

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Petition No.82/2012

Subject: In the matter of review petition under Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 read with Section 94 of the Electricity Act, 2003 for review of the Order passed by this Hon'ble Commission dated 7th September, 2012 passed in petition No.7 of 2012 in the matter of approval of Power Purchase Agreement executed between the Review Petitioner and Respondents.

ORDER

(Date of Order: 4th February, 2013)

M/s M B Power (Madhya Pradesh) Ltd., New Delhi

Petitioner

V/s

1. M. P. Power Management Co. Ltd., Jabalpur
2. M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur
3. M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal
4. M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore

Respondents

Shri Ravi Arya, VP (Comml.), Shri Rameshwar Dubey, Head Corporate Affairs, Shri Vikas Sharma, Consultant, Shri S. Venkatesh, Advocate and Ms. Ambica Garg, Advocate appeared on behalf of the petitioner.

Shri Prakash Pachori, DGM (Comml.) and Shri R. V. Saxena, DGM appeared on behalf of Respondent No.1 and also on behalf of Respondent No.2.

Shri V. Ramesh Iyer, DGM (Comml.) appeared on behalf of Respondent No.3.

Shri Anant Chaure, Law Officer appeared on behalf of Respondent No.4.

The petitioner has filed the subject petition seeking review of the Order passed by the Commission dated 7th September, 2012 in petition No.7 of 2012 in the matter of approval of Power Purchase Agreement executed between the Review Petitioner and Respondents under Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 read with Section 94 of the Electricity Act, 2003.

2. The petitioner broadly submitted the following in its petition and the rejoinders filed during various proceedings in the matter :

- (i) *That the Hon'ble Commission in passing the Impugned Order at Para 12 has unilaterally imposed an obligation on the Review Petitioner of obtaining concurrence of the procurer, Respondent No. 1 herein, to the fuel supply agreement, which the Review Petitioner enters into with its fuel supplier for long term fuel supply.*
- (ii) *That the Hon'ble Commission in imposing such a condition has gone beyond the scope of the PPA dated 05.01.2011 and the Original Petition No. 07 of 2012 wherein there was no such obligation on the Review Petitioner to procure such consent.*
- (iii) *That during the proceedings of Petition No. 07 of 2012 there was no discussion/deliberation either through pleadings or orally on the aforesaid conditions. The said condition appears to be an error apparent on the face of the record as it was not an issue that had been discussed or agitated in any of the hearings. Hence, the Review Petitioner has 'sufficient reasons' to file the present Review Petition for the reconsideration of the Impugned Order.*
- (iv) *That the conditions laid down by the Hon'ble Commission at para 12(iii) read with the second part of the condition at para 12(v), go beyond the scope of the petition and such a condition is not ordinarily included in a PPA, wherein the concurrence of the procurer is to be sought for the fuel supply agreement. While the condition in para 12(v) is acceptable, there should be no requirement for seeking any concurrence of the fuel supply agreement from the procurer.*
- (v) *The Review Petitioner has already made significant progress in the development of the project and has invested and committed significant amount towards the project construction. Therefore, any subjective condition in the PPA at this stage will add to the risk to the project and can potentially lead to lenders concerns in addition to putting the Review Petitioner to additional burden if the procurer were to not grant its concurrence. It is submitted that the Review Petitioner apprehends that this condition could lead to delays and disputes. It was always the intention of the Parties that the Project would source fuel under appropriate FSA (s) to be executed pursuant to the Implementation Agreement (IA) with the facilitation of the Government of Madhya Pradesh. The specific provisions relating to fuel supply are contained in the PPA and these provisions are consistent with the terms and conditions of the extant Government of India ("GoI") policies. So long as the Review Petitioner undertakes such obligation and executes the fuel supply agreements, there can be no occasion for any further subjective concurrence from the procurer at a later stage.*

- (vi) *The National Electricity Policy and the Tariff Policy both contemplate that interest of private investors also needs to be protected along with consumer interest and also to ensure regulatory certainty. Thus, while this Hon'ble Commission has to keep the interest of the consumers in consideration while passing any order, however, the interest of the private investors such as the Review Petitioner cannot be hampered in that process as the said onerous conditions puts the PPA in perpetual uncertainty.*
- (vii) *If the said impugned condition being laid down by this Hon'ble Commission is not removed then the Respondent No. 1 will have unfettered power not to proceed with the PPA with the Review Petitioner on the grounds of not accepting terms and conditions of FSA including Coal Prices. The Review Petitioner is likely to commission its Project in FY 2013-14 therefore, a substantial amount of funding is yet to be received from financial institutions. Therefore, the impugned condition if allowed, would also affect the financing of the Project as the PPA signed between the parties will become unstable.*
- (viii) *The Review Petitioner would like to humbly submit that if the order dated 07.09.2012 to the extent impugned is not reviewed and if the said obligation of the Review Petitioner obtaining concurrence from the Respondent of the Fuel Supply Agreement is not withdrawn, extreme hardship would be caused to the Review Petitioner.*
- (ix) *It is further submitted that the additional condition is onerous and is susceptible to misinterpretation and may potentially lead to disputes. The Review Petitioner has not control over the policy of the GoI under which the fuel will be procured. The FSA and GoI policy will have to be accepted by the Review Petitioner and Procurer without any further subjective evaluation.*
- (x) *It is further submitted that the Coal India through its Subsidiaries in the current scenario qua coal makes the Private Developers sign the Fuel Supply Agreements on dotted lines and thus there is no scope for negotiation. It is further submitted that the Review Petitioner is procuring Fuel as per extant policy of Government of India and in view of the current scenario pertaining to Coal there is no scope for negotiating any terms and conditions including Coal Price. Therefore, if the said Clause is allowed to be incorporated in the PPA then the same would cause tremendous difficulty to the Review Petitioner as if the Procurer does not agree to any terms and conditions of the FSA including the Coal Price being offered by the Coal Companies then the Review Petitioner will have no option but to shutdown its plant and halt its supply of Power to the Procurer leading to huge financial losses and investment risks to the Review Petitioner.*

(xi) *It is submitted that Model Power Purchase Agreement approved by Energy Department, Government of Madhya Pradesh, is substantially in line with the Standard Bidding Document of the Ministry of Power, Government of India. Further, the PPA entered into between the Review Petitioner and the Respondent No. 1 is identical to the Model Power Purchase Agreement. Relevant extracts of the said Model PPA are not being repeated herein for the sake of brevity. The Hon'ble Commission in passing the Impugned Order has erred in not appreciating that the terms and conditions in the PPA are in direct consonance with the approved Model PPA and if such clause is added to the PPA, it will lead to change in material terms of the PPA and the model PPA issued by the GoMP.*

(xii) *Therefore, in view of the above it is humbly prayed before this Hon'ble Commission to consider the submissions being made by the Review Petitioner and allow the present Review Petition and further review its Order dated 07.09.2012, to the extent impugned by the Review Petitioner, passed in Petition No. 07 of 2012 and pass an order withdrawing condition in paragraph 12 (iii) of the Impugned Order and amend the condition in paragraph 12(v) of the Impugned Order, to read as follows – “The Company shall enter into appropriate arrangements for supply of Fuel for all or part of the capacity of the Unit(s) upon prudent terms and conditions materially consistent with the extant policy of the Government of India, if any. The Company shall provide a copy of duly executed Fuel Supply Agreement to the Procurer;”.*

3. The case was listed for motion hearing when the Counsel on behalf of the petitioner argued, inter-alia, that satisfaction of the conditions subsequent by the company for having obtained concurrence of the procurer to the Fuel Supply Agreement entered into with the fuel supplier was neither agitated/deliberated in any previous hearing nor discussed in any of the daily orders issued by the Commission in the matter. The petitioner, therefore, did not get any opportunity to examine and respond in the matter.

4. Considering this argument, the subject review petition was admitted under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 40 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and the petitioner was directed to serve copy of the petition on all respondents. The respondents were also directed to appear before the Commission in this matter on the date of next hearing and file their reply on the issues in the petition by 10th December, 2012.

5. Vide letter No.MBPMPL/MP/Commercial/12-13/2907 dated 1st December, 2012, the petitioner confirmed that the copy of the petition was served on all respondents in the matter.

6. M P Power Management Co. Ltd., Jabalpur, Respondent No.1 in the matter, filed its response with the Commission on 17th December, 2012. The respondent broadly submitted the following:

- (i) *The petition filed by the Review Petitioner for review of the judgement and order dated 7.9.2012 passed by the Hon'ble Commission is totally misconceived and is without any merit. It is well settled that a petition for review is maintainable only on error apparent on the face of record or for sufficient reasons akin to the same or for discovery of any material which were not available at the time of the hearing of the main petition.*
- (ii) *The decision of this Hon'ble Commission in the Order dated 7th September, 2012, in particular, in paragraph 12 (iii) and (v) have been taken consciously in the circumstances that fuel constitutes significant part of the cost of power generation and sale of electricity by the Review Petitioner to Respondents. The higher fuel cost will be against the interest of the consumers. The said decision of the Hon'ble Commission cannot be said to be erroneous much less an "error apparent on the face of the record".*
- (iii) *In terms of clause 3.2 (iii) of the PPA, the review petitioner has duly agreed to implement the PPA "with such modification to the terms thereof as may be decided by the Appropriate Commission". Accordingly, the decision of the Hon'ble Commission on the aspect of modification to clauses 3.1.1.2 and clause 4.1(iii) of the PPA are fully in accordance with the terms agreed to by the review petitioner in the PPA.*
- (iv) *MPPMCL while denying all the arguments put forth by the review petitioner has stated that there is no merit in this review petition filed by the review petitioner.*

7. During hearing held on 18th December, 2012 :

- a) Respondent No.1 stated : that it had filed its reply with the Commission on 17th December, 2012.
- b) Respondent No.2 authorized Respondent No.1 to represent it before the Commission in the subject matter.
- c) Counsel for the petitioner sought two weeks' time to file a rejoinder to the reply filed by Respondent No.1 since the reply from Respondent No.1 was received only on 15th December, 2012.

8. By affidavit dated 2nd January, 2013, the petitioner filed a rejoinder to the reply filed by Respondent No.1. The petitioner broadly submitted the following in the aforesaid rejoinder :

- a) *It is humbly submitted that the Respondent No.1 has failed to appreciate that the expression “or for any other sufficient reasons” provided in Order 47 Rule 1 of the Civil Procedure Code, 1908 provides that a liberal construction is required so as to advance substantial justice. Thus, the contention of the Respondent No.1 that the instant Review Petition is not maintainable is not in the interest of justice. It is a settled principle of law that a court may reopen its judgement if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.*
- b) *It is humbly submitted that the Review Petitioner has never refuted the regulatory powers of this Hon’ble Commission. It is however, the grievance of the Review Petitioner that this Hon’ble Commission while passing the Impugned Order has not considered the extent of ramifications before unilaterally imposing the additional onerous condition for obtaining concurrence of the procurer, Respondent No.1 herein, to the fuel supply agreements, which is the Review Petitioner enters into with its fuel supplier for long term fuel supply. Further, the said issue was never discussed orally or by way of pleadings in petition No.7 of 2012. It is submitted that the principles of natural justice embody the right to every person to represent its interest to the court of justice. Further, pronouncing a judgement which adversely affects the interest of the parties to the proceedings who have not been given a chance to represent its case is contrary to the principles of natural justice.*
- c) *It is humbly submitted that this Hon’ble Commission has the regulatory powers to modify the agreement however, the Hon’ble Commission while doing so should also keep the interest of the developer in mind. It is submitted that one of the most significant development by the enactment of the Electricity Act, 2003 is that the said act provided for investment from private sector. Further, the policies framed there under further stipulated that Private Sector Participation is important and that the need of the hour is to have an environment free from Regulatory Risks.*
- d) *While quoting certain clauses of National Electricity Policy and Tariff Policy, the petitioner reiterated that both contemplate that interest of private investors also needs to be protected along with consumer interest. Therefore, it is humbly submitted that one of the principles being laid down by the Act and the policies framed there under is to minimize regulatory risks, however, the present condition if allowed to continue will cast severe regulatory risks on the Review Petitioner’s Project and would make the PPA subject to uncertainty.*

- e) *It is further submitted that the Coal India through its Subsidiaries in the current scenario qua coal makes the Private Developers sign the Fuel Supply Agreements on dotted lines. Therefore, leaving no scope for Negotiation. Moreover, the price of the landed coal does not form part of the said agreement. Therefore, the argument of the Respondent No.1 that the said clause would enable it to monitor the prices of landed coal in the interest of consumers is also untenable as the pricing does not form part of the agreement but is notified to the developer from time to time. Hence, if the said condition being laid down by this Hon'ble Commission is not revoked then it is the apprehension of the Review Petitioner that the Respondent No.1 will have unfettered power not to proceed with the PPA with the Review Petitioner if the Coal Prices being notified by the Coal Company due to global coal scenario increases. It is humbly submitted that the Review Petitioner is likely to commission its project in FY 2013-14 therefore a substantial amount of funding is yet to be received from financial institutions. Therefore, the impugned condition if allowed would also affect the financing of the Project as the PPA signed between the parties will become unstable.*
- f) *Therefore, in view of the above made submissions it is humbly submitted that this Hon'ble Commission may please amend the Impugned Order as prayed for in the instant review petition.*

9. During the hearing held on 5th January, 2013, the representatives who appeared on behalf of the respondents submitted that they had nothing to add to their written submission already filed with the Commission.

10. Counsel for the petitioner submitted that a rejoinder in support of the arguments made by him on 5th January, 2013 shall be filed with the Commission. He was allowed to file the rejoinder after serving a copy on the other side also by 16th January, 2013. The petitioner filed its rejoinder on 16th January, 2013 with the Commission. The contention of the petitioner in its aforesaid rejoinder has been mentioned in Para 2 of this order.

11. The Commission has carefully considered the arguments put forwarded by the petitioner and respondents. The Commission finds merit in the petitioner's contention that the amendment in Sub-Articles 3.1, 3.2(ii), 4.1.1(iii) and 4.2(ii) directed by the Commission's Order dated 7th September, 2012 injects a certain ambivalence to the clearly agreed and stipulated responsibility of the procurer in so far as the creation of the evacuation infrastructure is concerned. Indeed, in directing the said amendment, the Commission in its Order of 7th September, 2012 was merely seeking to cover all possible options of creating the evacuation infrastructure, whether directly by the procurer or through third agencies. It was never intended to divide or otherwise reduce the procurer's responsibility in this regard. The Commission has therefore, decided to clarify the issue.

12. The second objection of the petitioner is regarding the Commission's direction dated 7th September, 2012 that it would have to seek the concurrence of the procurer to the terms and conditions etc. of the FSA. The petitioner believes that the amendment directed by the Commission would confer on the procurer an extra right to walk out of a duly executed PPA at its own pleasure. The petitioner believes that giving such right to one party will violate the balance of responsibility and authority inherent in any agreement between parties. The petitioner feels that this makes the agreement unequal and can, at the hand of the procurer, adversely impact the long term prospects of the power generation venture. Such a PPA would also raise doubts in the minds of the lenders who could demand unaffordable guarantees to cover unforeseen and indeterminate risks. The petitioner would have no objection to any authority of this kind being vested in the Commission itself but definitely to the way the procurer is sought to be authorized. The petitioner is willing to submit the FSA for examination according to law by the Commission.

13. Having considered this argument, the Commission find itself in agreement with the petitioner that the suggested amendment would, in a manner, confer on the procurer a virtual regulatory authority which would not be in order.

14. In view of the foregoing analysis, the Commission, on review has decided that its Order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012, be amended as follows :

a) Para 12 (ii) be read as follows :

Definition of "Scheduled Connection Date" in Sub-Article 1.1 in Article 1 of the PPAs be amended :

"Scheduled Connection Date shall mean the date on or before which the availability of evacuation facilities for the Contracted Energy beyond the Delivery Point shall be established or ensured by the Procurer, which shall be the date falling two hundred and ten (210) days before the Scheduled COD or Revised Scheduled COD, as the case may be, of the first Unit."

b) Para 12 (iii) is deleted.

c) Para 12 (iv) be read as follows :

Sub-Article 3.2 (ii) in Article 3 of the PPAs be amended :

"The procurer shall establish at its cost or ensure availability of necessary evacuation infrastructure through CTU/STU or any other agency beyond the delivery point required for evacuation of the Scheduled Energy at least 210 days prior to commissioning of the first unit."

- d) **Para 12 (v) is deleted.**
- e) **Para 12 (vi) be read as follows :**

Sub-Article 4.2(ii) in Article 4 of the PPAs be modified as given below :

“Establishing or ensuring the availability of necessary evacuation infrastructure through CTU/STU or any other agency beyond the delivery point required for evacuation of the Contracted Capacity at least 210 days prior to commissioning of the first unit.”

15. All other conditions and directions in the Commission’s order dated 7th September, 2012 in petition Nos.7, 8, 9, 10 & 12 of 2012 and the corrigendum issued vide Commission’s letter No.MPERC/D(T)/2012/2701 dated 13th September, 2012 shall remain unchanged.

Ordered accordingly.

sd/-
(Alok Gupta)
Member

sd/-
(A. B. Bajpai)
Member

sd/-
(Rakesh Sahni)
Chairman