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**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION**  
**BHOPAL**

**Sub: In the matter of petition under section 86(1)(f) of the Electricity Act,2003 for recovery of charges and claiming compensation on account of long term non-clearance of invoices as per Article 7.6 read with Article 13 of the Power Purchase Agreement dated 08.09.2016 executed between the petitioner and Madhya Pradesh Power Management Company Limited (MPPMCL) for 4MW (2x2 MW) Wind Energy Generators for a period of 25(Twenty Five) Years**

**ORDER**

**(Hearing through video conferencing)**  
**(Date of Order: 4<sup>th</sup> August' 2022)**

**M/s. Arkas Energy LLP,**  
Premises No. 29, CC Basant Lok,  
Vasant Vihar, New Delhi – 110 057

- **Petitioner**

**Vs.**

**The Managing Director**  
**M. P. Power Management Co. Ltd.**  
Shakti Bhawan, Rampur, Jabalpur – 482008

- **Respondent**

Shri Vignesh Srinivasan, Advocate and Shri Matrugupta Mishra, Advocate appeared on behalf of the petitioner.

Shri Deepak Awasthi, Advocate appeared on behalf of the Respondent.

The petitioner M/s. Arkas Energy LLP. has filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 for recovery of charges and claiming compensation on account of long term non-clearance of invoices as per provisions under Article 7.6 read with Article 13 of the Power Purchase Agreement dated 08.09.2016 executed between the petitioner and Respondent (MPPMCL) for supply of power from 4MW (2x2 MW) Wind Energy Generators (WEGs) to Respondent for a period of twenty five Years.

2. The petitioner broadly submitted following in the subject petition:

*"1. This Hon'ble Commission in exercise of its power under MPERC (co-generation and generation of electricity from renewable sources of energy) (Revision-1) Regulations, 2010, passed a tariff order dated 17.03.2016 for procurement of power from Wind Electric Generators (WEGs) applicable to all new wind-based electricity generation project in the State of Madhya Pradesh, commissioned on or after 01.04.2016 for sale of electricity to DISCOM within the State of Madhya Pradesh. The Petitioner commissioned its wind power plant of 2x2 MW on 10.06.2016. Accordingly, a Power Purchase Agreement (PPA) was executed between the Petitioner and the Respondent on 08.09.2016 for supply of the entire installed capacity for the project life i.e., 25 years from the date of commissioning of the power project.*

2. *By the present petition, the Petitioner seeks to bring on record that the Commercial Operation Date of the Project was 10.06.2016 as per Article 1.1 of the PPA read with Article 4 of the PPA wherein the full capacity of the Power Project was synchronised with the Grid System after the WEGs completed their performance acceptance test as per the standards prescribed under Article 4 of the PPA and had demonstrated their reliable operation thereby gaining synchronization/commissioning certificate issued by the TRANSCO/DISCOM.*
3. *Following the aforementioned commissioning of the Project, the Petitioner continued to evacuate/ supply of power to the Respondent in furtherance of its obligations as per the terms of the PPA and monthly bills for such evacuation were submitted to the Respondent periodically. In the midst of this, the Respondent, vide letter dated 05.01.2018 bearing reference no. 05-01/GM(F&A)/16, had proposed to the Petitioner that since most of the wind power generators were offering a 1% rebate on their outstanding dues along with a waiver of surcharge provided that the payment of dues was made expeditiously, the Petitioner may also consider doing the same in order to facilitate the Respondent's efforts to clear the pending dues. In response to such communication, the Petitioner responded as a show of goodwill and consented to such waiver vide letters sent periodically along with monthly invoices.*
4. *Despite the goodwill shown by the Petitioner and its efforts to accommodate and facilitate faster clearing of outstanding dues by the Respondent, the latter has failed to reciprocate by failing to fulfil its obligations of making timely payments with respect to the bills submitted by the Petitioner as it was supposed to, under the terms of the PPA. The Respondent has failed to make payments despite repeated exhortations by the Petitioner and is currently defaulting on its payments since May 2020. As per the last bill submitted by the Petitioner on 31.07.2021 for the month of June, the total outstanding amount due is INR 2,15,32,359/- (Rupees Two Crore Fifteen Lakhs Thirty-Two Thousand Three Hundred and Fifty-Nine Only).*
5. *It is pertinent to mention herein that Article 7.6 of the PPA provides for a clear-cut method for payment mechanism detailing when and how the payment shall be made and what recourse is available in case such payment is not done on time. As per Article 7.6.1 of the PPA, the settlement period of the Petitioner for the energy supplied is set to be 30 days from the date of submission of the bill to the concerned DISCOM. For the ready reference of this Hon'ble Commission, Article 7.6.1 of the PPA is reproduced hereinunder:*

**“7.6 Payment Mechanism**

7.6.1 *The settlement period of the bill of Seller for the energy supplied to Procurer shall be 30 days from the date of submission of the bill to the concerned DISCOM where the power is injected.”*

6. *Further, Article 7.6.3 provides for delayed payment surcharge wherein it is stated that in case of there being a delay beyond the 30 days payment period as provided under Article 7.6.1, the Respondent is liable to pay delayed payment surcharge on the outstanding amount pending at the rate of 2% over and above the SBI (PLR) prevailing on the first day of the month when payment became due. For the ready reference of this Hon'ble Commission, Article 7.6.3 is reproduced hereinunder:*

“ ...

*7.6.3 In case if delay beyond the 30 days payment period, the Procurer will pay delayed payment surcharge on outstanding amount at the rate of 2% p.a. over and above the short term lending rate of the State Bank of India (known as Prime Lending Rate) prevailing on the first day of the month when payment became due.”*

7. *Such callous disregard in performing its obligations on the part of the Respondent despite repeated reminders and appeals by the Petitioner as well as its efforts to facilitate the Respondent in clearing of outstanding dues is simply an act of taking the Petitioner for granted while the Petitioner for all its efforts, is suffering from acute financial crisis as a result of the Respondent's inaction/omission to perform its duties/responsibilities as per the PPA.*
8. *In view of the above, the Petitioner is entitled to claim its outstanding dues with interest as well as proportionate compensation for the dire situation it has been put under due to the Respondent's failure to fulfil its contractual obligations. The said amount is a contractual consideration, payable by the Respondent in lieu of what has been provided by the Petitioner indicated at the time of executing the PPA/contract. Therefore, the parties are bound by such clauses of the agreement.*
9. *It is pertinent to mention herein that the Petitioner has set up a 2 x 2 MW wind based power plant which is a renewable energy source and as per Section 86(1)(e) of the Act, every state commission is under an obligation to promote generation of electricity from such renewable source of energy by providing suitable measures for connectivity as well as sale, by specifying a percentage of the total consumption by the DISCOM to be mandatorily procured from such renewable sources. Accordingly, the State of Madhya Pradesh has come up with Wind Power Project Policy, 2012 for implementation of the projects of power generation using wind energy in the State. Further under the 2010 Regulation, this Hon'ble Commission has laid down the trajectory as to the percentage of power to be compulsorily procured from such WEGs.*
10. *It may be appreciated that apart from being promoted by the State Government towards the achievement of the sublime and environmentally benign objectives under the Act, these small renewable plants are*

*established at a higher cost which are funded by banks and financial institutions. Further, the only sale proceed from such plants are the tariff amount payable by the procurers, in this case the Respondent to the Petitioner. Therefore, stoppage of payment from the month of May, 2020 is not only violative of the PPA, but also it tends to defeat the very objective of the Electricity Act, 2003 to promote mandatory procurement from such renewable sources of energy.*

11. *Apart from the above violation as well as frustration of the objectives, the stakes of the banks and financial institutions are also of much significance, since in the absence of regular sale proceeds, the Petitioner would be rendered NPA by the banks and financial institutions, as the Petitioner has become unable to serve its own debt. There has been letters and communications made from time to time from bankers for regular payment towards the outstanding loan amount, whereas in the absence of regular payment being made by the Respondent, the Petitioner is gradually nearing financial unviability.*

*This Hon'ble Commission being the sectoral regulator is burdened with the responsibility of not only protecting the interests of the consumer at large but also to ensure a level playing field amongst the stakeholders and also the lawful and equitable recovery of amounts/ tariff by the generators, in the absence of which the very viability of the entire sector would crumble down.*

*Taking into consideration the growing menace of the inability of the DISCOMs to make payment on time to the generators, the Ministry of Power, Government of India issued direction to be complied by all DISCOMs on 28.06.2019, which has further been clarified and modified from time to time. In this direction, the Government of India after realizing the difficulty being faced by the generators, mandated that each and every DISCOM is liable to open Payment Security Mechanism in the form of Letter of Credit, in absence of which no power shall be scheduled under the respective PPAs. Therefore, the indulgence of this Hon'ble Commission is being sought by the Petitioner, to implement the above direction of the Government of India as well as issue direction to the Respondent for making immediate payment to the Petitioner of the amount outstanding along with Late Payment Surcharge (LPS) as per the PPA.*

12. *There is a prima facie case in favour of the Petitioner since the outstanding amount due is undisputed and there is no amount of dispute with regard to the liability of the Respondent to the Petitioner in lieu of the power supplied under the PPA. The balance of convenience is in favour of the Petitioner and against the Respondent, unless the prayers sought herein, are allowed in favour of the Petitioner, the Petitioner shall be subjected to irreparable loss and the project might be declared as NPA by the lenders, since, no more grace period are allowed by the lenders for ensuring deferment of payment of instalments.*

13. *The cause of action for the present petition is arising out of the PPA executed with the Respondent and the Petitioner for supply of power, which PPA is approved by this Hon'ble Commission. Further, the cause of action has arisen within the territorial limit of the Hon'ble Commission and the dispute in hand is exclusively falling within the jurisdiction of this Hon'ble Commission under Section 86(1)(f) of the Act.*
14. *The present petition is bona fide and made in the interest of justice. No other similar petition is being preferred by the Petitioner before any other court of competent jurisdiction.*
15. *The Petitioner is filing the present Petition under Section 86(1)(f) of the Electricity Act, 2003 which grants powers to this Hon'ble Commission to adjudicate upon disputes between licensees and generating companies and to refer them if required for arbitration. It is submitted that the present petition is bonafide and is made in the interest of justice. Further the Petitioner craves leave to file any further pleadings/ documents as may be required in the interest of justice, at a later stage."*

3. With the aforesaid submissions, the petitioner has sought directions to the Respondent (MPPMCL) to pay an amount of INR 2,15,32,359/- (Rupees Two Crore Fifteen Lakhs Thirty-Two Thousand Three Hundred and Fifty-Nine only) towards outstanding dues up to the month of June'2021 raised by the petitioner on 31.07.2021 along with Late Payment Surcharge under Article 7.6 of the PPA dated 08.09.2016.

4. The petition was admitted on 23.11.2021. Since, it was mentioned in Para 16 of the subject petition that the aforesaid PPA was approved by this Commission therefore, the petitioner was directed to file a copy of approved PPA within a week. The petitioner was further directed to serve copy of petition on the Respondent within seven days. The Respondent was directed to file reply to the subject petition within two weeks. The Respondent was also directed to serve a copy of the aforesaid reply to the petitioner simultaneously and the petitioner was asked to file rejoinder on the aforesaid reply within two weeks, thereafter. Subsequently, the case could not be heard due to vacancy of Member (Law) in the Commission till 04.02.2022.

5. By affidavit dated 07.12.2021, petitioner confirmed service of this petition to Respondent but the petitioner has not filed any copy of approval of aforesaid PPA as directed in Commission's daily order dated 25.11.2021.

6. The Respondent filed reply to the subject petition on 14.01.2022. At the hearing held on 15<sup>th</sup> March' 2022, Ld. Counsel for the petitioner stated that he did not receive aforesaid reply filed by Respondent. Therefore, the Respondent was directed to serve copy of its reply to the petitioner within a day. The petitioner was directed to file rejoinder within a week, thereafter. The case was fixed for arguments on 26.04.2022.

7. Respondent MPPMCL, Bhopal vide its affidavit dated 14<sup>th</sup> January' 2022 submitted following in reply to the petition:

1. *That, the petitioner herein has approached this Hon'ble Commission, seeking relief to the extent that the respondent MPPMCL may be directed to pay an amount of Rs. 2,15,32,359/- (Rupees Two Crores Fifteen Lakhs Thirty Two Thousand Three Hundred & Fifty Nine only), to the petitioner towards outstanding dues along with the Late Payment Surcharge under Article 7.6.3 of the PPA dated 08.09.2016.*
2. *That, before adverting to the factual aspects of the present case, it would be proper here to refer to the different clauses of Power Purchase Agreement (in short PPA). Article 9.4 deals with "Procedure for cases of Procurers Event of default" and Article 13 deals with "Governing Law & Dispute Resolution". The answering respondent in relying on Clause 13.3.2 which deals with dispute Resolution through Arbitration Clause 9.4.1 and Clause 13.3.2 are reproduced here for kind consideration*

**Article 9.4.1:** *In case payment is not made within 60 days of presentation of Bill as per Article 9.2.1(0) (Le Thirty days more than the prescribed limit of Thirty Day for normal payment), the seller may issue 15 clear days Notice to the procurer to make the payment. This, however, will not absolve the procurer from payment of delayed payment surcharge as provided in Article 7.6.3 of this Agreement. In case the procurer still does not make the payment, the seller shall have the liberty to approach M.P.E.R.C. for allowing sale of power to third party*

**Article 13.3.2:** *Dispute resolution through Arbitration*  
*If the dispute arises out of or in connection with any claims not covered in Article 13.3.1(a), such dispute shall be resolved by Arbitration under the Indian Arbitration & Conciliation Act, 1996, as under provided not settled amicably as per Article 13.2.1.*

3. *That, at this juncture, it would be relevant here to take into consideration Article 12.14 to 12.19 of the "Tariff Order for procurement of power from Wind Electric Generator 2016", framed by Hon'ble Commission in exercise of power under Section 86(1)(a), (b), (c) & (e) and Section 62(1) of the Electricity Act, 2003 Article 12.14 to 18 deals with "Payment mechanism" whereas Article 12.19 to 12.22 deals with "Default provisions for third party sale or sale to utility" Article 12.19 provides as under:-*

**12.19** - *In case payment is not made within 60 days of presentation of bill (ie, thirty days more than the prescribed limit of thirty days for normal payment), the developer may issue fifteen clear days" notice to the M.P. Power Management Company Limited to make the payment. This, however, will not absolve M.P. Power Management Company Limited from*

*payment of delayed payment surcharge as provided in Clause 12.16 of this order. In, case, M.P. Power Management Company Limited still does not make the payment, the developer shall have the liberty to approach the Commission, for allowing sale of power to third party."*

4. *That, on conjoint reading of Article mentioned above, so also the Article 12.19 of the Tariff Order 2016, it is clear that in case of non-payment by then procurer, the Developer has a liberty to approach the Hon'ble Commission, permitting Third Party Sale. In the present case, evenafter availability of such remedy, the petitioner has not approached the Hon'ble Commission in this regard. It is also clear from the record that as per the stipulation made in the Clause 9.4.1, no notice was served on the answering respondent for payment of the amount in question, which is being claimed by the petitioner*
5. *That Article 13.3.2, the petitioner has an efficacious remedy under the provisions of Arbitration and Conciliation Act, 1996 and the aforesaid issue was duly considered by the Hon'ble Commission in the case of M/s Green Infra Wind Energy Limited Vs. The Managing Director, M.P. Power Management Company Limited, petition No.52/18, decided on 04.01.2021, and after appreciating Article 14.3.2 of PPA and also taking note of the judgment rendered by the Hon'ble Supreme Court in the Case of Gujarat Urja Vikas Nigam Limited Vs. ESSAR Power Limited 2008 (4) SCC 755. "The Hon'ble Commission has directed for Arbitration proceedings.*
6. *That, in relation to non-payment of the bill amount, it is clear form the assertion made in the petition that till April 2020, all the payments have been made in time and in relation to pending payment, it is submitted that the respondent is facing issue of insufficient funds, as from past few years the amount of subsidy, which is recoverable from Government of Madhya Pradesh, has been accumulated to the extent of Rs. 20861 Crores. The answering respondent is already taking effective steps to make payments to all the Generators in phased manner and in the case of petitioner also, the respondent has taken effective steps to settle the claims.*

***That, para-wise reply of the petitioner are as under:***

7. ***In relation to para 1 to 6:***  
*The contention and the submissions raised in these paragraphs are matter of records and needs no reply.*
8. ***In relation to para 7:***  
*In relation to the contention raised in this paragraph, it is submitted that the answering respondent has always made payment in time to the petitioner, except the period in question. In relation to Annexure P-4 & P-5, it is submitted that answering respondents are taking urgent steps to ensure the payment of admitted amount. It is submitted that the amount mentioned in Annexure P-4 & P-5 are subject to verification and therefore, not admitted.*

9. ***In relation to para 8 to 11:***  
*In relation to contention raised in Para 8 & 9, it is submitted that the Article 7.6 & 7.6.3, are part of PPA and is binding on both the parties. The answering respondent specifically deny the allegations of non-payment even after repeated reminders, it is submitted that except for the period in question, all the payments of the petitioner are settled. The answering respondent in the preceding paragraphs has mentioned the reason that he is facing issue of insufficient funds from past few years as amount of subsidy, which is to be received from the State of Madhya Pradesh has not been received.*
10. ***In relation to para 12 to 15:***  
*The contention raised in para 12, are matter of record. In relation to assertion made in para 13, it is submitted that answering respondent has not violated any provisions of PPA and in case, there is any non-compliance/ dispute, the petitioner is free to raise dispute as per the provisions of Article 13.3.2 of the PPA.*
11. ***In relation to submission in para 14:***  
*It is submitted that the facts mentioned are matter of record and answering respondent is already making urgent efforts to settle the undisputed amount, the petitioner has unnecessarily approached the Hon'ble Commission without awaiting or amicably settling the issue.*
12. ***Regarding contention made in para 15:***  
*It is submitted that the answering respondent specifically deny, that outstanding amount is undisputed as the amount claimed by the petitioner is subject to verification, thus there is no prima-facie case in favour of the petitioner.*
13. ***In relation to para 16:***  
*It is submitted that no cause of action is in favour of the petitioner, as answering respondent are already making effort to pay the undisputed amount, if any, in accordance with the provisions of PPA and petitioner without resorting to the provisions of PPA has rushed to the Hon'ble Commission. In relation to approval of PPA by the Hon'ble Commission, the petitioner has been directed by the Hon'ble Commission vide Order dated 25.11.2021, to file the copy of approved PPA and therefore, answering respondent is not submitting any reply to the aforesaid facts and reserves his right to submit reply after filing of approved copy of PPA.*
14. ***In relation to para 17 to 19:***  
*The claim raised by the petitioner in the present petition is without any justification and same is liable to be dismissed."*
8. Petitioner vide letter dated 25.06.2022 submitted its written note as under:  
"1. *This Written Note is being filed pursuant to this Ld. Commission's order dated 15.06.2022 wherein it was ordered that along with the document containing the details regarding the Late Payment Surcharge views of the*



parties on the latest rules notified by the Ministry of Power on 03.06.2022 being the Electricity (Late Payment Surcharge and Related Matters) Rules, 2021 (hereinafter referred to as the 'Rules').

2. *The Petitioner has gone through the abovementioned rules and finds them to be a step in the right direction to resolve the issues plaguing the current scenario of DISCOMs renegeing on their commitments and obligations to make payment to the Generating Companies on time while at the same time providing for a clear-cut mechanism to clear outstanding dues along with Late Payment Surcharge (LPS).*
3. *It is submitted that the Power Purchase Agreement (PPA) signed between the Petitioner and the Respondent contains clear cut provisions for the billing cycle as well as mechanism for payment to be made by the Respondent to the Petitioner detailing the time period available to the Respondent for making such payment as well as detailing the conditions to be followed in case of delay in such payments.*
4. *The terms and conditions as provided under the PPA are comprehensive and lay out a clear process for determination of tariff, billing and payment mechanism. Article 7 of the PPA enumerates the abovementioned provisions. Article 7.5.1 provides that the billing of metered energy is to be carried out on a monthly basis. Article 7.6.1 provides that the settlement period of the bill submitted by the Petitioner for the energy supplied by it to the Respondent shall be 30 (thirty) days from the date of submission of the bill. Further, Article 7.6.3 provides that in case of delay on part of the Respondent beyond the 30 days payment period, the Petitioner is to be paid LPS on the outstanding amount at the rate of 2% p.a. over and above the SBI (PLR) prevailing on the first day of the month when payment becomes due. The relevant extract of the PPA is being reproduced hereinbelow for the ready reference of this Hon'ble Commission:*

***"7.5 Energy Accounting and Billing***

*7.5.1 Billing of the metered energy shall be carried out on a monthly basis.*

*(...)*

***7.6 Payment Mechanism***

*7.6.1 The settlement period of the bill of Seller for the energy supplied to Procurer shall be 30 days from the date of submission of the bill to the concerned DISCOM where power is injected.*

*(...)*

*7.6.3 in case of delay beyond the 30 days payment period, the Procurer will pay delayed payment surcharge on outstanding amount at the rate of 2% p.a. over and above the short-term lending rate of the State Bank of India (known as Prime Lending Rate) prevailing on the first day of the month when payment became due.*

(...)"

5. *The Petitioner would also like to submit that LPS is also provided under Rule 3 of the Rules while also providing for the rate and conditions under which it will be applicable. Further, Rule 4 is a positive step towards clearing of outstanding dues while at the same time providing for the adjustment of the LPS first followed by adjustment towards monthly charges, starting from the longest overdue bill.*
6. *Further, it is submitted that the Respondent may also be directed to maintain and operate an adequate payment security mechanism as provided under Rule 6, since maintaining and operating such payment security mechanism is of utmost importance when looking at the Rules as that provides for the security and continuity of the payments to the Petitioner while failing to do so would have adverse effects on the Respondent.*
7. *A brief perusal of Rule 6 states that a Distribution Licensee or other user of the transmission system is to maintain an unconditional, irrevocable and adequate payment security mechanism. Further, it also provides Generating Companies with the leeway that in case of non-maintenance of payment security mechanism, they may regulate the supply of power to the Distribution Licensee. It also provides for situations wherein if the Distribution Licensee fails to maintain the payment security mechanism, the Generating Company may make supply of power only when such mechanism is maintained or if in cases of non-payment of outstanding dues by the default trigger date, the Generating Company may reduce the supply of power to Seventy-Five percent while the balance may be sold to the Power Exchanges. Further, in case of the Distribution Licensee continuing to not maintain payment security mechanism or continues to default on its payments for a period of thirty days, then the Generating Company may proceed to sell 100% of the contracted power to the Power Exchanges.*
8. *Rule 6 being a comprehensive provision containing the rights and obligations of the parties involved so as to facilitate the payment of outstanding dues along with LPS also provides that the Distribution Licensee will continue to be liable for payment of fixed charges or capacity charges as applicable. The gains from the sale of such power by the Generating Company, being the difference between the selling price in the Power Exchanges and the expenses borne including energy charges, transmission charges etc., are to be adjusted first for the recovery of fixed charges, followed by liquidation of overdue amount and finally the balance to be shared between the Distribution Licensee and the Generating Company in the ratio of 75:25.*
9. *In this respect, the Petitioner would like to submit that considering the comprehensive and well thought out Rules which have been notified with the intention to reduce clogging in the payment of dues and to streamline such process is a welcome move and that the Respondent be directed to comply*

*with the provisions of the said Rules without delay and expedite the formation of the payment security mechanism as provided.”*

**Commission’s observations and findings:**

**9.** The petitioner is a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003 and it has installed capacity of 4 MW (2x2MW) located at Loc. No. NPY-P-42 and NPY-P3-87 near village Chandwasa and Bhatuni in Tehsil Shamgarh, District Mandsaur, Madhya Pradesh. The aforesaid WEGs were commissioned on 10/06/2016 and a PPA was executed between the Petitioner and the Respondent on 08/09/2016 for supply of the entire installed capacity for the project life i.e., 25 years from the date of commissioning of the power project.

**10.** Subsequent to commissioning of its aforesaid project, the Petitioner continued to supply power to Respondent as per terms of the PPA and monthly bills for such supply were submitted to the Respondent periodically. However, the Respondent failed to make timely payments of bills submitted by the Petitioner. As per the last bill submitted by the Petitioner on 31/07/2021 for the month of June’ 2021, total outstanding amount due was INR 2,15,32,359/- (Rupees Two Crore Fifteen Lakhs Thirty-Two Thousand Three Hundred and Fifty-Nine Only).

**11.** As a result of the above, the Petitioner has filed this petition under Section 86 (1)(f) of the Electricity Act, 2003 for recovery of charges and claiming compensation on account of long-term non-clearance of invoices as per Article 7.6 read with Article 13 of the Power Purchase Agreement dated 08.09.2016 executed between the Petitioner and MPPMCL.

**12.** The Respondent in its reply to this petition submitted that all the payments till April’ 2020 have been made in time, however, for pending payment, the Respondent is facing issue of insufficient funds, as the amount of subsidy, which is to be received from Government of Madhya Pradesh, has not been received.

**13.** Subsequently, at the hearing held on 26<sup>th</sup> April’ 2022, Petitioner informed that the original outstanding amount of payment for which the subject petition was filed has now been paid. The petitioner stated that as this amount was not paid within due date, Late Payment Surcharge had to be paid by the Respondent and therefore, petitioner sought two weeks’ time to file the exact amount of Late Payment Surcharge to be paid by Respondent. Petitioner also pleaded that while original outstanding amount has been paid, there is a subsequent liability towards payment by Respondent and that petitioner would like to raise this issue as well in the subject petition because the contract between the petitioner and Respondent is an ongoing contract.

**14.** Respondent argued that while issue of Late Payment Surcharge may be adjudicated by the Commission in the subject petition, the request of petitioner to raise fresh issue regarding new liabilities may not be entertained. Petitioner was allowed two weeks’ time to file an affidavit along with excel sheet indicating amount of Late Payment Surcharge due on account of late payment of original outstanding payment filed with the subject petition.

15. At the next hearing held on 14<sup>th</sup> June' 2022, Ld. Counsel for the petitioner informed that the information on excel sheet is now available and it will be possible for them to file the same within two weeks. The petitioner was directed to furnish the aforesaid information alongwith affidavit within ten days. Both the parties were asked about their awareness about notification of rules by Government of India related to outstanding dues of generating companies and other licensees and Late Payment Surcharge related matters. However, both parties expressed their ignorance in this matter. Therefore, both parties were asked to give their views through written notes within ten days in relation to the aforesaid Rules notified by the Government of India and their applicability in the subject petition alongwith the information to be filed with the Commission.

16. At the next hearing held on 19<sup>th</sup> July' 2022, both the parties informed that provisions of Electricity (Late Payment Surcharge and related matters) Rules 2022 notified on June 3, 2022 by the Central Government have not been invoked in this matter. However, by affidavits dated 23<sup>rd</sup> June' 2022 and 25<sup>th</sup> June'2022, while mentioning various provisions under PPA and aforesaid rules, the petitioner filed updated information regarding outstanding dues and late payment surcharge. The Respondent while showing disagreement with the aforesaid figures of outstanding dues submitted by petitioner stated that these figures need reconciliation. The Respondent also stated that the Power Purchase Agreement (PPA) in this matter does not have any provision for Letter of Credit.

17. Articles 7.6 and 13 of PPA invoked by petitioner provide as under:

**(i) Article 7.6- Payment Mechanism**

- 7.6.1** *The settlement period of the bill of Seller for the energy supplied to Procurer shall be 30 days from the date of submission of the bill to the concerned DISCOM where the power is injected.*
- 7.6.2** *The bills favouring the Procurer, shall be submitted to the concerned SE/AGM (O&M) DISCOM in whose area the power is injected. The bill shall be verified by the officer not below the rank of EE/DGM. Then SE/AGM (O&M) DISCOM shall send the verified bills in triplicates (3 copy) along with joint meter reading statement to the CGM Commercial, MPPMCL, Jabalpur within 7 days of receipt of bills for arranging payment to the seller.*
- 7.6.3** *In case of delay beyond the 30 days payment period, the Procurer will pay delayed payment surcharge on outstanding amount at the rate of 2% p.a. over and above the short term lending rate of the State Bank of India (known as Prime Lending Rate) prevailing on the first day of the month when payment became due.*
- 7.6.4** *The delayed payment surcharge will be passed on to the DISCOM to the Procurer.*

**(ii) Article 13- Governing law and Dispute Resolution**

**13.1 Governing Law**

**13.1.1** *This agreement shall be governed by and construed in accordance with the laws of India. Any legal proceedings in respect of any matters, claims or disputes under this agreement shall be under the jurisdiction of courts in Jabalpur.*

**13.2 Amicable Settlement and Dispute Resolution**

**13.2.1 Amicable Settlement**

- (a)** *Either party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this agreement ("Dispute") by giving a written notice ("Dispute Notice") to the other party which shall contain:*
- i. A description of the Dispute;*
  - ii. The grounds for such Dispute; and*
  - iii. All written material in support of its claim.*
- (b)** *Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 13.2.1(a) Both parties shall endeavour and make all efforts to amicably settle the Dispute.*
- (c)** *If the parties fail to resolve the Dispute amicably within thirty (30) days, the Dispute shall be referred for dispute resolution in accordance with Article 13.3.*

**13.3 Dispute Resolution**

**13.3.1 Dispute Resolution by MPERC**

- (a)** *Where any dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or relates to any matter agreed to be referred to MPERC, such dispute shall be submitted to adjudication by MPERC.*
- (b)** *The Procurer shall be entitled to co-opt the lenders (if any) as a supporting party in such proceedings before MPERC.*

**13.3.2 Dispute Resolution through Arbitration**

*If the Dispute arises out of or in connection with any claims not covered in Article 13.3.1(a) such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 as under provided not settled amicably as per Article 13.2.1. The Arbitration Tribunal shall consist of three (3) Arbitrators. Each party shall appoint one Arbitrator within thirty (30) days of the receipt of request for settlement of dispute by Arbitration. The two appointed Arbitrators shall within 30 days of their appointment, appoint a third Arbitrator who shall act as presiding Arbitrator. In case the party fails to appoint an Arbitrator within 30 days from the date of receipt of request or the two appointed Arbitrators fail to agree on the third Arbitrator within 30 days of their appointment, the appointment of Arbitrator, as the case maybe, shall be made in accordance with the*

- Indian Arbitration and Conciliation Act, 1996.*
- (b) *The place of Arbitration shall be Jabalpur. The language of Arbitration shall be English.*
  - (c) *The Arbitration Tribunal's award shall be substantiated in writing. The Arbitration Tribunal shall also decide on the costs of the arbitration proceedings and the application thereof.*
  - (d) *The provisions of this Article shall survive the termination of this Agreement for any reason whatsoever.*
  - (e) *The award shall be of majority decision. If there is no majority, the award will be given by the presiding Arbitrator.*
  - (f) *Procurer shall be entitled to co-opt the lenders (if any) as a supporting party in such arbitration proceedings.*

**13.4 Parties to Perform Obligations**

*Notwithstanding the existence of any Dispute and difference referred to MPERC or the Arbitration Tribunal as provided in Article 13.3 and save as MPERC or the Arbitration Tribunal may otherwise direct by a final or interim order, the Parties hereto shall continue to perform their respective obligations (which are not in dispute) under this agreement.*

**18.** The Respondent has relied upon the following Articles of PPA:

**9.4.1** *In case payment is not made within 60 days of presentation of Bill as per Article 9.2.1(i) (i.e. thirty days more than the prescribed limit of thirty days for normal payment), the seller may issue 15 clear days Notice to the procurer to make the payment. This, however, will not absolve the procurer from payment of delayed payment surcharge as provided in Article 7.6.3 of this Agreement. In case the procurer still does not make the payment, the seller shall have the liberty to approach MPERC for allowing sale of power to third party.*

**13.3.2 Dispute Resolution through Arbitration**

*If the Dispute arises out of or in connection with any claims not covered in Article 13.3.1(a) such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 as under provided not settled amicably as per Article 13.2.1.*

**19.** The Respondent has also relied upon the following Clause of “**Tariff Order for Procurement of Power from Wind Electric Generator 2016**”:

**12.19** *In case payment is not made within 60 days of presentation of bill (i.e. thirty days more than the prescribed limit of thirty days for normal payment), the developer may issue fifteen clear days' notice to the M.P. Power Management Company Limited to make the payment. This, however, will not absolve M.P. Power Management Company Limited from payment of delayed payment surcharge as provided in Clause 12.16 of this order. In case M.P. Power Management Company Limited still does not make the payment, the developer shall have the liberty to approach the Commission for allowing sale of power to*

*third party.*

20. As per above provisions in tariff order, in case of non-payment by the procurer, the developer has a liberty to approach the Commission to seek permission for sale of power to third Party. However, the Petitioner has not approached the Commission in this regard. Further, on perusal of submissions made by the parties in this case, it is clear that the Respondent has failed to fulfill its obligations regarding payments under the PPA which may be due to insufficiency of funds. The Commission has noted that as provided in PPA and Tariff Order, the Petitioner is free to sell the contracted capacity to any third party of its choice in the event of non-payment by the procurer.

21. From the foregoing, the Commission has noted that this petition has been filed for directions of this Commission to Respondent to pay total outstanding amount which was INR 2,15,32,359/- (Rupees Two Crore Fifteen Lakhs Thirty-Two Thousand Three Hundred and Fifty-Nine Only) as per the last bill submitted by the Petitioner on 31/07/2021. During proceedings in this matter, it was informed by petitioner that aforesaid outstanding amount for which the subject petition was filed has now been paid however, the late payment surcharge is still payable by Respondent. The Petitioner by affidavit dated 23.06.2022 filed a copy of excel sheet detailing the outstanding Late Payment Surcharge of INR 93,62,154 (Ninety-Three Lakhs Sixty Two Thousand One Hundred and Fifty Four Only) as on date. However, as contested by Respondent during hearing, this amount is subject to reconciliation by both the parties.

22. Therefore, at the outset, both the parties are directed to reconcile the actual amount of outstanding LPS as on date within a period of 30 days. Thereafter, the Respondent shall ensure to make payment of all reconciled outstanding LPS amount to the petitioner within 60 days. In future bills, if Respondent doesn't ensure payment as per provisions of PPAs executed between the Petitioner & Respondent, the Petitioner may avail option as provided under Article 9.4 of the PPA and 12.19 of tariff order.

With the aforesaid observations and directions, the subject petition stands disposed of.

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

**(Mukul Dhariwal)**  
**Member**

**(S.P.S. Parihar)**  
**Chairman**