

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition filed under Section 86(1)(b) of the Electricity Act, 2003 read with MPERC (Conduct of Business) Regulations, 2004 for approval of Second Addendum dated 08.06.2017 to the Power Purchase Agreement dated 05.01.2011 for procurement of 30% of installed capacity from the BLA Power's Generating Station in Gadawara (M.P.)

Petition No. 39/2017

ORDER

(Date of Order: 30th 'December' 2017)

- 1. M.P. Power Management Company Ltd., Jabalpur**
Block No. 2, Shakti Bhawan, Rampur, Jabalpur – 482008
- 2. M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.**
Shakti Bhawan, Rampur, Jabalpur – 482008.
- 3. M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.**
Nishtha Parisar, Govindpura, Bhopal – 462023
- 4. M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.**
GPH Compound, Pologround, Indore.

- **Petitioners**

V/s

- 1. M/s. BLA Power Pvt. Ltd.**
84, Maker Chambers, Nariman Point, Mumbai-400 021
- 2. M/s. BLA Industries Pvt. Ltd.**
84, Maker Chambers, Nariman Point, Mumbai-400 021

- **Respondents**

Shri R.V. Saxena, DGM and Shri Gagan Diwan DGM and Shri Ashish Anand Bernard, Dy A.G appeared on behalf of M.P. Power Management Co. Ltd., Jabalpur.

Shri Shailendra Jain, Dy. Director, Shri Anant Chaure, Law Officer and Shri Kumar Shubham, AE appeared on behalf of M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore.

Shri Devaditya Dubey, Manager (Commercial) appeared on behalf of M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur.

Shri A.R. Verma, GM, Shri Himanshu, AO and Shri B.S. Khanooja, GM appeared on behalf of the M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal.

Shri Nishant Kumar, Advocate, Ms. Shikha Ohri, Advocate, Shri S. Samajder, Director, Shri Kapil Gurvani, DM, Ms. Titash Sen, Advocate and Shri Manoj Sahu, GM (Commerical) appeared on behalf of M/s. BLA Power Pvt. Ltd.

Shri Ayush Agrawal, Advocate and Shri Vikrant Singh, Advocate appeared on behalf of M/s. BLA Industries Pvt. Ltd.

M.P. Power Management Co. Ltd., Jabalpur (MPPMCL) and the three Distribution Companies in the state have jointly filed the subject petition under Section 86(1)(b) of the Electricity Act, 2003 read with MPERC (Conduct of Business) Regulations, 2004 for approval of Second Addendum dated 08.06.2017 to the long term Power Purchase Agreement for 20 years entered into between the petitioners and M/s BLA Power (P) Ltd on 05.01.2011 for procurement of 30% power of installed capacity from the BLA Power's Generating Station in Gadawara (M.P.).

2. The defects in the subject petition were communicated to the petitioner and the same were cured by the petitioner on 26th September' 2017. Thereafter, the case was fixed for motion hearing on 27th September' 2017.

3. In the subject petition, the petitioner (MPPMCL) broadly submitted the following:

- “(i) It is submitted that the Govt. of MP had entered into MoU's with private developers for promoting investment in Generation so that the State may overcome the then power deficit situation. That, GoMP vide letter No. 4370/13/2008 Bhopal dated 24th June 2008 has nominated the Petitioner to procure MP Share from these Power Stations at the tariff to be determined by the Appropriate Commission. Discoms have the first right on aforesaid power (MP share as referred above) and the Petitioner shall make available this power to Discoms in the proportion as may be directed by the GoMP.*
- (ii) That, it is submitted that as such MPPMCL has signed PPA with BLA Power Pvt. Ltd. on 05.01.2011 (“PPA”) for procurement of 30% installed capacity from their 2x45 MW Thermal Power Plant for 20 years at regulated tariff to be determined by MPERC. Further, GoMP have signed another agreement dated 04.05.2011 for purchase of 5% power at variable charges only from the plant. A copy of the PPA dated 05.01.2011 is attached as **Annexure-1**. Apart from 30% installed capacity and 5% power as mentioned above, BLA Power is free to make other arrangements for sale of balance power (which is not contracted with the Petitioner) to third parties as MPPMCL does not guarantee purchase of that power.*
- (iii) The PPA dated 05.01.2011 as approved by the MPERC under section 86(1)(b) on 07.09.2012 in Petition No. 10 of 2012. The order was further modified vide order dated 07.02.2013 for Petition No. 85 of 2012. A copy of the orders dated 07.09.2012 and 07.02.2013 is attached as **Annexure-2 (Colly)***

- (iv) *It is further submitted that pursuant to the directives in MPERC order dated 07.09.2012 in Petition No. 10 of 2012 and order dated 07.02.2013 in Review Petition No. 85/2012, 1st Addendum to the PPA was executed on 26.08.2013, Copy enclosed 1st Addendum dated 26.08.2013 as **Annexure-3**.*
- (v) *The BLA Power's Unit-1 and Unit-2 (45 MW each) declared Commercial operation on 03.04.2012 and 20.03.2017 respectively.*
- (vi) *In compliance with Clause 4.1.1(iii) of the PPA dated 05.01.2011, BLA Power entered into a Fuel Supply Agreement ("FSA") with BLA Industries ("Fuel Seller") on 25.04.2011. **A copy of the Fuel Supply Agreement dated 25.04.2011 was submitted to the Petitioner by BLA Power under cover of letter dated 17.09.2012.** Copy of the FSA with amendments enclosed as **Annexure-4**.*
- (vii) *It is submitted that meanwhile, following Hon'ble Supreme Court's order dated 24.09.2014 regarding de-allocation of coal blocks, the coal mine from where BLA Power was getting coal for generation of power, had been taken over by the custodian [Western Coal Fields Ltd. (WCL)] on midnight of 31st March 2015. The judgment of the Hon'ble Supreme Court is reported in (2014) 9 SCC 516 (Manohar Lal Sharma v. Principal Secretary and others and (2014) 9 SCC 614 (Manohar Lal Sharma v. Principal Secretary and others). It is submitted that by virtue of the above judgments, the coal blocks were cancelled and de-allocated.*
- (viii) *It is submitted that as informed to the Petitioner, after handing over of the aforesaid coal mine to WCL by the Fuel Seller on 31st March 2015, BLA Power initially generated power from e-auction coal, thus leading to higher Variable charge to the tune of Rs. 3.40/kWh approx. in the months of April to May, 2015. However, payment of Variable charge in the monthly bills since April 2015 are being made taking the rate approved by Hon. MPERC in the Final Generation Tariff Order dated 22.05.2015 as the upper limit. The same was informed to Hon. Commission vide letter dated 30.06.2015 and 29.07.2015. Copy of said correspondence is attached as **Annexure-5 (colly)** A copy of the tariff order dated 22.05.2015 is attached as **Annexure-6**.*
- (ix) *It is submitted that Respondent has intimated that the boiler in their plant is of CFBC type and it is capable of using solid fuels other than coal for generation of power. As per Respondent, the international oil prices had fallen considerably during last few months, they had informed regarding blending of coal with Petroleum coke (Pet*

coke) for generation of power in order to reduce the Variable cost. The Variable cost claimed by M/s. BLA Power in their monthly bills since Sept-15 for FY 2015-16 are as follows:

Month	Sept-15	Oct-15	Nov-15	Dec-15	Jan-16	Feb-16	Mar-16
ECR claimed (Rs/kWh)	3.412	3.409	2.45	2.33	2.33	2.33	2.31
ECR paid (Rs/kWh)	2.18	2.18	2.18	2.18	2.18	2.18	2.18

- (x) The power from the plant was scheduled as and when the rate claimed by Respondent fell within the cut-off mark of MOD of that month.
- (xi) It is submitted that with intention of reducing Variable Charge, Respondent requested for use of Pet coke as fuel or for blending with coal for generation of power as this would ensure optimum utilization of resources.
- (xii) As informed by Respondent, for generation of power, use of Petroleum Coke, blended with coal, has resulted in reduction of Variable charge of energy when compared with coal procured through E-Auction in the given scenario. It is observed that since blending of coal with Petroleum coke started in Nov-15, the Variable charges have reduced considerably thereafter. **The Petitioner believes that procurement of fuel and assessing its suitability in boiler is the responsibility of the generator.** As per the trend in price of Petroleum coke envisaged, it would be beneficial to allow blending of coal with **Petroleum coke, or use of Pet Coke alone, for generation of power by suitably amending the definition of "Fuel" in the PPA if the same is approved by this Hon'ble Commission as per the provisions of the Electricity Act, 2003.** This would reduce the variable cost, resulting in advantage to end consumer of the State. It is implicit that Pet coke shall be used for blending only when it results in lowering of ECR than e-action coal. This Petitioner, as always, shall schedule power based only on Merit Order Despatch and in principle, **has no objection regarding type of fuel used by the generator, subject to approval from this Hon'ble Commission,** in accordance with law, so long as it helps in reducing variable cost of power generated and providing greater choice to the Petitioner to schedule power.
- (xiii) It is in this background that the Petitioners and Respondent BLA Power have entered into the Second Addendum dated 08.06.2017 to the PPA dated 05.01.2011 **amending certain clauses of the PPA dated 05.01.2011 which inter-alia, include**

the definition of “Fuel” and “Power Station” amongst other amendments. It is submitted that Petitioner No. 2, 3 and 4 are conforming parties to the PPA dated 05.01.2011 and also the Addendums, including the Second Addendum dated 08.06.2017 to the PPA. A copy of the Second Addendum dated 08.06.2017 to the PPA dated 05.01.2011 is attached as **Annexure-7.**

- (xiv) However, it is submitted that, the aforesaid amendment has been undertaken on the strict condition that (i) M/s. BLA Power Pvt. Ltd. ensures that they will not claim any increase in Fixed cost during the operating period **because of change in type of fuel** and (ii) indemnifies MPPMCL for any increased financial burden because of wear and tear of the machines due to use of Petroleum coke or fuel other than coal.
- (xv) It is submitted that power from the power plant of Respondent shall be procured in accordance with the established principles of Merit Order Dispatch and on no account shall the interests of the end consumers of State of MP be sacrificed. **Besides, Respondent have agreed that in case the use of Pet-coke results in increase in Fixed cost payable, the same shall not be claimed and hence will not be transferred to the end consumers.**
- (xvi) It is submitted that the entire issue of usage of Petcoke has been analysed and studied and reported by the consulting company namely Price Water-House Coopers (PWC) also and its report is attached as **Annexure-8.**
- (xvii) It is further submitted that another amendment to the PPA undertaken through the Second Addendum dated 08.06.2017 is with respect to “Due Date” in clause 10.4.2 regarding Late Payment Surcharge in the PPA dated 05.01.2011.
- (xviii) It is humbly submitted that the definition of term “Due Date” of 30th Day read with Article 10.4.2 regarding Late Payment Surcharge given in the PPA, which triggers applicability of “Late Payment Surcharge”, is expressly at variation with the mandate of the Tariff Regulations, that is 60th Day.
- (i) The “Due Date” is defined in Article 1.1 of the PPA.....
 - (ii) Article 10.4.2 of the PPA defines the meaning of “Late Payment Surcharge” as quoted below.....
 - (iii) Regulation 30 of the tariff Regulation 2009.....
 - (iv) Regulation 46 of the Tariff Regulation 2015.....
 - (v) It may kindly be seen that the Tariff Regulations also mandate that the Late Payment Surcharge shall be applicable only after sixty days from the date of billing.....

(xix) *It is submitted that this inconsistency was causing grave prejudice to the Petitioner leading to increase in the Power Purchase cost of the Petitioner, in turn making power costlier for the end consumers. Owing to the earliest provision of 30th day due date in the PPA in contravention to the Statutory mandate of 60th day due date, the Respondent was unjustly benefitting and it was a case of unjust enrichment of the Respondent at the expense of the Petitioner and the common Consumers.*

(xx) *Also, the Comptroller and Auditor General (CAG), in their report titled – “Performance Audit on “Power Purchase Agreements entered into by MP Power Management Company Ltd./ Board./ Government of MP with Private Power Producers for purchase of power and its operationalization” during the period from 2008-09 to 2012-13, have made following observations:*

“17.10.2 Avoidable payment of LPS (Late Payment Surcharge) due to deviation from norms: *We observed that in PPA with Bina,Company incurred LPS of Rs. 39.19 lakh during the period from August 2012 to May 2013.*

Similarly, in the 19 PPAs/ PSAs the Company has specified payment period as 21 days/ 30 days instead of 60 days as prescribed in MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2009/ CERC (Terms and Conditions for Tariff) Regulations, 2009. As a result, the Company had incurred an avoidable LPS of Rs. 1.80 Crore in respect of Bina, BLA, Lanco and Torrent from which power supply had started.”

*A copy of the relevant portion of the Report of Comptroller and Auditor General (CAG) is annexed herewith and is marked as **Annexure-9**.*

(xxi) *The Due Date has been amended from 30 days to 60 days in the second amendment to PPA dated 05.01.2011. This is changed in the interest of the Petitioner as it saves the Late Payment Surcharge which is attracted after 30 days and will now be attracted after 60 days.”*
(Emphasis supplied)

4. With the abovementioned submissions, the petitioner prayed the following in the subject petition:

- (i) *Be pleased to admit the petition; and*
- (ii) *Be pleased to approve under section 86(1)(b) of the Electricity Act, 2003, the second addendum dated 08.06.2017 to the PPA dated 05.01.2011;*

(iii) *Be pleased to pass any other orders in the interest of justice.*

5. Brief background in the subject matter:

Before dealing with the issues in subject petition, the following background in the subject matter is necessary to discuss in this order:

- (i) The Respondent No.1 (M/s BLA Power Pvt Ltd) in the year 2014 had filed Petition No. 16 of 2014 for true-up of tariff for 2012-13 and 2013-14 and determination of tariff for 2014-15 and 2015-16 of Unit No.1 of its generating plant at Gadarwara. The Respondent No. 1 had sought determination of energy charges on the basis of coal sourced from Respondent No.2 i.e. M/s BLA Industries (P) Ltd from **Gotitoria coal mine** under the FSA executed between the BLA Power and its sister concern BLA Industries.
- (ii) During the pendency of aforesaid Petition No. 16 of 2014, the Hon'ble Supreme Court of India, vide its Judgment dated 25th August, 2014 in Writ Petition (Criminal) No. 120 of 2012 (*Manohar Lal Sharma vs. Principal Secretary & Ors.*) and Writ Petition (Civil) No. 463 of 2012 (*Common Cause vs. UOI & Ors.*) as well as other connected PILs, ruled that the allotment of coal blocks made by the Screening Committee of the Government of India, as also the allotments made through Government dispensation route, are arbitrary and illegal. Further, vide its Judgment dated 24th September, 2014 the Hon'ble Supreme Court cancelled the allocation of coal blocks including the allocation of the **Gotitoria coal mine to BLA Industries**. The Hon'ble Supreme Court also clarified that the cancellation of coal block is with effect from 31st March, 2015. **Accordingly, the Gotitoria coal mine of BLA Industries has been taken over by the Central Government on 31.03.2015.**
- (iii) Subsequently, the Government of India issued the Coal Mines (Special Provisions) Ordinance, 2014 to take immediate action to allocate coal mines to **successful bidders and prior allottees**, keeping in view the energy security of the country. The Ministry of Coal vide its Notification dated 11th December, 2014, issued the Coal Mines (Special Provisions) Rules, 2014, detailing the provisions for carrying out the auction of coal blocks. **In "consequent proceedings" in WP (civil) no. 463 of 2012, Hon'ble Supreme Court by**

order dated 24.09.2014 directed all the allottees of operating coal mines to pay an “Additional Levy” of Rs. 295/- per metric ton of coal in accordance with the report of Comptroller and Auditor General (“CAG”). Subsequently, the Central Government promulgated the Coal Mines (Special Provisions) Act, 2015 which gave statutory sanction to the additional levy imposed by the Supreme Court.

- (iv) The Central Government initiated bidding process for **all prior allottees** for auction of coal mines under Coal Mines (Special Provisions) Second Ordinance, 2014 and rules thereunder. The aforesaid auction process was conducted by the Central Government for allocation of coal mines to successful bidders and allottees keeping in view the energy security of the country. One of the conditions for participation by **prior allottees in coal auction process was that the prior allottee should have deposited the amount of Additional Levy imposed by the Hon’ble Supreme Court.**
- (v) The Commission by Order dated 22.05.2015 in aforesaid petition No.16 of 2014 had determined the tariff for the Appellant for 2012-13 & 2013-14 and provisional tariff for 2014-15 & 2015-16 (till exhaustion of normative coal stock from Gotitoria coal mine). By the aforesaid Order, the State Commission had determined the tariff on the basis of the GCV and landed cost of coal from the Coal Project of M/s BLA Industries at Gotitoria, Madhya Pradesh (“**Gotitoria coal mine**”).
- (vi) Pursuant to the cancellation of the Gotitoria coal mine, the Respondent no. 1 (BLA Power) approached the Commission through Petition No. 36 of 2015 seeking approval for generation of power based on short term e-auction coal in terms of directives of Commission in Para 9.91 of Commission’s order dated 22.05.2015. **The Commission by order dated 25.07.2015 disallowed usage of e-auction coal to generate power under a long-term PPA for 20 years with the petitioner, MPPMCL. The Commission, disallowed the procurement of e-auction coal as a short term measure such as procurement without an underlying FSA was not envisaged under the PPA executed for 20 years. It was also noted by the Commission that**

such short-term procurement would be more expensive and there would be sharp variations in price of short-term coal periodically, making it impossible to determine energy charges.

- (vii) In the interim period, the Commission disallowed the Respondent No.1 power purchase cost for two tariff periods by retail tariff orders dated 05.04.2016 and 31.03.2017. The Commission disallowed the BLA Power (P) Ltd's power purchase cost as the tariff order dated 22.05.2015 was applicable till exhaustion of normative coal stock of Gotitoria coal mine, under FSA. The Gotitoria coal mine allocation was cancelled by the Hon'ble Supreme Court's order dated 24.09.2014 and that usage of e-auction coal had been disallowed by State Commission's order dated 25.07.2015.
- (viii) In April'2017, the Respondent No. 1 i.e. M/s. BLA Power Pvt. Ltd. had filed Petition No. 13 of 2017 with the Commission seeking approval of MYT from FY 2016-17 to FY 2018-19 for sale of 30% capacity to MPPMCL (the Petitioner herein) and 5% power to Government of Madhya Pradesh as per Power Purchase Agreements dated 5.01.2011 and 4.05.2011 with MPPMCL and GoMP respectively. In the same petition, the Respondent No. 1 had also sought true-up of tariff of its Unit No. 1 determined vide Commission's order dated 22nd May' 2015. The Respondent No.1 filed the true-up petition after a delay of one and a half years. The MYT petition was also filed in April, 2017 after a substantial delay of approximately one year.
- (ix) In the intervening period, despite Commission's above mentioned order, the petitioner continued to schedule power from the Respondent No.1 till March, 2017 which was generated by using e-auction coal or Petroleum coke as per the contents of the aforesaid petition filed by the Respondent No.1 with the Commission. The petitioner has now stopped scheduling power from the Respondent No.1 and making payments to Respondent No.1 from March, 2017. The aforesaid issues have been dealt with at length by the Commission in its reply to Appeal no. 201 of 2017 and subsequent submissions before Hon'ble Tribunal for Electricity.

- (x) The Commission by the Order dated 02nd June'2017 in the aforesaid petition No. 13 of 2017 held that the PPA does not recognize Petroleum Coke blended with domestic coal as a 'fuel source'. Therefore, the Commission dismissed the aforesaid petition filed by the Respondent No.1 with certain observations (in light of provisions under PPA between the petitioner and Respondent No.1) and directions to Respondent No.1 i.e. M/s BLA Power.
- (xi) Aggrieved with the aforesaid order, Respondent No.1 preferred an Appeal (No. 201 of 2017 along with several interlocutory /interim applications before the Hon'ble Appellate Tribunal for Electricity against Commission above Order dated 02.06.2017 in Petition No. 13 of 2017.
- (xii) A number of hearings including the arguments from the side of M/s BLA Power (P) Ltd have been held before the Hon'ble Tribunal for Electricity in the aforesaid Appeal and IAs filed by Respondent No.1 (BLA Power) and the Appeal is now listed for hearing before Hon'ble Tribunal on **10th January'2018**. During the proceedings held on 21st September'2017 in the aforesaid Appeal No. 201 of 2017, the following directions were issued by the Hon'ble Tribunal to the petitioner (Respondent No.2 in Appeal) and the Commission:

“Respondent No.2 is stated to have filed an application for approval of the amended PPA before the Madhya Pradesh Electricity Regulatory Commission (State Commission). This is confirmed by counsel for Respondent No.2. Respondent No.2 shall ensure that all the defects are removed within a week's time from today. Learned counsel for the State Commission states that after the defects are cured, that matter will be listed for hearing on the next day. We accept this statement. The said application be disposed of as early as possible and preferably within a period of one month.....”

6. It is pertinent to mention in this order that as mentioned above, the Respondent No.1 (BLA Power) had also filed various Interim Applications (in the Appeal No.201 of 2017) before the Hon'ble Tribunal at different point of time seeking the following:

- (i) Stay of impugned order dated 02.06.2017 passed by the Commission in petition no. 13 Of 2017 ;
- (ii) Remand the matter in Appeal No. 201/2017 back to the Commission with certain terms of reference;
- (iii) Payment of arbitrary capacity Charges from March '2017 onwards without any approved tariff.

7. The Appeal No. 201 of 2017 is pending before the Hon'ble Tribunal for Electricity. However, the petitioner has mentioned some of the issues in its subject petition those are part of Appeal no. 201 of 2017 before the Hon'ble Tribunal. It appears from the subject petition that the aforesaid issues are mentioned by the petitioner in support of its contention to seek approval of subject Second Addendum to the PPA retrospectively i.e. with effective from 1st November'2015. Therefore, the observations of the Commission and all such issues which were necessary to examine the subject petition were communicated and the response was sought from the parties in the subject matter.

8. The defects in the subject petition were cured by the petitioner on 26th September'2017 and the petition was listed for motion hearing next day i.e. on 27th September'2017. During the course of motion hearing held on 27th September' 2017, the representative appeared on behalf of M.P. Power Management Co. Ltd., Jabalpur stated the following:

- (i) The Power Purchase Agreement (PPA) between MPPMCL and M/s. BLA Power Ltd. was signed on 05.01.2011 for procurement of 30% installed capacity from 2x45 MW Thermal Power Plant for 20 years at regulated tariff to be determined by MPERC.
- (ii) The aforesaid PPA was approved by the Commission.
- (iii) Government of Madhya Pradesh (GoMP) have signed another agreement with M/s. BLA Power Pvt. Ltd. on 04.05.2011 for purchase of 5% power at only variable charges from the aforesaid power plant.
- (iv) A Fuel Supply Agreement (FSA) was executed between M/s. BLA Power Pvt. Ltd. and M/s. BLA Industries on 25th April' 2011. A copy of the aforesaid FSA was

submitted by M/s. BLA Power to MPPMCL under the provisions of PPA.

- (v) Vide Hon'ble Supreme Court's order dated 24th September' 2014, the coal mine of M/s. BLA Industries where from the coal was supplied to M/s. BLA Power under FSA has been cancelled and taken over by the Central Government on 31st March' 2015.
- (vi) After handing over the aforesaid coal mine to Western Coal Fields Limited (WCL) on 31st March' 2015, M/s. BLA Power initially generated power from e-auction coal thus leading to higher variable charges to the tune of Rs. 3.40 per KWh approx in April and May, 2015.
- (vii) From June to September, 2015 MPPMCL had not scheduled/ availed any power from M/s. BLA Power Pvt. Ltd. due to high variable charges.
- (viii) Thereafter, MPPMCL scheduled/ availed power as and when the rate claimed by M/s. BLA Power fell within Merit Order Despatch.
- (ix) M/s. BLA Power requested MPPMCL to use Petcoke as fuel or for blending with coal (e-auction) for generation of power. The blending of coal with Petcoke started in November, 2015 and the cheaper power was scheduled/ availed by MPPMCL thereafter.

9. During the course of hearing held on 27th September'2017, the representative of petitioner i.e. MPPMCL stated that Petcoke is not recognized as fuel in the PPA therefore, the subject petition has now been filed for approval of the amendment in the Power Purchase Agreement primarily to incorporate Petcoke as fuel in the same. While observing that the amendment in PPA is basically sought on account of "change in fuel" therefore, M/s. BLA Industries, being the fuel seller under FSA, was also made one of the respondents in this matter.

10. In view of the background in the subject matter and the for the reasons mentioned above, the notice was also issued to M/s. BLA Industries Pvt. Ltd., Mumbai as one of the respondent in this matter. The petition was admitted and the petitioner was directed to serve the copies of subject petition on the respondents i.e. M/s. BLA Power Pvt. Ltd. and M/s. BLA Industries Pvt. Ltd. at the earliest. The respondents were directed to file their response on the petition at the earliest but not later than 7th October' 2017. The case was fixed for hearing on 10th October' 2017.

11. During the next hearing held on 10th October' 2017, M/s. BLA Power Pvt. Ltd. (Respondent No. 1), by its affidavit dated 7th October' 2017 filed its preliminary reply on the subject petition reproducing certain provisions under MoU, Implementation Agreement and

PPA executed with GoMP for development of its power project and concessional energy to be provided by it to GoMP or the agencies nominated by GoMP i.e. MPPMCL/ Discoms of the State. In its aforesaid preliminary reply, M/s BLA Power (P) Ltd has also mentioned about some clauses in main PPA dated 05.01.2011 executed with the petitioners and Respondent No. 1. With a request to allow the subject petition and approve second addendum dated 8th June' 2017 to the said PPA filed by the petitioner , M/s BLA Power (Respondent No.1) also filed a copy of the following document:

- (i) A copy of office Memorandum No. FU-9/2009-IPC dated 18.03.2011 issued by Ministry of Power regarding Amendment of coal Linkage policy for power projects in 12th Plan with unit size less than 200 MW. The provisions under aforesaid amendment by Ministry of Power are different for the Power projects of Central & State PSUs and **IPPs**, Plants having Biomass as primary fuel, Plants based on washery rejects and Co-generation based plants. It is clarified in the aforesaid Office Memorandum that the provision for non-availability of Coal linkage for any project with unit size less than 200 MW is for IPPs and this is not applicable to Captive Power Projects (CPP).
- (ii) A copy of letter dated 08.01.2016 of Boiler manufacturer
- (iii) A copy of MPPMCL's (petitioner No.1) letter No. 05-01/974 dated 03.08.2016 addressed to M/s BLA Power (P) Ltd seeking consent of M/s BLA Power (P) Ltd on the conditions proposed by MPPMCL for amendment/addendum to main PPA dated 05.01.2011 wherein one of the conditions was as given below:
*"(d) agrees that at any time during the operation of power station, the Kcal **landed price of Pet coke** used for generation of power shall not be more than per Kcal **landed price of WCL coal** for that month"*

12. During the same hearing held on 10th October'2017, Counsel appeared on behalf of Respondent No. 2 i.e. M/s. BLA Industries Pvt. Ltd filed a letter broadly mentioning that this Commission has no jurisdiction over BLA Industries Pvt. Ltd. under the provisions of the Electricity Act, 2003 or any other law for the time being in force however, it is entering appearance before the Commission under protest, through their Advocate, and without prejudice to the aforesaid objection.

13. During the course of same hearing held on 10th October' 2017, the Commission expressed several observations on the subject petition to the parties in this matter. Counsel

on behalf of the petitioner, while replying to the issues raised by the Commission had requested the Commission to communicate all such issues to the parties in this matter so that written submissions may be filed by the parties on all such issues. Considering the request, the parties were asked to file their reply to the observations of the Commission within seven days' time. Counsel of the Respondent No. 1 i.e. M/s. BLA Power Pvt. Ltd. requested to provide some more time due to festival occasions in third week of October. Therefore, the petitioner and respondents were directed to file their reply on the certain issues within ten days' time. The case was fixed for further hearing on 24th October' 2017.

14. Accordingly, vide Commission's order dated 10th October' 2017 in the subject petition, the observations of the Commission and the issues to be replied separately by the petitioner and each of the respondents were communicated to them seeking their reply within 10 days' time so that the petition may be expeditiously disposed of at the earliest as per the directions of Hon'ble Tribunal for Electricity. However, despite alleging urgency in the matter before the Hon'ble Tribunal in Appeal No.201 of 2017, the petitioner (MPPMCL) and Respondent No. 1 had sought four weeks' and seven days time respectively to file their reply to the aforesaid issues. Considering the aforesaid request made by the Petitioner and Respondent No.1 in the hearing held on 24th October'2017, they were allowed to file their reply at the earliest and it was mentioned by the Commission that the next date of hearing shall be fixed on receipt of reply from all parties in the subject matter.

15. The Respondent No.1 and 2 filed their reply on 06th November'2017 and 17th November'2017 respectively. During next hearing held on 21st November'2017 in this matter, the petitioner (MPPMCL) without filing their reply with the Commission had sought one weeks' adjournment mentioning that their Counsel is busy on this date in Hon'ble High Court, Jabalpur. The representative appeared on behalf of the petitioner (MPPMCL) stated that their reply is ready and the same shall be filed shortly. Counsel for Respondent No. 1 (BLA Power Pvt. Ltd.) also circulated a letter to the Commission mentioning that they have no objection to the aforesaid request of adjournment sought by the petitioner.

16. In its first reply by affidavit dated 8th November' 2017, M/s. BLA Industries Pvt. Ltd. had basically sought the review of this Commission's past daily orders dated 27.09.2017, 10.10.2017 and 24.10.2017 mentioning that the Commission has, without jurisdiction, made BLA Industries Pvt. Ltd. as a Respondent in the proceedings. In its aforesaid reply, M/s. BLA

Industries also contended that this Commission does not have jurisdiction to implead any person including M/s. BLA Industries Pvt. Ltd. as a party Respondent to the present proceedings under the provisions of Electricity Act, 2003 or any other law for the time being in force.

17. In its subsequent response by affidavit dated 17.11.2017, M/s. BLA Industries Ltd. while filing its reply to the issue stated the following:

“However, without prejudice to the aforesaid application dated 09.11.2017 and the contention that this Hon’ble Commission does not have jurisdiction to implead/ add BLA Industries as a party-respondent to the present proceedings, BLA Industries is submitting information sought by this Hon’ble Commission vide its order dated 10.10.2017 in spirit of cooperation with this Hon’ble Commission, a quasi-judicial authority. It is clarified that filing of the present response shall not in any manner be constructed as BLA Industries submitting to the jurisdiction of this Hon’ble Commission.”

18. Vide Commission’s daily order dated 21st November’ 2017 it was made clear to Respondent No. 2 i.e. M/s. BLA Industries Pvt. Ltd. that the contention of M/s. BLA Industries challenging the jurisdiction of this Commission is misplaced in light of Section 94, 95 and 96 of the Electricity Act, 2003. Further, the information/ documents being sought from M/s. BLA Industries being fuel seller under FSA and a sister concern of M/s. BLA Power Pvt. Ltd. (Respondent No. 1 and Generator) are very much relevant to the present proceeding wherein the amendment in PPA is primarily sought on account of change in fuel/ use of Petcoke. In the same order, it was also mentioned by the Commission that in order to have complete clarity on the issues related to fuel in the subject petition and to avoid any shadow of doubt on all such issues, the Commission has preferred to obtain all such information/ document in prima facie from M/s. BLA Industries only. Accordingly, M/s. BLA Industries was again provided with an opportunity to clarify and firm up its stand with regard to jurisdiction of this Commission to implead BLA Industries as party respondent in the subject proceedings.

19. On perusal of the reply filed by M/s. BLA Power Pvt. Ltd., it was observed that M/s. BLA Power did not provide the complete information and documents as sought by the

Commission. M/s. BLA Power (P) Ltd in its reply broadly raised questions on the necessity of approval for addendum to PPA in the subject petition by emphasizing that the “Petcoke is not changed fuel”.

20. In view of the above, M/s. BLA Power Pvt. Ltd. was directed to serve the copy of its reply to the petitioner and the petitioner was directed to file its response on the reply filed by M/s. BLA Power Pvt. Ltd. within 10 days’ time. The petitioner, MPPMCL was also directed to file its reply at the earliest to the issues communicated to the petitioner vide Commission’s order dated 10.10.2017.

21. Finally, vide letter No. 05-01/1749 dated 5th December’ 2017, the petitioner (MPPMCL) filed its reply for the first time to the observations and issues communicated to MPPMCL vide Commission’s order dated 10th October’2017. However, no response is filed by the petitioner No. 1 on the aforesaid reply filed by Respondent No.1.

22. During the course of next hearing held on 19.12.2017, Learned Counsel appearing on behalf of petitioner (MPPMCL) placed a copy of the “Record of Proceedings” in Writ Petition(s) (Civil) No (s). 13029/1985 and Order dated 13th December’ 2017 of the Hon’ble Supreme Court of India on the issue of “**Ban on sales and use of Furnace Oil and Petcoke**”. The petitioner further submitted that a ban on import and use of Petcoke is under consideration with MoEF in view of the environmental hazards. The copy of the document placed by the petitioner was taken on record by the Commission.

23. During the same hearing held on 19.12.2017, Learned Counsel of the petitioner was asked to confirm whether the copy of Fuel Supply Agreements with regard to “Petcoke” and “Coal” were obtained by the petitioner from Respondent No. 1 (M/s. BLA Power Pvt. Ltd.) before execution of the subject addendum to the Power Purchase Agreement with Respondent No. 1 (BLA Power) on 8th June’ 2017. At the outset, the representatives of the petitioner stated that they have not obtained the copy of the aforesaid agreements. However, it was mentioned that the petitioner will check the status with regard to copy of the said FSAs and confirm the same to the Commission. The petitioner was directed to submit the copy of aforesaid FSAs by 22.12.2017 if any, obtained from Respondent No.1. **However, the petitioner preferred to file no response on the aforesaid issue.**

24. During the last hearing held on 19.12.2017, Learned Counsel for Respondent No. 2 i.e. M/s. BLA Industries Pvt. Ltd. was asked to inform those bidding norms, conditions and qualifications under which M/s BLA Industries (P) Ltd. having FSA with its sister concern BLA Power, could not participate in the auction process for the coal blocks conducted by Ministry of Coal. In response to the aforesaid query, Learned Counsel of Respondent No. 2 disclosed for the first time before the Commission that **M/s. BLA Industries Pvt. Ltd. was not eligible to participate in the auction process for coal blocks conducted by Ministry of Coal because it has not paid the Additional Levy of Rs. 295 per MT amounting to more than Rs 75 Crores as imposed by the Hon'ble Supreme Court of India vide its Judgment dated 24thSeptember, 2014** in Writ Petition (Criminal) No. 120 of 2012 (Manohar Lal Sharma vs. Principal Secretary & Ors.) and Writ Petition (Civil) No. 463 of 2012 (Common Cause vs. UOI & Ors.) as well as other connected PILs.

25. The replies to the observations of the Commission and issues identified and communicated to the petitioner and Respondents in this matter are very important to examine and decide the subject petition by the Commission. On perusal of the replies filed by the petitioner and Respondents to the observations and the issues communicated to them vide Commission's order dated 10th October' 2017, a few clarifications on the replies alongwith some supporting documents were sought from the petitioner and respondents by 22nd December'2017 vide Commission's order dated 19th December' 2017 for detailed examination of their submissions. The case was closed for orders on compliance of aforesaid directives by the parties within stipulated time line. The Respondent No.1 and Respondent No.2 filed their reply on 23rd December'2017 which has been taken on record while deciding the subject petition by the Commission. **However, the petitioner has not filed any response on the aforesaid clarifications and documents sought by the Commission.**

26. As per directions of the Hon'ble Tribunal, the hearing in the subject petition have been fixed by this Commission with short dates and the issues observed by this Commission were communicated to the petitioner and respondents seeking their response at the earliest for early disposal of the subject petition. However, the petitioner could file its first reply on 5th December' 2017 after a period of more than one and half months. Even the respondents filed their replies after seeking time extension for the same.

Observations and findings:

27. On preliminary examination of the subject petition, it was observed that the petitioner

No.1 has mentioned some issues in support of its contention for seeking approval of subject "Second Addendum to the PPA" retrospectively i.e. with effective from 1st November'2015. In view of aforesaid and considering a long term period of 20 years' PPA between the petitioners and Respondent No.1, all such issues were identified by the Commission which were necessary to examine the amendments / modifications/ additions to the main PPA dated 05.01.2011 from Legal, Technical, Financial/Economical and Environment point of view. It is also to examine whether the use of "Petcoke" or combination of "Petcoke with domestic or imported coal" and the mechanism for arriving at the "Landed cost of fuel" for computation of Energy Charges is economically advantageous, technically safe and environmentally benign to generate power using Pet coke or combination of Pet coke with coal. The observations and the issues identified by the Commission were communicated to the respective party in the subject matter vide Commission's order dated 10th October'2017 seeking their response at the earliest.

28. Besides above, while discharging the function as sought in the subject petition, the Commission found it necessary to know certain details like sources of fuel (Pet coke and coal), reliability and duration of fuel supply arrangements etc for Unit No.1 of BLA Power (having a long term PPA for 20 years with the petitioners) in order to ensure that the addendum to the PPA, which is primarily on account of change in fuel should remain undisputed and sustainable in future.

29. The aforesaid observations and the issues as communicated to Petitioners and Respondents in this matter have been mentioned in Commission's orders dated 10.10.2017 and dated 19.12.2017. However, the issue-wise response of the Respondents and petitioner on the observations and issues communicated to them vide aforesaid Commission's order are mentioned in Annexure 1, 2 & 3 enclosed as part of this order.

30. On going through the subject second addendum executed between the Petitioners and Respondent No.1 on 08.06.2017 to the main PPA dated 05.01.2011, the Commission has observed the following:

(i) The following are provided in the second addendum executed on 08.06.2017 to the PPA:

(a) "AND WHEREAS, Clause (iii) of Article 3.2 provides that the parties agreed to implement the said PPA with such modifications to the terms thereof, as may be decided by the appropriate Commission.

- (b) AND WHEREAS the Company has installed boilers (“Boilers”) at the **Power Station which use Circulating Fluidized Bed Combustion (“CFBC”) technology and can use multiple types of fuel.**
- (c) AND WHEREAS the Procurer has given in-principle approval to the Company to use, in addition to and /or in the alternative to Fuel (as presently defined in the PPA), such other fuel as may be utilized in the Boilers.”

(ii) There are six Clauses for additions / modifications /amendments in the second addendum to PPA dated 05.01.2011 as mentioned below:

- (a) Change in **definition of Fuel** with Proviso for ratio of various fuels and **capping of Kcal/kg price** of changed fuel or combination of fuels with Kcal /kg price of equivalent quality of WCL coal as given below:

“The procurer & Company hereby agree that Definition of “Fuel” mentioned in Article-1 at page-10 of the Power Purchase Agreement be replaced by the following:

“Fuel means primary fuel used to generate electricity namely, domestic coal / imported coal/ blended coal/ or coke including Petroleum coke (Pet coke), or a combination of any of the forgoing (as applicable).

Provided that, at any time during the operation of Power Station, Coal or Petcoke or a combination of both shall not be less than two third (2/3) of total quantity of fuel used.

Provided further that, at any time during the operation of Power Station, Kilo calorie per Kilo gram(Kcal/kg) price of Coke including Pet coke used for generation of power for that month shall not be more than Kcal/kg price of equivalent quality of coal from Western Coalfields Ltd. (WCL), calculated as per relevant prevailing price notification issued by Coal India Ltd. from time to time.”

- (b) Amendment in **Definition of “Power Station”** as given below;

“The Procurer and the Company hereby agree that first sentence of Definition of “Power Station” in Article 1 at page 13 of the Power Purchase Agreement be amended as follows:

“Power Station shall mean coal or Pet coke based Thermal Power Station.....”

- (c) Amendment in Clause 10.4.2 in “ **Due Date**” regarding Late Payment Surcharge:

“The Procurer and the Company hereby agree that the word “Due Date” in Clause 10.4.2 regarding Late Payment Surcharge in the Power Purchase Agreement be replaced by:

“60 days after a Monthly Bill or a Supplementary Bill is delivered to and its receipt is acknowledged by the procurer”

- (d) Addition of clause 14.1.1 (c):

“The Procurer and the Company hereby agree that a new clause 14.1.1(c) be added as follows:

“14.1.1(c) any and all losses and damages arising from the use of Fuel other than coal, use of which affects the obligation of the Company to make available to the Procurer the Contracted Capacity in terms of this Agreement”

- (e) The following is mentioned in Clause 5 of the subject addendum to PPA:

“The PPA executed between the parties be read with the above changes for all intent and purposes.”

- (f) Retrospective effect of all above additions/ modifications/amendments:
The following is mentioned in last Clause 6 of the subject addendum to PPA :

“Except for the above additions / modifications / amendments, which shall be effective from 1st day of November’2015, all other terms and conditions of the PPA shall remain unchanged and shall continue to be effective and in full force. “

- 31.** Some relevant Articles in the main PPA dated 05.01.2011 are referred below :

- (i) Article 3.2 (iii) of main PPA dated 05.01.2011 mentioned by the parties in subject addendum to PPA dated 05.01.2011, provides that,
“The Procurer agrees and undertakes that the Procurer along with the Discoms shall file, within three (3) months from the Effective Date, an appropriate petition with the Appropriate Commission seeking the approval of the said

Commission for this Agreement. The Company shall duly furnish the requisite data, details, information and assist the Procurer in such proceedings before the Appropriate Commission. Subject to the appellate remedies that may be availed by any of the Parties hereto as provided under section 111 and 125 of the Electricity Act,2003, the parties agrees to implement this Agreement with such modification to the terms thereof, as may be decided by the Appropriate Commission”

(ii) Further, “Effective Date” in main PPA dated 05.01.2011 is mentioned in Article 2.1 as below:

“This Agreement shall come into effect from the date it is executed and delivered by the last of all the Parties and such date shall be referred to as the Effective Date.”

(iii) For Amendment in PPA, Article 16.2.1 provides that,

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

32. On detailed examination of the additions/ modifications /amendments in the second addendum executed on 08.06.2017 to the PPA dated 05.01.2011 vis-à-vis the above mentioned Articles of main PPA dated 05.01.2011 and the response filed by the parties in this matter on the observations and issues communicated to them vide Commission’s order dated 10.10.2017 and 19.12.2017, the observations and findings of the Commission are as given below:

(a) “Effective Date” in Article 2.1 of main PPA dated 05.01.2011 has been ignored in the aforesaid addendum **executed on 08.06.2017.**

(b) As per above mentioned Article 3.2(iii) and Article 16.2.1, the implementation of the Agreement or its amendments / modifications cannot be made before obtaining approval of the Commission. As per Article 3.2(iii), the petition seeking approval of the Commission shall have to be filed by the Procurer (Petitioners) within three months from the Effective Date, which is not complied with by the petitioners as per their contention of retrospective effect of the aforesaid second addendum from 01.11.2015.

- (c) Despite above express provisions in the main PPA dated 05.01.2011, it is observed from the contention in Para 10 to 13 of the subject petition that the amendments with regard to change in fuel in the aforesaid addendum executed on 08.06.2017 have been implemented by the petitioners and Respondent No. 1 from November'2015 by scheduling and payment of the power generated from changed fuel (using Pet coke with coal). Further, as already submitted by the Commission in its reply and additional submissions before Hon'ble APTEL in Appeal No. 201 of 2017, the tariff determined vide Commission's last tariff order dated 22.05.2015 is not applicable for the power generated and supplied by using such fuel (Petcoke) which is neither recognized in main PPA dated 05.01.2011 nor provided in MPERC Tariff Regulations for determination of tariff. The argument in this regard placed by the petitioner in its reply that "*The Second Addendum to PPA is made effective from 1st November'2015 as the initial process to amend the PPA was mentioned in the MOM dated 07.11.2015*" is found untenable and misplaced as there is no such provision for 'in-principle approval' or 'initial process' in main PPA dated 05.01.2011 to reckon the same as effective date for implementation of such amendments.
- (d) In the Minutes of meeting (MoM) held between the MPPMCL (petitioner No.1) and Respondent No.1, it was mentioned that Pet coke shall be used subject to approval from "competent authorities under Law". With regard to the competent authorities and Law, the petitioner No.1 replied that as per clause 4.1.1(i) of PPA, it is generator's obligation to obtain and maintain approvals in full force during the term of the Agreement. However, the Respondent no. 1 (BLA Power) has submitted that the phrase "competent authorities under law" **referred to MPERC** and this phrase i.e "competent authorities under law" was inserted in paragraph 8 at the insistence of MPPMCL. In view of the aforesaid response of the parties on this issue, it is evident that the prior approval for use of Pet coke / changed fuel as per MoM was to be obtained from the Commission which has not been complied with before using the same for generation and supply of electricity by petitioners and Respondent No. 1 (BLA Power).
- (e) Regarding the issue that why Respondent No.1 i.e. M/s BLA Power was asked in the aforesaid MoM held between the petitioner and Respondent No.1, to approach the Commission for approval of amendment to PPA whereas, it is the obligation of Procurer in terms of PPA. In response, the petitioner No.1 submitted that "*MPPMCL was seeking that M/s BLA Power file the petition as it would have*

led to saving of court fees by MPPMCL. However, when it was pointed out that it is the obligation of Procurer in the PPA, MPPMCL has filed the instant petition for approval of the amended PPA in accordance with clause 3.2(iii) of the PPA". On the same issue, Respondent No.1 submitted that "At the meeting held on 07.11.2015, MPPMCL was of the view that they were not inclined to take the initiative of approaching this Hon'ble Commission for any approval as may be required, and as such, it is recorded in the MoM that Answering Respondent would approach this Hon'ble Commission. Under Clauses 3.2(iii) and 16.2 of the PPA read with the definition of the term "Agreement" or "Power Purchase Agreement" or "PPA", only MPPMCL is entitled to approach the Hon'ble Commission for seeking approval to the PPA or any amendment thereto, if necessary. The PPA with the said clause has been earlier approved by the Hon'ble Commission. Therefore, when these provisions were pointed out, MPPMCL accepted that it will only be proper for them (MPPMCL) to approach this Hon'ble Commission for approval of the Second Addendum to the PPA.

From the above statements, the Commission has observed that the parties in the PPA are least concerned towards their obligations under the same PPA.

- (f) It is also observed that all additions / modifications/amendments including the amendment with regard to **Due date** regarding **Late Payment surcharge** also are made effective retrospectively from 1st November'2015 in the subject addendum to PPA.
- (g) The petitioner and Respondent No.1 were asked by the Commission to inform whether the PPA executed with GoMP on 04.05.2011 for concessional power has also been amended? In response to the aforesaid, the petitioner No. 1 submitted that GoMP is fully aware of and has approved the amendments placed before the Commission in the subject petition. It is further submitted by the petitioner that a request will be forwarded to the State Govt. for making suitable amendment in the PPA for 5% power after approval of second addendum by Commission, which has been approved by the State Govt.

On the aforesaid issue, Respondent No.1 (M/s BLA Power) submitted that the PPA executed between GoMP and M/s BLA Power on 04.05.2011 for Concessional Energy has not undergone any amendment. Respondent No.1 further submitted that GoMP is aware of the second addendum to PPA dated 05.01.2011, as GoMP has approved the said Second Addendum. If GoMP finds it necessary to amend the PPA dated 04.05.2011 and issues such directions to M/s

BLA Power, then it is agreeable to amend the said PPA dated 04.05.2011 in line with the Article 1 and 2 of the said Second Addendum.

- (h)** With regard to use of changed fuel i.e Pet coke, the Respondent No.1 (Generator/BLA Power) was asked to inform whether the use of changed fuel i.e Petcoke was considered in the **Detailed Project Report (DPR)** of BLA Power Plant filed with this Commission?

In response, M/s BLA Power has stated that Pet coke was not considered as a fuel in detailed project report as use of Pet coke was not envisaged at that point of time. It is stated that use of CFBC boiler was mentioned in DPR. The Respondent No.1 has mentioned several paragraphs in DPR wherein the CFBC Boiler was mentioned. It is further mentioned by respondent No.1 that the CFBC (Circulating Fluidized Bed Combustion) boilers of the Respondent No.1 are capable of firing 'blended' coal (coal blended with Pet coke) and also 100% Pet coke and other solid fuels as well without any adverse financial implication. The Respondent No.1 stated that once it is accepted that the CFBC boilers are multi fuel, it is irrelevant as to whether Pet coke as a fuel was specifically mentioned in the DPR.

From the submissions of Respondent No.1, it is observed that the Pet coke was not considered in DPR and use of Pet coke was also not envisaged at that point of time. Further, on perusal of the copy of DPR submitted by Respondent No.1, there is mention of CFBC Boiler in the Paragraphs/pages mentioned by Respondent No.1 but there is no mention of Pet coke in DPR. It is mentioned in introduction (in Para 4.1.1 of sheet (page) no. 22) of DPR that Indian coal has been considered for the power plant. As Fuel, it is mentioned in para 4.3.1 of DPR that Indian coal (D to F), shales and washery rejects are the available fuel for the power plant.

- (i)** The Respondent No.1 was asked to inform whether the use of changed fuel i.e Petcoke was considered by Original Equipment Manufacturer (OEM) while issuing Guaranteed Performance certificate of the Equipment/ BTG? If so, please file a copy of the same to the Commission.

In response, M/s BLA Power submitted that the Respondent No. 1 has never proposed nor intended that Pet coke will be "changed fuel" instead of "Fuel" as defined in PPA. Pet coke is only an additional alternative within the "Fuel" that may be fired either alone, or in combination with "Fuel" as originally defined, depending on fuel economics. It has further stated that *"Before using 'blended' coal, as in abundant caution, the Answering Respondent re-confirmed the usage of coal blended with Petcoke with Original Equipment Manufacturer, ISGEC Heavy*

Engineering Ltd. A copy of the letter dated 08.01.2016 issued by the OEM confirming that Answering Respondent's CFBC boilers are intrinsically designed to accommodate more than one type of solid fuel and are ideal for firing petcoke has already been placed on record before this Commission as Annexure R5 to its reply filed on 7 October 2017.

- (j) The Respondent No.1 was asked to inform **whether all original statutory clearances from competent authorities in the state as well as other than state which are with regard to "Coal" only as a fuel in BLA Power Plant have been revised in light of changed fuel in the subject petition?**

In response, Respondent No. 1 submitted that it is incorrect to state that 'All original statutory clearances' received by Answering Respondent are "with regard to Coal only as a fuel". The Statutory clearance received by Answering Respondent pertain to the various aspects of the Thermal Power Plant which may/or may not consider the choice of fuel. Most clearances received by Answering Respondent are actually unrelated to the choice of fuel. However, Respondent No.1 submitted that it has all the requisite clearances to run its Generating Station with Pet coke as an additional fuel. But the Respondent No. 1 had not filed the copy of aforesaid clearances as claimed by it. Therefore, M/s BLA power vide Commission's order dated 19.12.2017 on the last hearing held in this matter was asked to file copy of all such clearances particularly for/ before using Pet coke as fuel.

- (k) Vide letter No. BLA Power/MPERC/2675 dated 22nd December 2017 M/s. BLA Power Pvt. Ltd. submitted copies of various NOC/ certificates. On perusal of the aforesaid documents, the following is observed:
- (i) There is no mention regarding use of Pet coke in above documents except in the copy of consent to operate.
 - (ii) In the letter dated 17.11.2017 issued by the Regional Officer, M.P. Pollution Control Board, Jabalpur annexed as Annexure C, it is mentioned that the certificate is an amended certificate issued on the request of M/s. BLA Power Pvt. Ltd. The certificate is **undated** and there is no mention of Pet coke in the same. The certificate is concerned for a period of FY 2014-15 to FY 2016-17 only. It is mentioned in the aforesaid certificate that the certificate issued earlier on 29.09.2017 vide letter No. 1938 is cancelled. However, the copy of earlier certificate dated 29.09.2017 is not enclosed with the letter.

- (iii) In the consent order annexed as Annexure D, it is observed that the consent order is electronically signed by Member Secretary, Madhya Pradesh Pollution Control Board on 16.09.2017 wherein the following is mentioned:

*“The M.P. Pollution Control Board has agreed to grant **Consent to Operate the industry upto 31/08/2018 by using Coal as well as Pet Coke and biomass as alternate fuel either solely or in combination, in you existing 2x45 MW CFBC boilers subject to the conditions mentioned here in after”***

- (l) The Respondent No. 1 was asked to inform whether the appropriate permission from the concerned authority for Boiler safety in the state has been obtained for using changed fuel in Boiler? In response, M/s BLA Power submitted that there is no provision for fuel specific permission from “concerned authority for Boiler Safety”. As required under Indian Boilers Act 1923 and Indian Boiler Regulations 1950, the Answering Respondent has the necessary and appropriate clearances for both the boilers of its Generating Station. The statutory clearances are valid and operating till date. Subsequently, Respondent No.1 vide letter No. BLA Power/MPERC/2675 dated 22nd December 2017 submitted the copies of the following:
- A copy of the ‘Certificate for the use of the boiler’ issued on 29.06.2015 and 20.05.2016 by the Madhya Pradesh Boiler Inspection Department for Unit-1.
 - A copy of the certificate dated 16.05.2017, extending the validity of registration of boiler, issued by the Office of the Director of Boilers, Madhya Pradesh for Unit-1.
 - A copy of the Provisional Order under Section 9 of The Boiler Act, 1923 dated 10.07.2017 issued by the Director of Boilers for Unit-2.
 - A copy of the letter dated 31.10.2017 by the Director of Boilers to M/s. BLA Power Pvt. Ltd.
- (m) As sought by the Commission, the Petitioners and Respondent No. 1 could not report a single case across the country where the power is generated by any thermal power plant using Petcoke and supplied under cost plus tariff determined by any Electricity Regulatory Commission.
- (n) The petitioner (MPPMCL) was asked to inform whether MPPMCL checked and ensured the Technical feasibility for safe and environment related issues on using Pet-coke blended with coal by the power plant. In response to the aforesaid,

MPPMCL submitted the following:

“As per Article 4.1.1(i) & (iv), it is the obligation of the generator to obtain and maintain in full force and effect all consents, clearances and permits as per applicable law, and hence, compliance with environmental norms is also clearly the obligation of the generator. Further, in the event if the Procurer (Company) starts to verify and check the technical feasibility for safe and environment related issues for any generating company, and in the event any untoward incident occurs in that generating company, then MPPMCL shall also be held vicariously responsible. MPPMCL is neither authorized nor obligated to conduct such checks. The clause 4.1.1(i) sufficiently protects the interest of MPPMCL. Further, it is humbly submitted that MPPMCL neither has expertise nor resources to carry out these checks. There are separate watchdog agencies formed by Govt. of India and Govt. of MP under different laws to carry out the feasibility and environment issues.”

(o) Kilo calorie per Kilogram(Kcal/Kg) price capped in the second addendum dated 08.06.2017 for approval:

It is observed from Proviso to Clause 1 of second addendum dated 08.06.2017 that the **Kilo calorie per Kilo gram(Kcal/kg) price of Coke including Pet coke used for generation of power for a month is capped to the Kcal/kg price of equivalent quality of coal from Western Coalfields Ltd.** The Commission has observed the following in this issue:

- (i) The transportation cost and applicable statutory duties, taxes and levies have not been considered to arrive at the landed cost of fuel.
- (ii) Considering only price of fuel corresponding to Kcal/kg may lead to higher landed cost at any time and consequently, the higher energy charges hence this proviso may not be in the interest of consumers.
- (iii) In MPERC Tariff Regulations, there is no provision for such capping on price of fuel for determination of cost plus tariff under Section 62 of the Electricity Act'2003.
- (iv) M/s BLA Power with its first reply dated 07.10.2017 has enclosed a copy of MPPMCL's letter No. 05-01/974 dated 03.08.2016 addressed to M/s BLA Power (P) Ltd seeking consent of M/s BLA Power (P) Ltd on the conditions proposed by MPPMCL for amendment/addendum to main PPA dated 05.01.2011 wherein one of the conditions was as given below:

*“(d) agrees that at any time during the operation of power station, the Kcal **landed price of Pet coke** used for generation of power shall not be more than per Kcal **landed price of WCL coal** for that month”*

- (v) M/s BLA Power in its submission dated 06.11.2017 has again filed a copy of another MPPMCL's letter No. 05-01 /1261 dated 06.10.2016 whereby the method was proposed for comparing purchase price of petcoke with that of notified price of WCL coal. It is noted from the aforesaid method that Kcal/kg price cap is excluding transportation cost but the actual transportation cost of Petcoke will be added to the price so determined for calculation of Landed cost of Petcoke. Finally, the word "Landed price" is missing in the proviso to clause 1 of second addendum to main PPA in the subject petition.
- (vi) The reply of the petitioner and Respondent No.1 to the aforesaid issue is not adequate and satisfactory.

(p) The similar issue of amendment with regard to Due Date / Late Payment Surcharge as provided under Clause 3 of second addendum dated 08.06.2017 is *sub judice* before Hon'ble Tribunal in one Appeal No. 42 of 2017 filed by MPPMCL against Commission's order dated 21.09.2016 in petition No. 44 of 2016.

(q) In its reply to the issues, M/s. BLA Power has repeatedly submitted that "there has been no usage of petcoke as changed fuel which is only usage blended coal i.e. coal blended with petcoke". It has submitted that "Pet coke is not changed fuel in the second addendum filed by MPPMCL".

The above contention of BLA Power is misplaced and misleading as "blending" in terms of Tariff Regulations and PPA means domestic coal with imported coal. Blending does not mean coal with Petcoke. That is why the MPPMCL and BLA Power agreed through Minutes of Meeting to execute the second addendum of PPA and approach the Commission for approval.

(r) On perusal of the brief background in this matter mentioned in paragraph No. 5 of this order, it is clear that the **Gotitoria Coal Mines** under Fuel Supply Agreement between M/s. BLA Power Pvt. Ltd. with its sister concern M/s. BLA Industries Pvt. Ltd. has been cancelled by the Hon'ble Supreme Court of India vide judgment dated 24th September' 2014 and the Gotitoria Coal Mines of M/s. BLA Industries Pvt. Ltd. has been taken over by the Central Government on 31st March' 2015. Subsequent the aforesaid event, M/s. BLA Power Pvt. Ltd. had the opportunity like other prior allottees of cancelled coal blocks, to participate in the

coal mine auction process conducted by the Central Government for allocation of coal mines to successful bidders and allottees keeping in view the energy security of the country. During the proceedings in the subject matter, M/s. BLA Industries Pvt. Ltd. was asked to inform the reasons for not participating in the aforesaid auction process conducted by the Central Government. M/s. BLA Industries Pvt. Ltd. was also asked to inform the reasons as to why it has not executed any Fuel Supply Agreement with any of the subsidiary of the Coal India Ltd. to discharge its obligations under FSA.

- (s) In response to the aforesaid, M/s. BLA Industries Pvt. Ltd. submitted that it could not participate in any auction process for coal blocks conducted by Ministry of Coal as **M/s. BLA Industries Pvt. Ltd. was not qualified to do so as per the bidding norms, conditions and qualifications.** With regard to the second issue M/s. BLA Industries Pvt. Ltd. submitted that it cannot and is unable to enter into any FSA with any of the subsidiary company of Coal India Ltd. to discharge its obligations under FSA. Subsequently, it has been informed by M/s. BLA Industries Pvt. Ltd. during the course of hearing held on 19th December' 2017 that it could not participate in the auction process for coal blocks conducted by Ministry of Coal because **it has not paid the Additional Levy of Rs. 295 per MT amounting to more than Rs 75 Crores as imposed by the Hon'ble Supreme Court of India** vide its Judgment dated 24thSeptember, 2014 in Writ Petition (Criminal) No. 120 of 2012 (Manohar Lal Sharma vs. Principal Secretary & Ors.) and Writ Petition (Civil) No. 463 of 2012 (Common Cause vs. UOI & Ors.) as well as other connected PILs. However, M/s BLA Industries (P) Ltd by affidavit dated 17.11.2017 submitted that the matter of payment of additional levy of Rs. 295 per MT by BLA Industries, is *sub judice* before the Hon'ble Supreme Court of India in Writ petition (Civil) No. 63 of 2015. It has been further submitted by M/s BLA Industries that the Central Government has filed Contempt Petitions regarding alleged non- payment of the additional levy of rs. 295 per MT. The said Petitions have been directed by the Hon'ble Supreme Court to be tagged with the aforesaid Writ Petition vide order dated 21.08.2017.
- (t) By affidavit dated 22nd December' 2017, M/s. BLA Industries Pvt. Ltd. submitted that no "Demand Notice" has been received by M/s. BLA Industries Pvt. Ltd. specifically. However, it has received the following letters from the Coal Controller, Ministry of Coal and Collector, Narsinghpur:
- (i) Letter dated 18th December 2014 from Office of Coal Controller, Ministry of Coal with regard to "Demand for payment of the additional levy imposed by the

Hon'ble Supreme Court in its judgment dated 25.08.2014 and Order dated 24.09.2014.”

- (ii) Letter dated 11th March 2015 from Collector, Narsinghpur for recovery of additional levy imposed by Hon'ble Apex Court.
 - (iii) Letter dated 12th May 2015 from Office of Coal Controller, Ministry of Coal with regard to “Demand for payment of the additional levy imposed by the Hon'ble Supreme Court in its judgment dated 25.08.2014 and Order dated 24.09.2014.”
- (u)** In Para 20 of its Petition No. 13 of 2017, M/s BLA Power (P) Ltd. submitted that it has executed an agreement with IOCL on 16.02.2016 for purchase of 3400 tons per month of Petroleum Coke. In the same petition, M/s BLA Power (P) Ltd informed that it has executed Fuel Supply agreements for Coal with Subsidiaries of CIL on various dates in September' and October' 2016.
- In view of above, vide Commission's order dated 19.12.2017 on the last hearing in this matter, BLA Power was asked to file the **copy of Fuel Supply Agreements executed with IOCL with regard to Petcoke and with subsidiaries of CIL for coal.**
- (v)** Vide letter No. BLA Power/MPERC/2675 dated 22nd December 2017, M/s. BLA Power Pvt. Ltd. submitted the following documents:
- (i) A copy of the Memorandum of Understanding (MoU) dated 16.02.2016 with IOCL for Petcoke.
 - (ii) Copies of the following Fuel Supply Agreements for coal between M/s BLA Power (P) Ltd and subsidiaries of CIL;
 - FSA with WCL dated 26.09.2016 -Captive Power Plant (CPP) Sub Sector
 - FSA with WCL dated 26.09.2016 -Captive Power Plant (CPP) Sub Sector
 - FSA with SECL dated 19.10.2016 -Captive Power Plant (CPP) Sub Sector
 - FSA- Non Regulated Sector with NCL dated 20.10.2016 -Captive Power Plant (CPP) Sub Sector
- (w)** With regard to Fuel Supply Agreement for Petcoke with IOCL, M/s. BLA Power Pvt. Ltd. has only filed **Memorandum of Understanding (MoU)** dated 16th February 2016 with IOCL. The aforesaid MoU was for a period of **01.02.2016 to 31.03.2017** only. No Fuel Supply Agreement for Petcoke is filed by M/s. BLA Power Pvt. Ltd.
- M/s. BLA Power Pvt. Ltd. has also filed the copies for Fuel Supply Agreements for coal with subsidiaries of Coal India Limited. The aforesaid

FSAs have been signed by M/s. BLA Power Pvt. Ltd. with Western Coalfields Limited, South Eastern Coal field Ltd and Northern Coal Fields Ltd. in October and September 2016. On perusal of the aforesaid FSAs, it is noted that these Fuel Supply Agreements have been executed by M/s. BLA Power Pvt. Ltd. after participation in an electronic auction for grant of Coal Linkage and pursuant to which M/s. BLA Power Pvt. Ltd. has qualified as successful bidder in accordance with the **Scheme Documents dated 22nd June' 2016** issued by the Coal India Ltd. for auction of coal linkages in the Non-regulated **Captive Power Plant sub-sector**. Even "BLA Power Private Limited, Captive Power Plant: 45 MW" is mentioned in the header of one FSA with SECL. Accordingly, all FSAs for coal filed by BLA Power have been executed under the scheme of Coal India Ltd. for auction of coal linkages **for Non-regulated sector i.e. CPP in this case but M/s BLA Power is the Regulated Entity**.

- (x) It is noted with concern by the Commission that Respondent No.1 (M/s BLA Power) filed the copies of abovementioned FSAs with the Commission after rigorous follow-up during the proceedings in the subject petition. On going through the past chronology of events as mentioned in foregoing Para 32 (r) to (w), the Commission is constrained to infer that post cancellation of Gotitoria coal mine, as informed in the proceedings, M/s BLA Industries (P) Ltd, sister concern of BLA Power, had not participated in the coal mine auction process as it was not eligible to do so due to non-payment of additional levy of Rs 295 per MT of coal (amounting to about more than Rs 75 Crores) to the Central Government. Further, as informed, on account of aforesaid reasons, M/s BLA Industries cannot and it is unable to enter into any FSA with any subsidiary company of Coal India Limited till the amount towards additional levy is deposited by BLA Industries (P) Ltd. Further, M/s BLA Power (P) Ltd who is a sister concern of BLA Industries and is a Regulated entity being an IPP having PPA for 20 years with MPPMCL and DISCOMs of MP cannot obtain coal linkage for a small unit of 45 MW as IPP (Regulated entity) as per coal linkage Policy. Thus, being a smaller unit and IPP, BLA Power is ineligible for coal linkage with CIL on one side and M/s BLA Industries (Fuel seller to BLA Power under FSA), being in default of payment of aforesaid Additional Levy is also ineligible to execute any FSA with CIL. Under aforesaid conditions, to obtain coal under FSA from subsidiary companies of CIL, M/s BLA Power participated in electronic auction as Captive Power Plant and qualified as successful bidder in the capacity of CPP in accordance with the Scheme Documents dated 22.06.2016 issued by Coal India Limited and executed all aforementioned

FSA as Non-Regulated entity (CPP) as mentioned in previous Para 32 (v) of this order. From foregoing, it may be possible that the status of M/s BLA Power (P) Ltd as IPP and Regulated Entity may not be informed to Coal India Limited. Since, it is the obligation of BLA Power under Article 4.1.1 (iii) of PPA to provide the copy of FSA to the procurer i.e. MPPMCL therefore, MPPMCL is accountable to ensure that the Fuel Supply Agreements of the Company (IPP) are appropriate and materially consistent with the extant policy of the Government of India..

- (y) During the last hearing held on 19.12.2017 in this matter, Learned Counsel appeared on behalf of petitioner No.1 (MPPMCL) placed a copy of the “Record of Proceedings” in Writ Petition(s) (Civil) No (s). 13029/1985 and Order dated 13th December’ 2017 of the Hon’ble Supreme Court of India on the issue of “**Ban on sales and use of Furnace Oil and Petcoke**”. The petitioner has further informed that a ban on import and use of Petcoke is under consideration with MoEF in view of the environmental hazards. On going through the “Record of Proceedings” and Orders of Hon’ble Supreme Court of India, it is clear that Hon’ble Apex Court has placed a ban on use of Furnace oil and Pet-Coke in the States of U.P., Haryana and Rajasthan with effect from 1st November’2017. If use of Pet-Coke is hazardous to environment in aforesaid three states then the use of Pet-Coke need not be promoted in MP also. The MP Pollution Control Board in their wisdom vide their e-signed letter dated 16.09.2017 have granted consent to operate the power plant by using Coal as well as Pet-Coke and biomass. Therefore, in view of the aforesaid developments regarding use and sale of Pet-Coke, the Commission is not inclined to consider the use of Pet-Coke as long term measure under the second addendum to main PPA dated 05.01.2011.
- (z) In view of all aforementioned observations and infirmities in the amendments / modifications /additions in the Second Addendum dated 08.06.2017 to the PPA dated 05.01.2011, the approval as sought in the subject petition is not considered by the Commission. However, the petitioner may approach the Commission afresh in light of all aforesaid observations in this order.
- With the above observations and findings, the subject petition is disposed of.

(Alok Gupta)
Member

(Dr. Dev Raj Birdi)
Chairman

Issue-wise response filed by the petitioner (MPPMCL)

(i) Issue:

The resolution of the Board of Directors of each Petitioner Company authorizing the officers who signed the subject addendum to PPA be submitted.

Response of MPPMCL:

The relevant documents of Petitioner Company is attached as Annexure-1.

(ii) Issue:

Whether PPA executed with GoMP for concessional power has also been amended? If not why and how tariff for such changed fuel would be applicable for variable charges under that PPA.

Response of MPPMCL

- It is pertinent to note that the PPA for 5% power with GoMP was not approved by the Hon. MPERC.
- Variable Charges are determinable in the PPA for 5% power with GoMP in accordance with its provisions and definitions given. It provides that variable charges determined under the 30% PPA shall be applicable to PPA for 5% power with GoMP. Clause 1.1 –Definitions stipulates as below :
*“Variable Charge/Cost
Shall have the meaning ascribed to the term under CERC Tariff Regulation 2009 in priority the following*
(a) In case any part of power from the Power station is sold subject to determination of tariff (Variable cost) by the Madhya Pradesh Electricity Regulatory Commission, the variable cost so determined by such Commission; and
(b)”
- GoMP is fully aware of and has approved the amendments. Letter is attached as **Annexure-2**. After approval of second addendum by Hon. Commission, which has been approved by the State Govt., a request will be forwarded to the State Govt. for making suitable amendment in the PPA for 5% power.

(iii) Issue

In light of the aforesaid, why the GoMP is not made respondent in this matter?

Response of MPPMCL

- It is pertinent to note that the PPA for 5% power with GoMP was not approved by the Hon. MPERC.
- It is further mentioned that in Petition no. 10 of 2012 for approval of 30% PPA, GoMP was not a party. After approval of second addendum, which has been approved by the State Govt., a request will be forwarded to the State Govt. for making suitable amendment in the PPA for 5% power.

➤ **Issue (iv):**

Whether the power generated by using Pet-coke has been scheduled by MPPMCL? If so, since when the power generated by using Pet-coke was being scheduled by MPPMCL and payments towards such power has been made to the generator/ Respondent No.1? The month-wise details with regard to the aforesaid query be filed.

Response (iv):

- It is humbly submitted that no power using only petcoke has been scheduled by MPPMCL. MPPMCL scheduled power generated by M/s BLA Power using blended coal, i.e., coal blended with petcoke. Blended coal is mentioned in the definition of "Fuel" in the PPA. Further, such power, generated by using blended coal, was scheduled based on MOD principle only. Had this power not been scheduled, next higher generator in MOD would have to be scheduled, resulting in additional financial burden to the consumers of the State. Accordingly, payment has been made against power scheduled following the MOD.

➤ **Issue (v):**

Vide letter dated 29th July' 2015 received in the office of Commission from MPPMCL (which was basically in reference to some other matter for review and determination of Energy Charges for such generating companies which were using coal from auctioned coal mines {Special Provisions} Second Ordinance, 2014 and Regulations, it was informed that MPPMCL had scheduled power from BLA's Power Plant in April and May 2015 being not aware of the conditions imposed by the Commission in its tariff order dated 22nd May' 2015. It is further mentioned in the same letter that scheduling of power from the plant has been stopped since June 2015. Therefore, the reasons to schedule power from M/s. BLA Power Pvt. Ltd. and make payments without any tariff applicable/ determined by the Commission be informed.

Response (v):

- It is humbly submitted that the power has only been scheduled in accordance with the Tariff Order dated 22.5.2015 (which was applicable till 31.3.2016) determined by the Hon. Commission following MOD, and also in accordance with relevant regulations of Tariff, 2015 (proviso to Clause 7.11).
- It is humbly submitted that the PPA with M/s BLA Power remains in existence and is operative. MPPMCL, as always, scheduled power based only on MOD principle for the benefit of consumers of the State. In the event such power was not scheduled from M/s BLA Power, then the next higher generator in the MOD would have been scheduled. This would have been against public interest. Therefore, power from BLA Power has only been scheduled when they fit in the MOD and stopped when they fell out of MOD. As an example, power in June 2015 was stopped as they fell out of MOD.

➤ **Issue (vi):**

As per contention in the Appeal No. 201 of 2017 filed by M/s. BLA Power, the scheduling and payments to the generator/ BLA Power have now been stopped by MPPMCL. If so, since when the scheduling and payment towards such power is stopped by MPPMCL?

Response (vi):

- It is humbly submitted that even after passage of substantial time, M/s BLA Power did not approach the Hon'ble MPERC for determining tariff for FY 2016-17. It was decided that the applicability of Clause 7.11 of Tariff Regulations-2015 cannot be continued indefinitely. Therefore, MPPMCL stopped scheduling of power and returned the bills from March 2017.

➤ **Issue (vii):**

The reasons for scheduling and making payment for a number of months during 2015-16 and 2016-17 without any approved tariff in terms of tariff order dated 22.05.2015 and stopping the same thereafter be explained to the Commission.

Response (vii):

- MPPMCL has always acted in consonance with the Tariff Order dated 22.5.2015 determined by Hon. Commission, the relevant regulations (proviso to Clause 7.11) and principles of MOD. MPPMCL has always scheduled power based only on MOD principle and in the event such power was not scheduled from M/s BLA Power, then the next higher generator in the MOD would have been scheduled causing additional financial burden. This would have been against public interest. Therefore, power from

M/s BLA Power has only been scheduled when they fit in MOD and stopped when they fell out of MOD. As an example, power in June 2015 was stopped as they fell out of MOD.

- The power has been scheduled in accordance with the Tariff Order dated 22.5.2015 (which was applicable till 31.3.2016) determined by Hon. Commission and in accordance with relevant regulations of Tariff, 2015 (proviso to Clause 7.11).
- It is further submitted that even after passage of substantial time, M/s BLA Power did not approach the Hon'ble MPERC for determining tariff for 2016-17. It was decided that the applicability of Clause 7.11 of Tariff Regulations-2015 cannot be continued indefinitely. Therefore, MPPMCL stopped scheduling of power and returned the bills from March 2017.

➤ **Issue (viii):**

As per the contents in Second Addendum to PPA filed before this Commission for approval and also from the Appeal No. 201 of 2017 filed by M/s. BLA Power Pvt. Ltd. before Hon'ble APTEL, two meetings were held between the officers of MPPMCL and one representative of BLA Power at two different timings i.e. at 1 PM and second at 4 PM of the same day i.e. 07.11.2015. In this regard, MPPMCL is required to inform the following to the Commission:

- (a) The reasons for holding these meetings at different timings on same day is not clear from the contents therefore, this needs to be clarified.**
- (b) Whether the officers present in those meetings were authorized to take such important decisions which were taken in these meetings and whether approval from BOD of the Company was obtained on such decisions? If yes, copy of the same be submitted.**
- (c) As mentioned in the title of the meetings, these meetings were convened pursuant to some order of this Commission. Why the outcome of these meetings which were taken against the Commission's tariff order dated 22.05.15 and provisions under PPA, was not placed before this Commission?**
- (d) As mentioned in the Minutes recorded in the above meeting that the use of fuel other than coal like Petcoke shall be subject to approval from the competent authorities as per law. Whether such approvals have been obtained before using such fuel other than coal.**
- (e) Why M/s. BLA Power was asked to approach the Commission through MoM whereas, the procurer i.e. MPPMCL was required to approach the Commission for amendment in PPA?**

Response (viii):

- i. With respect to (a) it is submitted that there is no specific reason for holding meetings at different timings. These were held according to convenience of the officers/representatives, mainly the lunch break happened in-between.
- ii. With respect to (b) it is submitted that the officer who chaired the meeting was of the rank of Chief General Manager (CGM) who is authorised by the resolution of Board of Directors dated 19.09.2008 to **participate in such proceedings**. A copy of the resolution and Manual is attached as Annexure-3.
- iii. MPPMCL is a regulated entity and has always fully abided with the orders and directions of this Hon'ble Commission. With respect to (c) it is humbly submitted that although holding the meeting for amicable settlement was indicated in the Order dated 25.07.2015 in line with Article 13.5.2 of PPA, there was no direction by Hon. MPERC to inform them about the outcome. Further, there is no regulation requiring the same nor is there any Clause in the PPA requiring Parties to intimate Hon. Commission on the outcome of meetings under Article 13.5.2. It is most respectfully submitted that no decision has been taken in the MOM which is contrary to any order of Hon. MPERC including Tariff order dated 22.5.2015.
- iv. With respect to (d) it is submitted that no power using only petcoke as fuel was scheduled by MPPMCL. It is further submitted that as per clause 4.1.1(i) of the PPA, it is generator's obligation to obtain and maintain such approvals in full force during the term of the agreement.
- v. With respect to (e) it is submitted that MPPMCL was seeking that M/s BLA Power file the petition as it would have led to saving of court fees by MPPMCL. However, when it was pointed out that it is the obligation of Procurer in the PPA, MPPMCL has filed the instant petition for approval of the amended PPA in accordance with clause 3.2(iii) of the PPA.

➤ **Issue (ix):**

Once the necessity for amendment in PPA was recognized in aforesaid meetings, the reasons for delay in execution of Second Addendum to the PPA under subject petition be explained.

Response (ix):

- GoMP, vide letter dated 24.6.2008, has nominated MPPMCL to procure 30% of the installed capacity of the Power Station on its behalf. Therefore, due approval of the second addendum from GoMP was necessary and the same could not be rushed. GoMP gave its approval on 05.06.2017, and the second addendum was executed on 08.06.2017.

- Besides above, the brief history of the case rendering to delay is as follows:-
 - (i) The first unit of the Plant was declared under Commercial Operation on 03.04.2012 ahead of scheduled COD on 30th Sept. 2012. The Scheduled COD of Unit No.2 was 31st December 2012 as per PPA.
 - (ii) M/s BLA Power, in Oct 2012, requested for allowing extension in the date of Scheduled COD in respect of 2nd Unit of 45 MW till 31st December 2013. They also indicated that they are ready to supply the contracted capacity of Unit No.2 to MPPMCL from their Unit No.1, already under operation, to compensate for the shortage of power due to delay in commissioning of Unit No.2 at the tariff determined on provisional basis by MPERC. M/s BLA Power's request for extension of COD to 31st December, 2013 was, however, not accepted at that time.
 - (iii) M/s BLA Power Pvt. Ltd., again in May 2015, requested for extending COD of Unit 2 to 31st March 2016. They further requested scheduling of power of Unit 2 from their Unit No.1. They have further mentioned that due to delay in commissioning of Unit-2, power of Unit-2 was continuously offered to be supplied from Unit 1, so as to fulfill obligation of supplying total 27 MW, and ensure MPPMCL gets uninterrupted power of the full quantum as per PPA.
 - (iv) Meanwhile, following Hon'ble Supreme Court's order regarding de-allocation of coal mines, Goitoria (East) & (West) Coal Mines, from where M/s BLA Power was getting coal for generation of power, had been taken over by Western Coal Fields Ltd. on midnight of 31st March 2015.
 - (v) In order to improve the financial health of Power sector in MP, Energy Department had constituted a Committee for suggesting strategy and recommendation for reduction of Power Purchase cost. The Committee submitted its report on 21.02.2015 wherein it was recommended that
 - “(i).....
 - (ii) *Legal opinion may be sought for exploring possibilities for early termination or short-closure of other contracts relating to high cost sources.*
 - (iii).....”

During presentation and discussion at the Government level, it was observed that MPPMCL should examine all PPAs with high ECR and efforts should be made to come out of these PPAs.

In view of such recommendation, it was considered that since the mine, which was providing linkage coal to M/s BLA Power, was handed over on 31.03.2015 to the custodian after Hon. Supreme Court's decision, and the fact that Unit-2 of M/s BLA Power has not achieved COD even after more than three years after the scheduled date, the matter constituted Generator's Event of Default as per provisions of the

PPA. Thus, the matter was decided to be put up before the Board for consideration of early termination of agreement in line with the recommendation of the Committee.

- (vi) The matter was placed before the BoD as Agenda Item No. 63.19 in the 63rd Board Meeting of MPPMCL on 30.07.2015. The Board, after deliberation, passed the following Resolution. **(Annex-A)**

“Resolved that

- (i) *Request of M/s BLA Power Ltd. for extension of COD of 2nd Unit up to March 2016 be not accepted.*
- (ii) *Notice for event of Company default as per Article 13.1.1 read with 4.5.2 of the PPA, be issued.”*

- (vii) Also, Hon'ble Minister, Energy chaired a meeting on 19.08.2015 to discuss and explore ways for reducing power purchase cost in the State. It was decided that terms of PPAs signed on Cost plus basis, who have high fixed charges, may be studied in detail and keeping the legal aspects in view, ways for early termination of such PPAs may be found. The MoM are enclosed as **Annex-B**.

- (viii) The matter was then sent to Energy Deptt., GoMP vide letter No.05-01/1617 dt. 04.09.2015 for according administrative approval. Energy Deptt. GoMP, vide letter No.F.03-51/2010/13 dt.06.11.2015 conveyed the following comments:

“मेसर्स बी.एल.ए. पावर प्रायवेट लिमिटेड द्वारा प्रथम ईकाई से विद्युत अप्रैल, 2012 से प्रदाय की जा रही है।

यह ईकाई पूर्णतः म.प्र. में निवेश कर विद्युत उत्पादन करने की योजना पर आधारित है। माननीय मुख्यमंत्री जी ने प्रधानमंत्री के “मेक इन इंडिया” नारे को आगे बढ़ाते हुए “मेक इन म.प्र.” पर जोर दिया है। जहां तक हो सके हमें ऐसे वातावरण में कार्य करने में निवेशक को प्रोत्साहित करना है, जिससे “मेक इन म.प्र.” सफल हो सके। ऐसा कोई भी निर्णय, जिससे निवेश में गतिरोध आए को निरोत्साहित करना है।

यह परीक्षण किया जाये कि द्वितीय ईकाई की वाणज्यिक उत्पादन प्रारंभ ना किए जाने पर क्या वैकल्पिक स्रोत से विद्युत प्रदाय अनुबंध के प्रावधान अनुसार की गई है? अगर विद्युत गृह अपनी द्वितीय ईकाई के समकक्ष विद्युत वैकल्पिक स्रोत से प्रदाय कर रहा है अथवा प्रदाय करने को तैयार है तो द्वितीय विद्युत ईकाई को वर्ष 2016 तक वाणज्यिक उत्पादन की अनुमति पर देने पर विचार करना चाहिए तथा इस संबंध में मेसर्स बी.एल.ए. पावर से वाणज्यिक उत्पादन की कार्य योजना प्राप्त कर समीक्षा उपरांत निर्णय लिया जाना चाहिए।”

- (ix) Thus, in response to the directives received from Energy Deptt., GoMP, MPPMCL scheduled meeting with representatives of M/s BLA Power on 07.11.2015. Further, MPPMCL requested M/s BLA Power Pvt. Ltd. to inform about the current position of work for commissioning of Unit-2 at site.

It can, therefore, be seen that the variety of events taking place during the period, ranging from proposal for termination of PPA to the decision of GoMP, has resulted in a delay which is not attributable to MPPMCL.

➤ **Issue (x):**

The Second Addendum to the PPA filed with the subject petition has been executed on 8th June' 2017. The reasons for further delay of three months in filing the same be also informed to the Commission.

Response (x):

The petition was filed immediately upon preparation of the petition by the legal counsel and after due approval of this petition by the Company and thus, there was no deliberate delay.

➤ **Issue (xi):**

In case of requirement of any clarification by MPPMCL from the Commission after passing the tariff order dated 22nd May' 2015 and other subsequent orders passed by the Commission in July 2015 on the review petitions filed by BLA Power, why MPPMCL has not approached the Commission in any manner after a period of about two years?

Response (xi):

- MPPMCL is a regulated entity and has always fully abided with the orders and directions of this Hon'ble Commission. The orders of the Hon'ble Commission were explicit and clear and, therefore, MPPMCL has consistently acted in consonance with the Tariff Order dated 22.5.2015, the relevant regulations (proviso to Clause 7.11) and principles of MOD. It is humbly submitted that in the event any clarification was required, MPPMCL could have only approached Hon. MPERC.

➤ **Issue (xii):**

Has MPPMCL executed any amendment/ addendum to any power purchase agreement approved by this Commission in past from retrospective date?

Response (xii)

- MPPMCL has executed the First Addendum to this PPA on 26.08.2013 pursuant to the Hon. Commission's order dated 07.09.2012 in Petition no. 10 of 2012 and

07.02.2013 for Petition no. 85 of 2012 where it is implicit that the First Addendum was applicable from the Effective Date mentioned in the PPA dated 05.01.2011.

➤ **Issue (xiii):**

If no, then why this subject Second Addendum to PPA which was executed on 8th June' 2017 is made effective from 1st November' 2015?

Response (xiii):

- The Second Addendum to PPA is made effective from 1st November 2015 as the initial process to amend the PPA was recorded in the MOM dated 07.11.2015.

➤ **Issue (xiv):**

The addendum to PPA is made effective from the retrospective date, however the effective date as per Article 2.1.1 in the main PPA has not been amended.

Response (xiv):

- It is submitted that under the law of contract, the Parties are free to choose the date of amendments and it is not necessary that the same should be the effective date of the original agreement.
- The Second Addendum to PPA is made effective from 1st November 2015 as the initial process to amend the PPA was mentioned in the MOM dated 7.11.2015.

➤ **Issue (xv):**

In Para 15 of the subject petition, it is mentioned that the amendment in the subject matter has been undertaken on the following strict conditions:

- (a) M/s BLA Power ensures that they will not claim any increase in Fixed cost during operating period because of change in type of fuel**
- (b) M/s BLA Power indemnifies MPPMCL for any increased financial burden because of wear and tear of the machines due to use of Petroleum coke or fuel other than coal.**

However, the contention in sub para (i) above is not provided in the addendum to PPA in subject petition. Secondly, the intent of contention in above sub para (ii) indicates the possibility of damage/ hazard on account of use of Pet-coke. The response of MPPMCL on aforesaid observations be submitted.

Response (xv):

- i. With respect to (a) it is submitted that MPPMCL has capped the price of Petcoke with that of equivalent quality of coal from WCL, calculated as per relevant prevalent price notifications issued by Coal India Ltd. (a Central Govt. PSU). Hence, the cost of coal considered for calculating "Interest on Working Capital", which forms a part of AFC

(Annual Fixed Cost), has been effectively capped at WCL rates. Further, AFC cannot be increased because of Second Addendum on any other account.

- ii. With respect to (b) it is submitted that second addendum to PPA has added a new clause 14.1.1(c) in order to protect our commercial interest. Further, proper safekeeping of the generating plant and proper O&M in lines with Prudent Utility Practises is always the responsibility of the generator and is recorded as such in the PPA.

➤ **Issue (xvi):**

Has MPPMCL checked and ensured the Technical feasibility for safe and environment related issues on using Pet-coke blended with coal by the power plant.

Response (xvi):

- As per Article 4.1.1(i) & (iv), it is the obligation of the generator to obtain and maintain in full force and effect all consents, clearances and permits as per applicable law, and hence, compliance with environmental norms is also clearly the obligation of the generator. Further, in the event if the Procurer (Company) starts to verify and check the technical feasibility for safe and environment related issues for any generating company, and in the event any untoward incident occurs in that generating company, then MPPMCL shall also be held vicariously responsible. MPPMCL is neither authorized nor obligated to conduct such checks. The clause 4.1.1(i) sufficiently protects the interest of MPPMCL. Further, it is humbly submitted that MPPMCL neither has expertise nor resources to carry out these checks. There are separate watchdog agencies formed by Govt. of India and Govt. of MP under different laws to carry out the feasibility and environment issues.

➤ **Issue (xvii):**

Is there any case in the country where the power is generated by a thermal power plant the SERC/CERC using Pet-coke and supplied under cost plus tariff determined by.

Response (xvii):

MPPMCL is unaware of any similar generator in the country.

➤ **Issue (xviii):**

The following is mentioned in the addendum to PPA:

“Provided that, at any time during the operation of Power Station, Coal or Pet coke or a combination of both shall not be less than two third (2/3) of total quantity of fuel used.

*Provided further that, at any time during the operation of Power Station, **Kilo calorie per Kilo gram (Kcal/Kg) price of Coke including Pet coke used for generation of power for that month shall not be more than Kcal/Kg price of equivalent quality of coal from Western Coalfields Ltd. (WCL), calculated as per relevant prevailing price notifications issued by Coal India Ltd. from time to time.**”*

The following is observed from the above proviso under Addendum to PPA:

- (a) In second Proviso of the addendum, the price of Petcoke is capped in terms of Kilo calorie per Kilo gram (Kcal/Kg) price of equivalent quality of coal from WCL. However, the transportation cost of Petcoke is ignored while capping the same.**
- (b) In first Proviso of the addendum, what is the purpose and intent of mentioning “or combination of both” as it indicates the possibility of third type of fuel also other than coal and Petcoke.**

The response of MPPMCL to above observations be submitted.

Response (xviii):

- As regards (a), the price of petcoke is not capped unilaterally. It is mutually agreed by both the Parties. The Regulations provide right to Generator to recover Variable charges. When using Petcoke, the Generator has waived his right to recover Variable charges towards Petcoke beyond a certain cap, as provided in second addendum. MPPMCL insisted for this Clause in public interest.
- For various coal companies including WCL, which are Govt. of India enterprises, the Price Notification does **not** include the transportation cost and gives only Kcal/Kg cost at ROM (Run of Mine). Further, no government authority issues a price notification on transportation from such coal mines. It is indeterminable in advance because of the reason that the coal mine, from which coal will be supplied to the Generator, is not known in advance at the time of issue of Price Notification. Therefore, the same benchmark has been applied herein for ease of use and transparency. A sample copy of price notification issued by Coal India Ltd is attached as **Annexure-4**.
- As regards (b) it is submitted that there are only three fuels envisaged in Second Addendum which are Coal, Coke and Pet-coke.

- **Issue (xix):**
Whether the use of Pet-coke as fuel and capping of fuel price is in accordance with the provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015?

Response (xix):

- The Regulations provide right to Generator to recover Variable charges. When using Petcoke, the Generator has waived his right to recover Variable charges towards Petcoke beyond a certain cap, as provided in second addendum. MPPMCL insisted for this Clause in consumer's interest.

- **Issue (xx):**
The Coal Mines (Special Provisions) Rules, 2014 were framed for auction and allotment of all coal blocks which were subject to cancellation pursuant to the order of Hon'ble Supreme Court of India judgment. Pursuant to the communication by Government of India, the Energy Department, Government of Madhya Pradesh issued directives to this Commission under Section 108 of the Electricity Act, 2003 for downward revision of tariff in respect of the generating stations wherein the coal is being sourced from the auctioned or allotted coal mines under Coal Mines (Special Provisions) Second Ordinance 2014 and Rules framed thereafter. However, on perusal of the contents in the Second Addendum to the PPA filed with the subject petition, it is observed that the tariff on use of changed fuel is most likely to be on upward side. In view of the aforesaid, the response of MPPMCL is required by the Commission in this regard.

Response (xx):

BLA Power does not have any coal mine allotted under Coal Mines (Special Provision) Act and rules framed therein. The referred letter of GoMP is for a situation which is not applicable in this case. There is no changed fuel. Petcoke is in addition to the domestic coal, imported coal, coke and blended coal. The terms of Second Addendum ensure that the consumer is not put to any disadvantage due to the use of Petcoke.

It is therefore prayed that the above submissions may be pleased to be taken on record and the Petition may be allowed in the interest of justice.

Response of Petitioner (MPPMCL) on the clarifications sought vide Commission's order dated 19th December'2017:

MPPMCL was directed to file the copy of Fuel Supply Agreements with regard to Petcoke and Coal if any, obtained by MPPMCL from M/s BLA Power (P) Ltd in terms of provisions under the PPA before execution of addendum to the PPA under approval.

Status of Compliance:

No response received from MPPMCL.

Issue-wise response filed by the Respondent No. 1 (M/s. BLA Power Pvt. Ltd.):

Before submitting issue-wise reply, the Respondent no. 1 broadly submitted the following:

- (i) *The Second Addendum dated 08.06.2017 to the PPA dated 05.01.2011 was entered in between the Petitioners and Answering Respondent and as informed to the Answering Respondent also with due approval of Government of Madhya Pradesh (GoMP).*
- (ii) *The said Second Addendum, inter-alia, incorporates an addition to the definition of "Fuel" as mentioned in Article-1 at Page 10 of the said PPA dated 05.01.2011 where the words "/or coke including Petroleum coke (Pet coke), or a combination of any of the foregoing as applicable" are added.*
- (iii) *The Circulating Fluidised Bed Combustion ("CFBC") boilers of Answering Respondent are capable of firing multiple types of fuel including coal and petcoke. It is submitted that Second Addendum to the said PPA enables the Answering Respondent to use the most competitive Primary Fuel i.e. either coal or blended coal or coke including petcoke, based upon the Fuel availability at most economical cost, which is the consumer interest. It is respectfully submitted that Second Addendum is an enabler which brings competition of different types of fuel hence enables use of optimum economical fuel and thereby has potential to reduce cost during the tenure of the said PPA, ensures economical use of resources, and therefore is in the spirit of safeguarding consumer interest.*
- (iv) *The Second Addendum seeks to better control the fuel cost and its impact on tariff by **use of various solid fuels including petroleum coke**. This would be prudent and in consumer interest consistent with Section 61 tariff principles.*
- (v) *It is respectfully submitted that the said Second Addendum impacts neither the term, nor the pricing nor the Contracted Capacity under the PPA dated 05.01.2011 and is not a substantive or critical amendment to the said PPA **that would necessarily require the approval of this Hon'ble Commission under Article 16.2 of the said PPA**. However, nonetheless, MPPMCL has approached this Hon'bel Commission for approval of the Second Addendum to the PPA.*
- (vi) *The Answering Respondent respectfully submits that the "Issues" raised by this Hon'ble Commission relating to the fuel cost and fuel arrangements are not relevant and are unnecessary for the purpose of the present petition which has been filed for approval of the Second Addendum to the PPA dated 05.01.2011.*

- (vii) *It is respectfully submitted that this Hon'ble Commission is bound by orders of the Hon'ble Supreme Court as also its aforesaid order dated 24th July 2012 and therefore this Hon'ble Commission cannot look into fuel cost or fuel arrangement. Further, compared to "Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) (Revision-II) Regulations, (RG-26(II) of 2012) there is no addition to the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 RG-26 (III) of 2015 which allows examination of fuel supply arrangement by this Hon'ble Commission.*
- (viii) *Without prejudice to the aforesaid submissions, the Answering Respondent is filing the present reply in response to the queries raised by this Hon'ble Commission vide its order dated 10.10.2017 with respect to the Second Addendum to the PPA.*

The issue-wise response for the issues raised under the heading "Issues to be replied by Respondent No. 1 i.e. M/s. BLA Power Pvt. Ltd." is as under:

Issue (i):

In the Minutes of Meeting (MoM) held 07.11.2015 between MPPMCL and BLA Power, it is mentioned that Petcoke shall be used subject to approval from "competent authorities under Law". What are these competent authorities and Law?

Response (i):

As per the understanding of the Answering Respondent, the phrase "competent authorities under law" referred to MPERC.

The phrase "competent authorities under law" was inserted in paragraph 8 at the instance of MPPMCL. The said phrase is thereafter clarified in paragraph 9 wherein it is mentioned that approval is to be sought from this Hon'ble Commission.

Issue (ii):

Whether the approvals as mentioned in Minutes of Meetings have been obtained before use of Petcoke as changed fuel?

Response (ii):

There has been no usage of "petcoke as changed fuel". The Answering Respondent has only used 'blended coal', i.e. coal (main element of fuel) blended with petcoke, which is a permissible fuel under the PPA. Even after the Second Addendum, petcoke is not a "changed fuel".

Petcoke is now an additional fuel which can be used by Answering Respondent in significantly higher percentages without blending it with coal. The amendment is only an enabling provision, which is aimed at reducing the variable cost of fuel. The amendment is also in the nature of a clarification, for the reason that Petcoke is a fuel that, depending on the market price of Petcoke is a fuel that, depending on the market price of Petcoke, can be generally used in a thermal generating station based on fossil fuel. Using such additional fuel enables the Answering Respondent to receive the benefit of competitive principles for fuel supply to its Generating Station (instead of relying only on coal), which has potential to reduce the variable charges during the life of the PPA, and therefore is in consumer interest.

To further emphasis and clarify, the said PPA dated 5 January 2011 executed between the parties defines "Fuel" as under:

*"Fuel" means primary fuel (coal) used to generate electricity namely, domestic coal/ imported coal/ **blended coal** (as applicable)"*

The said PPA permits the use of 'blended' coal and Answering Respondent has only used 'blended' coal and has not used any "changed fuel".

Issue (iii):

As per concluding paragraph of MOM held on 07.11.2015, M/s. BLA Power was asked to approach the Commission. What for and under what provisions of PPA M/s. BLA Power was asked to approach this Commission and you were entitled to approach this Commission?

Response (iii):

At the meeting held on 07.11.2015, MPPMCL was of the view that they were not inclined to take the initiative of approaching this Hon'ble Commission for any approval as may be required, and as such, it is recorded in the MoM that Answering Respondent would approach this Hon'ble Commission.

*Under Clauses 3.2(iii) and 16.2 of the PPA read with the definition of the term "Agreement" or "Power Purchase Agreement" or "PPA", only MPPMCL is entitled to approach the Hon'ble Commission for seeking approval to the PPA or any amendment thereto, **if necessary**. The PPA with the said clause has been earlier approved by the Hon'ble Commission. Therefore, when these provisions were pointed out, MPPMCL accepted that it will only be proper for them (MPPMCL) to approach this Hon'ble Commission for approval of the Second Addendum to the PPA.*

Accordingly, the present Petition No. 39 of 2017 has been filed by MPPMCL.

Issue (iv):

Whether the use of changed fuel i.e Petcoke was considered in the Detailed Project Report (DPR) of BLA Power Plant filed with this Commission? If so, mention the relevant part of DPR along with submission of a copy of the same to the Commission.

Response (iv):

It is most respectfully submitted that the Answering Respondent has never proposed petcoke as a “changed fuel” instead of “Fuel” as defined in the said PPA. Petcoke is only an additional fuel (in addition to “Fuel” as defined in PPA) that may be fired either alone, or in combination with coal, depending on fuel economics. Petcoke was not considered as a fuel in the Detailed Project Report (DPR) as use of petcoke was not envisaged at that point of time by the Answering Respondent.

It is fortuitous that the boilers selected by the Answering Respondent, i.e. CFBC boilers, are intrinsically multi-fuel boilers. The said CFBC (Circulating Fluidized Bed Combustion) boilers of the Answering Respondent are capable of firing ‘blended’ coal (coal blended with petcoke) and also 100% petcoke and other solid fuels as well without any adverse financial implication.

It is clearly stated at the several places in the DPR that the Answering Respondent’s Generating Station is planned using CFBC Boiler. Some of the instances where ‘CFBC boiler’ is mentioned in the DPR are listed below:

Para 2.4.2 on page 9, para 4.4.2 at page 22, para 4.6.2 at page 23, para 6.2.2.1 at page 31., para 6.6 and 6.8 at page 32, para 8.6.5.1, 2 & 3 at page 51, para 10.1.1.1 at page 110

As mentioned above, it is well established and proven that CFBC Boilers can intrinsically use various solid fuels including petroleum coke. Once it is accepted that the CFBC boilers are multi fuel, it is irrelevant as to whether Petcoke as a fuel was specifically mentioned in the DPR.

Issue (v):

Whether the use of changed fuel i.e Petcoke was considered by Original Equipment Manufacturer (OEM) while issuing Guaranteed Performance certificate of the Equipment/ BTG? If so, please file a copy of the same to the Commission.

Response (v):

It is reiterated that the Answering Respondent has never proposed nor intended that petcoke will be “changed fuel” instead of “Fuel” as defined in PPA. Petcoke is only an additional alternative within the “Fuel” that may be fired either alone, or in combination with “Fuel” as originally defined, depending on fuel economics.

The boiler selected by Answering Respondent, i.e. CFBC boiler, is intrinsically a multi-fuel boiler. The said CFBC boiler of the Answering Respondent is capable of firing ‘blended’ coal (coal blended with petcoke) and also 100% petcoke and other solid fuels as well.

Before using ‘blended’ coal, as in abundant caution, the Answering Respondent re-confirmed the usage of coal blended with petcoke with Original Equipment Manufacturer, ISGEC Heavy Engineering Ltd. A copy of the letter dated 08.01.2016 issued by the OEM confirming that Answering Respondent’s CFBC boilers are intrinsically designed to accommodate more than one type of solid fuel and are ideal for firing petcoke has already been placed on record before this Hon’ble Commission by Answering Respondent as Annexure R5 to its reply filed on 7 October 2017.

Issue (vi) :

All original statutory clearances from competent authorities in the state as well as other than state are with regard to “Coal” only as a fuel in BLA Power Plant. Whether all aforesaid clearances have been revised in light of changed fuel in the subject petition?

Response (vi):

As mentioned above in this response, petcoke is not a “changed fuel”. It is incorrect to state that ‘All original statutory clearances’ received by Answering Respondent are “with regard to Coal only as a fuel”. The Statutory clearance received by Answering Respondent pertain to the various aspects of the Thermal Power Plant which may/or may not consider the choice of fuel. Most clearances received by Answering Respondent are actually unrelated to the choice of fuel.

The Answering Respondent has all the requisite clearances to run its Generating Station with petcoke as an additional fuel.

Issue (vii):

Whether the appropriate permission from the concerned authority for Boiler safety in the state has been obtained for using changed fuel in Boiler?

Response (vii):

As mentioned above in this reply, petcoke is not a “changed fuel”. Furthermore, there is no provision for fuel specific permission from “concerned authority for Boiler Safety”. As required under Indian Boilers Act 1923 and Indian Boiler Regulations 1950, the Answering Respondent has the necessary and appropriate clearances for both the boilers of its Generating Station. The statutory clearances are valid and operating till date.

Issue (viii):

Is there any case across the country where the power is generated by any thermal power plant using Petcoke and supplied under cost plus tariff determined by SERC/CERC.

Response (viii):

There are numerous instances of Generating Stations with CFBC boilers firing petcoke in the country. More specifically, the Answering Respondent’s OEM boiler manufacturer has supplied or is supplying more than ten boilers for multi-fuel use and has recently supplied CFBC boilers with identical technology to PSU refineries for firing of 100% petcoke.

The Answering Respondent, however, does not have the ability to do an exhaustive survey of numerous generating stations in the country and/ or their regulatory tariff structure to appropriate respond to the second part of this issue.

Issue (ix):

Whether PPA executed with GoMP for concessional power has also been amended? If not why and how tariff for such changed fuel would be applicable for variable charges under that PPA.

Response (ix):

The PPA executed between GoMP and the Answering Respondent on 04.05.2011 for Concessional Energy has not undergone any amendment. The variable charges under the PPA dated 04.05.2011 have been and will continue to be determined in accordance with definition of “Variable Charges” on page 11 of the PPA dated 04.05.2011. As mentioned above in this reply, petcoke is not as “changed fuel”.

It may be pertinent to point out herein that GoMP or MPPMCL had not sought any approval of this Hon'ble Commission for the PPA dated 04.05.2011. To best of Answering Respondent's understanding, no amendment is required or necessary for the PPA dated 04.05.2011 either for its operation or for supplying Concessional Power to GoMP.

In any event, GoMP is aware of the second addendum to PPA dated 05.01.2011, as GoMP has approved the said Second Addendum. If GoMP finds it necessary to amend the PPA dated 04.05.2011 and issues such directions to the Answering Respondent, then Answering Respondent is agreeable to amend the said PPA dated 04.05.2011 in line with the Article 1 and 2 of the said Second Addendum.

Issue (x):

What are the modalities methodologies in capping the Kcal/kg of changed fuel w.r.t relevant quality of coal of WCL. How the cost of changed fuel over and above the capping considered in amended PPA shall be recovered by BLA Power?

Response (x):

*As mentioned above in this reply, petcoke is not a "changed fuel". The "modalities and methodologies in capping the Kcal/kg of changed fuel w.r.t. relevant quality of coal of WCL" are as per MPPMCL letter No. 05-01/1261 dated 06.10.2016. The said letter of MPPMCL dated 06.10.2016 is annexed herewith and marked as **Annexure R4**.*

As per the sixth amendment to the Fuel Supply Agreement (FSA) with the Fuel Seller dated 28.06.2017, there will be no cost over and above the capping considered which will be required to be recovered by Answering Respondent.

*A copy of the sixth amendment to the FSA dated 28.06.2017 is annexed herewith and marked as **Annexure R5**.*

Issue (xi):

Whether some FSA for supply of Petcoke and coal has been executed? If so, for what duration such FSA are executed and what are the parties in this FSA? The Commission would like to see the terms and conditions under all such FSAs under which the changed fuel with blending is proposed by MPPMCL.

Response (xi):

The Answering Respondent has an existing FSA with BLA Industries (“Fuel Seller”) dated 25.04.2011 which covers coal and as “Alternate Source(s)” covers imported coal, open market purchase of coal or any other arrangement.

Subsequently, in November 2015 disputes between the Answering Respondent and the Fuel Seller was referred to arbitration by the Hon’ble High Court of Bombay. These disputes were adjudicated and duly resolved by the Learned Sole Arbitrator, Hon’ble Mr. Justice V.N. Khare, Former Chief Justice of India through an Award dated 27.05.2017. The Award has now attained finality. Thereafter, the Answering Respondent and the Fuel Seller agreed to execute the Sixth Amendment Agreement to the FSA, whereby, inter alia, petcoke has been also included as a Fuel from “Alternate Source(s)”. The Sixth Amendment Agreement to the FSA was executed on 28.06.2017.

Copies of the said FSA, including the 6th Amendment has been already handed over to MPPMCL earlier.

Issue (xii):

A detailed break- up of the landed cost including transportation and statutory duties and levies of “coal and Petcoke” with source of coal and petcoke vis-à-vis landed cost of same quality of coal from WCL mine with its source be submitted.

Response (xii):

*In response to the aforesaid issue, attached herewith are three charts giving out the break-up of actual cost incurred for purchase of coal at an instance in the past, break-up of actual cost incurred for purchase of petcoke at an instance in the past, as also the cost of coal from WCL mine (without adding the transportation cost for the reasons mentioned in the said annexure) which is to be used by MPPMCL for second proviso to the definition of Fuel stipulated under Article 1 of the Second Addendum to the PPA; and same are annexed herewith and marked as **Annexure R6**.*

Issue (xiii):

What is the role of fuel supplier i.e BLA Industries under FSA in the proposed arrangements?

Response (xiii):

BLA Industries ("Fuel Seller") is the supplier of fuel to the Answering Respondent and is also supplying/ causing to supply fuel from Alternate Sources, as per the terms and conditions of FSA (Clause 3.3). There is no "proposed arrangements". The Fuel Supply Agreement dated 25.04.2011 with the Fuel Seller BLA Industries is existing and continuing and defines the role and responsibility of the Fuel Seller.

In relation to the Fuel Seller's obligation under the FSA, the Learned Sole Arbitrator, Hon'ble Mr. Justice V.N. Khare, Former Chief Justice of India, by way of Award dated 27.05.2017 has held as under:

"...

18. Accordingly, the Tribunal holds that in order to harmonize Clauses 3.3.1 and 3.3.2, the words "on a best effort basis", shall be constructed to mean that the Respondent shall make its best effort to meet its obligation to ensure the supply of Coal, or cause to supply Coal/ fuel, from Alternate Sources. Such supply, however, made by the Respondent shall be against the Applicable Price, which is to be paid by the Claimant. The words "on a best effort basis" cannot be said to absolve the Respondent from its obligation if it fails to supply from Alternate Sources merely upon making an effort to do so, rather it reaffirms the same.

19. In view of the interpretation given above, the Tribunal holds that there is a binding obligations on the Respondent to supply coal, or cause to supply Coal/ fuel, from "Alternate Sources" in during the continuance of the event of 'Force Majeure'.

...

23. The Tribunal has considered the arguments of the parties as well as the documents placed on record. In the case of Energy Watchdog v. Central Electricity Regulatory Commission and Ors [2017(4) SCALE 580], the Hon'ble Supreme Court has conclusively considered this aspect, and held that merely because the performance of a contract becomes more onerous upon the party, the Courts will not absolve the said party of its performance. The Hon'ble Supreme Court further relied upon 'Chitty on Contracts' as under:

This view of the law has been echoed in 'Chitty on Contracts', 31st edition. In paragraph 14-151 a rise in cost of expense has been stated not to frustrate a contract. Similarly, in 'Treitel on Frustration and Force Majeure', 3rd edition, the learned author has opined, at paragraph 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be

constructed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See paragraph 15-158)'

(Emphasis Added)

24. Clause 3.3.2 of the FSA, as set out above, clearly contemplates an alternative mode of performance of the Contract upon happening of an event of Force Majeure. Accordingly, having considered the submissions of the parties, the Tribunal is of the view that the contract is valid and subsisting despite the prolonged Force Majeure event and reject the Respondent's contention that the Fuel Supply Agreement dated 25th April 2011 stand terminated and / or rescinded on account of prolonged force majeure.

....”

A copy of the arbitral award dated 27.05.2017 passed Learned Sole Arbitrator, Hon'ble Mr. Justice V.N. Khare is annexed herewith and marked as **Annexure R7.**”

Response of M/s BLA Power (P) Ltd on the clarifications sought vide Commission's order dated 19th December'2017:

- (a) M/s. BLA Power had stated that M/s. BLA Power has all the requisite clearances to run its generating station with petcoke as an additional fuel. Therefore, M/s. BLA Power was directed to file copy of all such clearances particularly for/ before using Petcoke as fuel.
- (b) M/s BLA Power had submitted that it has the necessary and appropriate clearances for both the boilers of its Generating Station and these clearances are valid and operating till date. Therefore, M/s. BLA Power was directed to file the copy of all clearances for boiler safety particularly for/before using Petcoke as fuel.
- (c) In Para 20 of its Petition No. 13 of 2017, M/s BLA Power (P) Ltd. submitted that it has executed an agreement with IOCL on 16.02.2016 for purchase of 3400 tons per month of Petroleum Coke. In the same petition, M/s BLA Power (P) Ltd informed that it has executed Fuel Supply agreements for Coal with Subsidiaries of CIL on various dates in September' and October' 2016.
In view of above, BLA Power was directed to file the **copy of Fuel Supply Agreements executed with IOCL with regard to Petcoke and with subsidiaries of CIL for coal.**

Status of compliance:

Vide letter No. BLA Power/MPERC/2675 dated 22nd December 2017 M/s. BLA Power Pvt. Ltd. has submitted the following:

- A copy of the NOC dated 16.09.2010 issued by the Airports Authorities of India annexed as **Annexure A**.
- Copies of the Environmental Clearance dated 21.04.2009, 23.03.2011, 03.01.2012 (incorrectly dated as 03.01.2011) and 12.11.2012 annexed as **Annexure B**.
- Copy of the certificate issued by the M.P. Pollution Control Board dated 17.11.2017 annexed as **Annexure C**.
- A copy of consent to operate annexed as **Annexure D**.
- Copies of the 'Licence to work a factory' dated 22.12.2015, 10.12.2016 and 23.11.2017 are annexed as **Annexure E**.
- A copy of the 'Certificate for the use of the boiler' issued on 29.06.2015 and 20.05.2016 by the Madhya Pradesh Boiler Inspection Department for Unit-1 is annexed as **Annexure F**.
- A copy of the certificate dated 16.05.2017, extending the validity of registration of boiler, issued by the Office of the Director of Boilers, Madhya Pradesh for Unit-1 annexed as **Annexure G**.
- A copy of the Provisional Order under Section 9 of The Boiler Act, 1923 dated 10.07.2017 issued by the Director of Boilers for Unit-2 annexed as **Annexure H**.
- A copy of the letter dated 31.10.2017 by the Director of Boilers to M/s. BLA Power Pvt. Ltd. annexed as **Annexure I**.
- A copy of only Memorandum of Understanding (MoU) dated 16.02.2016 with IOCL for Petcoke annexed as **Annexure J**.
- Copies of the Fuel Supply Agreements for coal under CPP sub-Sector-for Non-Regulated entity between BLA Power and subsidiaries of CIL annexed as **Annexure K**.

Issue-wise response filed by Respondent No.2 (M/s. BLA Industries Pvt. Ltd.):

(i) Issue :

What has been the status about existence of FSA during FY 2015-16, FY 2016-17 and in the present?

Response:

The Fuel Supply Agreement with M/s. BLA Power Pvt. Ltd. ("FSA") has been valid and subsisting since execution on 25.04.2011, including during FY 2015-16, FY 2016-17 and continues to be valid in the present. The FSA has not been terminated under the provisions of the FSA.

The issue whether the FSA is still in force and that whether the FSA stood terminated or rescinded was subject matter of an arbitration proceeding between BLA Power and BLA Industries pursuant to order passed by Hon'ble Bombay High Court. The said arbitration proceedings were before the Arbitral Tribunal comprising Justice V.N. Khare, Former Chief Justice of India as Sole Arbitrator.

Through award dated 27.05.2017 in the said arbitration proceedings, the Arbitral Tribunal has, inter alia, confirmed that the said FSA is valid and subsisting. The said arbitration award dated 27.05.2017 has attained finality.

(ii) Issue

Whether M/s. BLA Industries supplied coal or any other fuel to M/s. BLA Power under FSA during FY 2015-16 and FY 2016-17? If so, the month wise details be submitted.

Response

Yes, BLA Industries has been meeting its obligations under the FSA by causing to supply fuel to BLA Power in FY 2015-16 and FY 2016-17 (as also subsequently).

The issue of whether BLA Industries is in breach of the FSA dated 25.04.2011 by not making available fuel from alternate sources was a matter adjudicated by the Arbitral Tribunal comprising Justice V.N. Khare, Former Chief Justice of India as Sole Arbitrator. In the award dated 27.05.2017 the Arbitral Tribunal has stated as follows: (The 'Respondent' in the extract below refers to BLA Industries and the 'Claimant' refers to BLA Power.)

"Accordingly, the Tribunal holds that the Respondent is not in breach of the FSA in as much as it has been causing to make available fuel from Alternate Sources. Since the Respondent has caused to supply MRO from the alternate source from which the Claimant is getting the coal/ fuel, it has to be treated as a supply from

the Respondent, for which the Claimant would, in any event, have to pay the 'Applicable Price'.

Hence, it is further clear that BLA Industries has met its obligation to supply requisite fuel under the FSA.

(iii) Issue

Why the coal could not be procured from the Coal India Ltd. post cancellation of Gotitoria Coal Mines?

Response

To meet its obligations under the FSA, post 01.04.2015, BLA Industries has also caused supply of coal, from Coal India Ltd. and its subsidiaries from time to time.

Furthermore, there is no "post cancellation of Gotitoria Coal Mines" as mentioned in the "Issue (iii)" above. The mining lease for coal mine belonging to BLA Industries over 249 Ha known as Dharmsthal Coal Project has not been cancelled. However, due to error of Central Government, the name of the BLA Industries has been included in the list annexed to Coal Mines (Special Provisions) Act, 2015 and the said coal mine of BLA Industries has been wrongly taken over by "Custodian" Western Coalfields Ltd. ("WCL"), albeit under strong protest. To safeguard the fundamental rights granted by the Constitution of India, BLA Industries was forced to file a Writ Petition being Writ Petition (Civil) No. 63 of 2015 ("Writ Petition") before the Hon'ble Supreme Court challenging the said error of Government of India which has led to the takeover of our Dharmsthal Coal Project by "Custodian" WCL. In the said Writ Petition, on 21.08.2017, Hon'ble Supreme Court has directed to "Issue Rule", i.e. admitted the Writ Petition. The said Writ Petition is presently pending adjudication before the Hon'ble Supreme Court. Pertinently, in the said Writ Petition, Government of Madhya Pradesh ('GoMP') has supported the stand of BLA Industries.

(iv) Issue

Had you participated in the bidding process initiated and completed by the Central Government for all prior allottees for auction of coal mines under Coal Mines (Special Provisions) Second Ordinance, 2014 and rules thereunder. If not, what were the reasons for not participating in the aforesaid auction process which was conducted by the Central Government for allocation of coal mines to successful bidders and allottees keeping in view the energy security of the country and to minimize on the core security such as steel, cement and power utilities.

Response

*BLA Industries could not participate in any auction process for coal blocks conducted by Ministry of Coal ('MoC') **as it was not qualified to do so as per the bidding norms, conditions and qualifications.** It is the contention of BLA Industries in Writ Petition pending adjudication before Hon'ble Supreme Court that BLA Industries is not a "prior allottee" under provisions of "Coal Mines (Special Provisions) Second Ordinance, 2014 and rules thereunder" and/or the subsequent Act. Furthermore, under "Coal Mines (Special Provisions) Second Ordinance, 2014" and/or the subsequent Act, auction of coal mine of BLA Industries has not yet been conducted by MoC and the mine remains inoperable in the custody of "Custodian" WCL.*

Moreover, it is for the government to enact legislation and frame policies & guidelines "keeping in view the energy security of the country and to minimize on the core security such as steel, cement and power utilities" and BLA Industries, being a mere corporate entity, always tried to do its best to meet its obligations under the FSA in the given economic circumstances in accordance with law.

(v) Issue

Why BLA Industries has not executed any FSA with any of the subsidiary company of Coal India Ltd. to discharge its obligations under FSA?

Response

*Based on the current policies and guidelines of MoC, **BLA Industries cannot and hence is unable to enter into "any FSA with any of the subsidiary company of Coal India Ltd. to discharge its obligations under FSA"**.*

Furthermore, as mentioned in responses above, BLA Industries has been discharging its obligation under the FSA.

(vi) Issue

How the BLA Industries is now fulfilling its obligations for supply of fuel to BLA Power under FSA?

Response

BLA Industries has been meeting its obligations under the FSA by causing to supply fuel to BLA Power from Alternate Sources as provided under the FSA.

In the FSA, alternate means of performance is provided. The relevant Article 3.3 of the FSA is reproduced below:

".....In the event that the Seller is unable to supply the Monthly Required Quantity of Coal from the Coal Mine, whether due to an event of Force Majeure or due to default of the Seller, the Seller shall supply or cause the supply of the Coal from

Alternate Sources in accordance with the provisions of Articles 3.3.2 and 3.3.3.....”

(Emphasis added)

The alternate means of performance as envisaged in the FSA, is upheld in award dated India as Sole Arbitrator.

(vii) Issue

Had M/s. BLA Industries ever supplied coal other than Gotitoria Coal Mines to M/s. BLA Power upto 31st March’ 2015 i.e. before taking over the coal mines by the Central Government?

Response

Yes, only during Force Majeure caused by mining difficulties.

(viii) Issue

For how long period, the Force Majeure event was initially assessed by BLA Industries post cancellation of Gotitoria Coal Mines? Whether Force Majeure event is still continuing? If so, how long it will continue under the provisions of FSA?

Response

BLA Industries initially assessed that the Force Majeure event would not last very long as it had promptly filed Writ Petition on 05.01.2015 before Hon’ble Supreme Court, anticipating the illegal takeover of its coal mine by the “Custodian” after enactment of Coal Mines (Special Provisions) Ordinance, 2014. However, after a period of nearly two and half years, the Writ Petition has now been admitted by the Hon’ble Supreme Court by order dated 21.08.2017. The matter is pending adjudication of the highest Court of our country.

Hence, the Force Majeure situation is continuing subject to further orders that may be passed by the Hon’ble Supreme Court in the said Writ Petition.

Under the provisions of the FSA, there is no time limit prescribed for limiting the period of Force Majeure event. Article 3.3 of the FSA allows procurement of fuel from alternate sources. In light of, inter alia, the said provisions, BLA Industries is continuously fulfilling its obligation under the FSA.

Furthermore, in award dated 27.05.2017 of the Arbitral Tribunal comprising Justice V.N. Khare, Former Chief Justice of India as Sole Arbitration has also made it clear that regardless of the Force Majeure, the obligation of BLA Industries to supply MRQ continues.

(ix) Issue

M/s. BLA Power Pvt. Ltd. had placed a Arbitration Award dated 27th May' 2017 with regard to some arbitration proceedings emanate from a dispute between M/s. BLA Power and M/s. BLA Industries with regard to their rights and obligations under FSA. On cursory perusal of the aforesaid Arbitration Award, it is observed that the following issue was also framed in arbitration award:

“Is the Respondent entitled to the additional levy of Rs. 295 per metric tonne of coal in terms of the Supreme Court order dated 24.11.2014 and if so, to what extent and amount?”

Response

No response is required as factual.

(x) Issue

The aforesaid issue was decided against the BLA Industries Pvt. Ltd. which means that the additional levy of Rs. 295 per metric tonne of coal is to be paid and borne by M/s. BLA Industries in term of order dated 24.11.2014 passed by the Hon'ble Supreme Court of India. However, the details and status of such additional levy imposed by the Hon'ble Supreme Court of India is not found in the aforesaid award.

Response

The award dated 27.05.2017 of the Arbitral Tribunal comprising Justice V.N. Khare, Former Chief Justice of India as Sole Arbitrator was inter-parties i.e. between BLA Power and BLA Industries. BLA Industries had raised a counter-claim in the said arbitration proceeding that in the event BLA Industries was held liable by the Hon'ble Supreme Court in the Writ Petition to pay the alleged liability to pay the “additional levy” of Rs. 295 per metric tonne, whether such alleged liability was to be borne by BLA Power. As mentioned in the “Issue (x)” above, in the said arbitration, the said counter-claim was decided against BLA Industries.

The Ld. Arbitrator has not (and could not have) made observations in relation to the Writ Petition pending before the Hon'ble Supreme Court, where the issue whether BLA Industries is at all liable to pay the additional levy of Rs. 295 per metric tonne is pending adjudication. In the said Writ Petition, Hon'ble Supreme Court has directed to “Issue Rule”, i.e. admitted the Writ Petition. The said Writ Petition is presently pending adjudication before the Hon'ble Supreme Court. Further, the Central Government has filed Contempt Petitions regarding alleged non-payment of the additional levy of Rs. 295 per metric tonne. The said Contempt Petitions have been

directed by the Hon'ble Supreme Court to be tagged with the abovementioned Writ Petition vide order dated 21.08.2017.

Thus, inter alia, the matter of, payment of additional levy of Rs. 295 per metric tonne by BLA Industries, is sub judice before the Hon'ble Supreme Court of India and it is most respectfully and humbly submitted that it will be against judicial propriety for this Hon'ble Commission to seek "details and status of such additional levy" in the present proceedings or otherwise.

In any case, the present Petition No. 39 of 2017 before MPERC relates to approval of amendment to a PPA between a generating company and MPPMCL, and as per the said Award of Arbitral Tribunal (which has attained finality), any of BLA Industries' potential liability to pay the additional levy of Rs. 295 per metric tonne is clearly not recoverable from BLA Power, and neither from any of the Petitioners, including MPPMCL.

(xi) Issue

In view of the above, the status of compliance by M/s. BLA Industries with regard to additional levy of Rs. 295 per metric tonne of coal excavated from the coal mines as per the directions of Hon'ble Supreme Court of India be informed to the Commission.

Response

The matter of payment of additional levy of Rs. 295 per metric tonne by BLA Industries, is sub judice before the Hon'ble Supreme Court of India.

By its Judgment dated 25.08.2014 and order dated 24.09.2014 (read together), Hon'ble Supreme Court has directed that "beneficiaries of the flawed process" i.e. allottees of coal mines through the Screening Committee route should pay an additional levy of Rs. 295 per metric tonne of coal extracted. BLA Industries is not a beneficiary of the flawed process struck down by the Hon'ble Supreme Court. On the contrary, the grant of the mining lease to BLA Industries was done by GoMP independent of any alleged allocation/ allotment letter issued by Central Government (based on Recommendation of Screening Committee). The grant of mining lease to BLA Industries was done by GoMP strictly by following the provisions of the Mines & Minerals (Development & Regulations) Act, 1957.

Consequent to Hon'ble Supreme Court cancelling allotment letters issued by Central Government based on Screening Committee recommendation, the coal mines of BLA Industries ought not to have been taken over by the "Custodian" since our coal mines lease was not based on any allotment letter of Central Government. However, due to error of Central Government, the name of the BLA Industries has been included in

the list annexed to Coal Mines (Special Provisions) Act, 2015 and the said coal mine of BLA Industries has been wrongly taken over by “Custodian” WCL, albeit under strong protest. To safeguard the fundamental rights granted under the Constitution of India, BLA Industries was forced to file the Writ Petition before the Hon’ble Supreme Court challenging the said error of the Central Government.

The said Writ Petition is pending before the Hon’ble Supreme Court, where the issue whether BLA Industries is at all liable to pay the additional levy of Rs. 295 per metric tonne is pending adjudication. In the said Writ Petition, on 21.08.2017 Hon’ble Supreme Court has directed to “Issue Rule”, i.e. admitted the Writ Petition. Further, the Central Government has filed Contempt Petitions regarding alleged non-payment of additional levy of Rs. 295 per metric tonne. The said Contempt Petitions have been directed by the Hon’ble Supreme Court to be tagged with the abovementioned Writ Petition vide order dated 21.08.2017.

In the said Writ Petition, GoMP has filed an affidavit in Hon’ble Supreme Court and supported the stand of BLA Industries.

Thus, inter alia, the matter of, payment of additional levy of Rs. 295 per metric tonne by BLA Industries, is sub judice before the Hon’ble Supreme Court of India and it is most respectfully and humbly submitted that it will be against judicial propriety for this Hon’ble Commission to seek “details and status of such additional levy” in the present proceedings or otherwise.

It is most humbly submitted that the present Petition No. 39 of 2017 before MPERC relates to approval of amendments to a PPA between a generating company and MPPMCL, and as per the said Award of Arbitral Tribunal (which has attained finality), any of BLA Industries’ potential liability to pay the additional levy of Rs. 295 per metric tonne is clearly not recoverable from BLA Power, and neither from any of the Petitioners, including MPPMCL.

(xii) Issue

Whether concerned department of the State Govt. has raised any demand note towards additional levy imposed by the Hon’ble Apex Court? If so, what is the status of the same?

Response

The State Government did not raised any demand towards the additional levy, while demand has been raised by MoC. Further, BLA Industries reiterates its response to Issue (x)(a) in response to the present issue.

Response of M/s BLA Industries (p) Ltd on the clarifications sought vide Commission's order dated 19th December'2017:

(xiii)(a) Issue

It was mentioned by M/s. BLA Industries that it cannot or it is unable to enter into any FSA with any of the subsidiary companies of Coal India Ltd. to discharge its obligations under FSA. Therefore, M/s. BLA Industries was asked to mention the policies and guidelines issued by Ministry of Coal on account of which it is unable to enter into FSA with any of the subsidiary companies of the Coal India Ltd.

(xiii)(b) Issue

With regard to the additional levy of Rs 295 per MT of coal imposed by the Hon'ble Apex Court, it was mentioned by M/s. BLA Industries Pvt. Ltd. that the State Government did not raise any demand towards the additional levy while demand has been raised by Ministry of Coal. With reference to the aforesaid reply, M/s. BLA Industries Pvt. Ltd. was directed to inform/file the following:

- (i) The amount of demand raised by the Ministry of Coal to M/s BLA Industries (P) Ltd on account of Additional levy imposed by Hon'ble Apex Court.
- (ii) A copy of aforesaid demand raised by the Ministry of Coal.
- (iii) The correspondence/(s) if any, made by the State Govt. towards Additional levy imposed by Hon'ble Apex Court.

Response

Vide letter No. BLA/MPERC/158 dated 22nd December' 2017, M/s. BLA Industries Pvt. Ltd. has almost reiterated its contention that has been earlier filed by it.

With regard to additional levy of Rs. 295 per MT, M/s. BLA Industries Pvt. Ltd. has broadly submitted the following:

- *"It is most humbly submitted that the present Petition No. 29 of 2017 before MPERC relates to approval of amendments to a PPA between a generating company and MPPMCL, and as per the said Award of Arbitral Tribunal (which has attained finality), any of BLA Industries; potential liability to pay the additional levy of Rs. 295 per metric tonne is clearly not recoverable from BLA Power, and neither from any of the Petitioners, including MPPMCL.*
- *It is clarified that no 'Demand Notice' or 'Demand' has been received by BLA Industries specifically. However, the letters from Coal Controller and Collector, Narsinghpur, which pertain to the payment of any additional levy are attached. We reiterate that BLA Industries is not a 'prior allottee' and*

the issue of payment of any additional levy is sub judice before Hon'ble Supreme Court, as mentioned above."

With its aforesaid reply M/s. BLA Industries Pvt. Ltd. has filed the copy of following documents:

- (iv) Letter dated 18th December 2014 from Office of Coal Controller, Ministry of Coal with regard to "Demand for payment of the additional levy imposed by the Hon'ble Supreme Court in its judgment dated 25.08.2014 and Order dated 24.09.2014."
- (v) Letter dated 11th March 2015 from Collector, Narsinghpur for recovery of additional levy imposed by Hon'ble Apex Court.
- (vi) Letter dated 12th May 2015 from Office of Coal Controller, Ministry of Coal with regard to "Demand for payment of the additional levy imposed by the Hon'ble Supreme Court in its judgment dated 25.08.2014 and Order dated 24.09.2014."