon'ble High Court of Delhi has a direct bearing on the present issue at hand, is devoid of any merit and is liable to be rejected at the very threshold.*

The Compensation Mechanism provided under the DoP approved by the MPERC and the one approved by CERC suffers from serious infirmities

- xii. *Vide its Reply dated 05.07.2022, MPPMCL has contended that the DoP approved by this Hon'ble Commission and the one approved by the Hon'ble CERC suffers from various infirmities, due to which MPPMCL is suffering financial losses to the tune of Rs. 30 Crores per year from a Generator (i.e. 450 Crores for the remaining period of the PPA with the Petitioner herein).*
- xiii. *In this regard, it is respectfully submitted that the said contentions raised by MPPMCL are wholly outlandish and unsubstantiated in as much as MPPMCL despite being purportedly aggrieved by the stipulations of the DoP approved by this Hon'ble Commission, has failed to challenge the same before the appropriate forum and by*

citing such alleged infirmities, MPPMCL is attempting to enlarge the scope of the present petition.

- xiv. *The scope of the present petition is merely confined to the execution of the SPPA between the Petitioner and MPPMCL so as to incorporate the applicable provisions of the DoP vis-à-vis the Technical Minimum Scheduling and Compensation in respect thereof. Hence, MPPMCL cannot be permitted to enlarge the scope of the present petition in any given circumstance.*
- xv. *Furthermore, it is apposite to mention that both MPEGC, 2019 and DoP are delegated form of legislation which have been notified by this Hon'ble Commission as part of its regulatory framework, hence MPPMCL is statutorily and contractually bound to align the PPAs in line with the provisions of the DoP. This fact can be demonstrated from the following:*
- (a) *As per Clause 1.3 of the MPEGC, 2019, the Grid Code will be applicable and have to be complied with by Independent Power Producers (such as the Petitioner) and Distribution Licensee (such as MPPMCL) who are connected to the Transmission System of the State of Madhya Pradesh.*
 - (b) *Clause 8.8 of the MPEGC, 2019 mandates incorporating a compensation mechanism between the Procurer and the Generating Company having partial tie up (of 65% + 5% in the present case) is entitled to claim compensation for operation of plant at part schedule on account of degradation of SHR, Auxiliary consumption and Start-up Fuel cost from MPPMCL.*
 - (c) *The Petitioner being a generating Company located in the State of Madhya Pradesh will be covered within the scope and ambit of MPEGC, 2019.*
 - (d) *This Hon'ble Commission on 29.01.2020 has approved the DoP and compensation mechanism applicable to the Petitioner's Power Plant in terms of Section 86 (1) (h) of the Act. Hence, the Petitioner ought to be compensated for the erratic scheduling given by MPPMCL.*
 - (e) *MPPMCL is under a statutory obligation to align the PPAs with the Regulations framed by this Hon'ble Commission on issues which are not covered in the PPA.*
- xvi. *In so far as the contention of MPPMCL with respect to non-inclusion of injection from "Must Run Plants" in the DoP for fixing the liability on the entity which causes the plant to be operated below the Normative Annual Plant Availability Factor ("NAPAF"), is concerned, it is respectfully submitted that the said purported infirmity/issue cited by MPPMCL cannot be reagitated once the DoP already stands approved by this Hon'ble Commission vide order dated 29.01.2020 and MPPMCL has admittedly failed to*

challenge the same. Therefore, the contention raised by MPPMCL in this regard, is devoid of any merits and is liable to be rejected on this ground alone.

- xvii. *Therefore, view of the aforesaid background, it is pertinent to state that the provisions and stipulations under the MPEGC, 2019 and DoP remains valid and binding (in absence of any challenge in respect thereof), hence there is no reason for MPPMCL to delay the execution of the SPPA with the Petitioner. Furthermore, keeping in view the fact that MPPMCL has failed to challenge the stipulations of the MPEGC, 2019 and the DoP approved by this Hon'ble Commission, MPPMCL is in deliberate violation of the provisions contained therein and the various orders passed by this Hon'ble Commission in relation thereto.*
- xviii. *Hence, the contentions raised by MPPMCL in this regard are untenable, unsubstantiated and are liable to be rejected.*

The Amendment to the PPA as sought in the present petition would result in unjust enrichment to the Generator and tantamount to change in the terms and conditions of the PPA

- xix. *Vide its reply, MPPMCL has contended that the DoP approved by this Hon'ble Commission compensates the Generators against any increase in the cost of generation, which was not contemplated at the time signing/execution of the PPA, hence any amendment to the PPA at this stage, would result in unjust enrichment to the Generator and tantamount to change in the terms and conditions of the PPA, which is impermissible in law.*
- xx. *In this regard, it is respectfully submitted that the contentions raised by MPPMCL is untenable and wholly outlandish in as much as the PPA executed between the Petitioner and MPPMCL, in itself contemplates the Petitioner's obligation to execute operate and maintain its Project in conformity with the Act, rules and regulations framed thereunder which admittedly includes the Grid Code notified by this Hon'ble Commission. In order to substantiate the same, it is relevant to advert the various clauses of the PPA which contemplates the obligations of the Petitioner:*

“4.1 Company's Obligations

4.1.1 Subject to the terms and conditions of this Agreement, the Company undertakes to be responsible, at its own cost and risk, for:

(iii) Operation and maintenance of the Power Station in accordance with the provisions of this Agreement, Grid Code and Prudent Utility Practices;

6.1 Availability, Scheduling and Despatch

6.1.1 The Company shall comply with the provisions of the applicable Law regarding Availability, scheduling and Despatch including, in particular, to the provisions of the ABT and Grid Code relating to declaration of Availability and the matters incidental thereto.”

- xxi. *On a plain reading of the aforesaid provisions of the PPA, it is abundantly clear that the PPA itself brings out the obligations of the Generator (i.e. the Petitioner herein) to operate and maintain its project in conformity with the Act, rules and regulations framed thereunder. While operating and maintaining its plant, the Petitioner is also obligated to comply with the applicable rules and regulations framed in respect of Availability, Scheduling and Despatch. Furthermore, the financial and other associated risks related to the inclusion/incorporation of the provisions of the MPEGC, 2019 as well as the DoP approved by this Hon’ble Commission, in the SPPA, would still lie with the Generator i.e. the Petitioner herein.*
- xxii. *Even otherwise, this Hon’ble Commission, while deciding the Petition No. 31 of 2021 preferred by Jhabua Power Limited under Section 142 read with Section 146 of the Act seeking direction qua MPPMCL to execute the SPPA, vide its Order dated 07.12.2021 has unequivocally held that despite the absence of such provisions in the PPA (executed between Jhabua Power Limited and MPPMCL), the provisions for Compensation for Technical Minimum Scheduling as stipulated in the DoP have to be incorporated. In this regard, reliance is drawn to Para 17(viii) of the Order dated 07.12.2021, the relevant extract whereof is reproduced herein below for the sake of reference:*

“Under Regulation 8.8 of MP Electricity Grid Code, 2019, there is no discretion for compensation in case of SSGS and therefore there is no requirement of execution of supplementary agreement for SSGS. However, for generating stations other than SSGS and wherein 100% installed capacity is not tied up with MPPMCL or whose tariff is determined by the Commission only for partial/contracted capacity, such generating station shall have to appropriately factor in the provision in PPA for compensation mechanism as per provision under Appendix II of Detailed Operating Procedure issued by this Commission. Even in the aforesaid provision, it is abundantly clear that there is no scope for not entering into such PPA without which this process cannot be agreed to. Even if original PPA did not have these provisions, such provisions have to be incorporated in accordance with the aforesaid provisions under MP Electricity Grid Code and detailed operating procedure issued by the Commission. It is in view of these provisions that this Commission had approved the supplementary power purchase agreements with full understanding of the requirement for such provisions under PPA.”

xxiii. Therefore, the mechanism set out in the DOP as approved by this Hon'ble Commission, allows the Petitioner to be compensated against any increase in the cost of generation, which cannot be covered within the Operating norms fixed in the Tariff Regulations. Hence, MPPMCL is bound to execute a supplementary PPA and compensate the Petitioner in line with the MPEGC and the DOP. Denial of compensation to the Petitioner without any substantial ground is not only violative of the MPEGC and the DoP but would also substantially lead to withholding of the legitimate amounts of the Petitioner which in turn would result in unjust enrichment to MPPMCL.

Commission's Observations and findings:

12. In the subject petition, the petitioner has sought directions to Respondent No. 1 (MPPMCL) to execute Supplementary Power Purchase Agreement (SPPA) in order to include relevant provisions of the Madhya Pradesh Electricity Grid Code (Revision-II), 2019 and the Detailed Operating Procedure to compensate the Petitioner for the losses due to erratic scheduling. So that, the petitioner would be entitled to get compensation on various counts like degradation of heat rate, auxiliary energy consumption, secondary fuel oil consumption for operation of plant at lower than normative levels due to non-scheduling/less scheduling of power.
13. The petitioner stated that DOP and MPEGC, 2019 as approved by the Commission are mandatory for Respondent No. 1 to incorporate applicable Compensation Mechanism provisions in the PPA in terms of DoP. The petitioner has contended that despite numerous reminders, MPPMCL has not taken any initiative to implement the SPPA and evading its responsibility under the MPEGC, 2019 and the DOP. The petitioner has further stated that MPPMCL is giving erratic schedule to petitioner even below technical minimum limit ranging from 0 MW to 156MW for each unit of 250MW and due to such erratic scheduling, the petitioner bound to operate its plant at part load, and thus is entitled to compensation under the MPEGC 2019 and the DoP.
14. The Respondent No 1 has submitted that compensation mechanism provided by MPEGC and DoP in line of the mechanism in IEGC that are being challenged in the High Court of Delhi by them which is pending adjudication. The Respondent has contended that the subject petition should be stayed until the Respondent's Petition is heard by the High Court of Delhi. Since, any order issued as a result of the Writ Petition pending before the High Court of Delhi will have an impact on the compensation mechanism approved by the Commission.

15. With regard to aforesaid writ petition filed by the Respondent No. 1 before the Hon'ble High Court, New Delhi, the Commission has observed that the aforesaid Writ Petition has been filed challenging Regulation 6.3(B) of the Fourth Amendment to IEGC Regulations issued by the CERC and not this Commission's notified MPEGC, 2019 and the DoP. Further, no stay order or any other direction has been passed by the Hon'ble Delhi High Court on implementation of the IEGC.
16. MPPMCL has contended that the DoP approved by this Commission compensates the Generators against any increase in the cost of generation, which was not contemplated at the time signing/execution of the PPA, hence any amendment to the PPA at this stage, would result in unjust enrichment to the Generator and change in the terms and conditions of the PPA, which is impermissible in law.
17. Let us now look into the relevant provisions under Indian Electricity Grid Code (IEGC), Madhya Pradesh Electricity Grid Code (MPEGC) and corresponding Detailed Operating Procedures (DOPs) issued by the Central Commission and MPERC which are relevant to the subject matter:
- (i) Central Commission issued fourth amendment to the IEGC on 6th April, 2016. Sub Regulation 4 of the Regulation 6.3 B of IEGC (Fourth Amendment) provides as under:
- “4. In case of a generating station whose tariff is neither determined nor adopted by the Commission, the concerned generating company shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule.”*
- (ii) Subsequently, the Central Commission vide Order dated 5th May' 2017 issued Detailed Operating Procedure for taking unit(s) under Reserved Shut Down and Mechanism for Compensation for Degradation of Heat Rate, Aux. Compensation and Secondary Fuel Consumption, due to part load operation and Multiple Start/Stop of Units. With regard to applicability of compensation, Para 2 of the Appendix – II of the aforesaid DOP provides as under:
- “This Compensation Mechanism is applicable to Coal/Gas based Central Generating Stations and Coal/Gas based Inter-State Generating Stations whose tariff is either determined or adopted by the Central Commission (hereinafter “designated generating stations”). In case of generating stations whose tariff neither determined nor adopted by the Commission but which is a regional entity, they shall be required to make appropriate provisions in their*

PPAs or any other supplementary agreement in the light of the Compensation Mechanism.”

- (iii) This Commission has notified Madhya Pradesh Electricity Grid Code (MPEGC) 2019 on 12.06.2019, Regarding the technical minimum schedule and claiming compensation, Regulation 8.8 (4) of the Madhya Pradesh Electricity Grid Code, 2019 provides as under:

*In case of generating stations other than SSGS, wherein the 100% installed capacity is not tied up with MPPMCL/ Discoms of MP through a long term power purchase agreement or whose tariff for only partial/contracted capacity is determined by the Commission, such generating station / company may have **to appropriately factor in the above provisions in the PPAs entered into by it with M.P. Power Management Company/ Discoms for sale of power, in order to claim compensations for operating at the technical minimum schedule.***

- (iv) Vide order dated 29th January' 2020, this Commission issued Detailed Operating Procedure for taking unit(s) under Reserved Shut Down and Mechanism for Compensation for Degradation of Heat Rate, Aux. Compensation and Secondary Fuel Consumption, due to part load operation and Multiple Start/Stop of generating units. Regarding applicability for the aforesaid compensation, the following is mentioned in Appendix II of the aforesaid Detailed Operating Procedure:

*“This Compensation Mechanism is applicable to Coal based State Generating Stations, having 100% installed capacity tied up with MP Power Management Co. Ltd. whose tariff is determined or adopted by the MPERC. In case of generating stations other than SSGS, wherein 100% installed capacity is not tied up with MPPMCL through a long term power purchase agreement or whose tariff for only partial/contracted capacity is determined/adopted by the Commission, such generating station/ company **shall have to appropriately factor in the provisions in the PPAs entered into by it with MPPMCL for sale of power, in order to claim compensations for part load operation and multiple start/stop under RSD.**”*

- (v) The only question to be examined in this order is whether the execution of supplementary PPA has to be done or not. The Commission has noted that the provisions in supplementary PPA are provided in Indian Electricity Grid Code and MP Electricity Grid Code. MP Electricity Grid Code and the detailed operating procedure issued by this Commission are in line with the IEGC and DoP issued by the Central Commission. No discretion is provided for execution of supplementary PPA in IEGC

and the detailed operating procedure issued by the Central Commission. The compensation mechanism has been brought in to compensate a generator to cover financial loss on account of variation in Station Heat Rate, Auxiliary Consumption and Secondary Fuel Oil Consumption due to partial load operation of plant resulting from schedule given by procurer.

- (vi) Under Regulation 8.8 of MP Electricity Grid Code, 2019, there is no requirement of execution of supplementary agreement for such compensation to be claimed by State Sector Generating Station (SSGS) wherein 100% capacity tied up with MPPMCL. However, generating stations other than SSGS and wherein 100% installed capacity is not tied up with MPPMCL or whose tariff is determined by Commission only for partial/ contracted capacity, have to appropriately factor in the provision in PPA for compensation mechanisms as per provision under Appendix II of Detailed Operating Procedure issued by this Commission. Even in the aforesaid provision, it is abundantly clear that there is no scope for not entering into such PPA without which this process cannot be agreed to. Even if original PPA did not have these provisions, such provisions have to be incorporated in accordance with the aforesaid provisions under MP Electricity Grid Code and Detailed Operating Procedure (DOP) issued by this Commission.

18. In view of the all-foregoing observations and looking into the technical requirements and financial implications, the Commission is of the view that the provision to claim compensation for part load operation as provided under DOP and MPEGC, 2019 are necessary to be incorporated in the PPA through a supplementary agreement between both the parties. Therefore, the Respondent (MPPMCL) is directed to draft an appropriate agreement in this regard in accordance to the provisions under MPEGC, 2019 and DOP issued by the Commission and approach the Commission for its approval after concurrence of both the parties.

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

(Gopal Srivastava)
Member (Law)

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman