

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: Application under section 86(1)(b) & (f) of the Electricity Act, 2003 to direct the Respondent No. 1 to procure the “Contracted Capacity” of Applicant’s 1320 MW (2 x 660 MW) coal based Super Thermal Power Project at Nigrie, District Singrauli as per the PPA dated 5th January, 2011 entered into by the Petitioner and Respondent No. 1.

Petition No. 30 of 2015

ORDER

(Date of Hearing: 21st July, 2015)

(Date of Order: 23rd July, 2015)

M/s. Jaiprakash Power Ventures Ltd.

(Unit: Jaypee Nigiri Super Thermal Power Plant)

Sector – 128, Noida – 201304 (UP)

- Petitioner

Vs.

1. M.P. Power Management Company Ltd., Jabalpur

- Respondent

2. State Load Despatch Centre, Jabalpur

Shri Sakya Singha Chaudhuri, Advocate and Shri Ashok Shukla, Authorized Representative appeared on behalf of the petitioner.

M/s. Jaiprakash Power Ventures Ltd. (Unit: Jaypee Nigiri Super Thermal Power Plant) has filed the subject petition under section 86(1)(b) & (f) of the Electricity Act, 2003 for adjudication on the operational issues related to “Declared Capacity” and “Contracted Capacity” of its 2x660 MW coal based Super Thermal Power Project as per Power Purchase Agreement entered into by the parties on 5th January, 2011.

2. In its prayer in the petition, the petitioner has requested for the following:

“(a) Declare that the Petitioner is entitled under the PPA to supply the Contracted Capacity under the PPA to the Procurers from any single Unit, both Units and/or any combination thereof.

“(b) Direct the Procurers/ Respondents to procure the Contracted Capacity from Petitioner’s Power Station whether from any single unit, both units and/or any combination thereof.”

3. Motion hearing in the matter was earlier fixed on 23rd June’ 2015 but the petitioner sought adjournment for the reason that the Counsel of the petitioner was not available on that day. Considering the request made by the petitioner, the case was fixed for motion hearing today i.e. 21st July’ 2015.

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4. During the course of motion hearing held today i.e. 21st July’ 2015, Counsel on behalf of the petitioner explained the genesis of the issues in the subject petition and he categorically mentioned that the issues for adjudication by the Commission are fundamentally based on certain definitions and conditions besides several other provisions articulated in the Power Purchase Agreement entered into by both the parties on 5th January’ 2011. He submitted the same grounds as mentioned in the subject petition in support of his contention. In his submissions during the hearing, he laid emphasis on the various definitions regarding “Contracted Capacity”, “Power Station”, “Installed Capacity”, “Scheduled Energy” and “Available Capacity” along with the provisions regarding liquidated damages in the aforesaid Power Purchase Agreement in support of his contention on the issue.

5. Having heard the Learned Counsel of the petitioner and also on examination of the contents in the petition, the Commission has observed the following :

- (i) The petitioner has approached the Commission under Section 86(1) (b) and (f) for adjudication on the issues which are related to the Power Purchase Agreement (PPA) executed between both the parties in the subject petition. This PPA was placed before the Commission for approval. The PPA was approved by the Commission after due deliberations and extensive arguments by both the parties on the same and also by giving ample opportunity to both the parties before according approval. Later, the petitioner had filed a review petition also before this Commission for review on certain provisions of the approved PPA which was also disposed of with appropriate orders passed by the Commission.
- (ii) Pursuant to the same PPA, the petition for provisional tariff for both the units of Petitioner’s power plant was filed with the Commission and the tariff has been provisionally determined by the Commission. In view of the aforesaid background on the PPA, it is evident that all provisions including amicable settlement of dispute in various Articles /sub-articles in the approved PPA are the bindings on each party in the executed PPA.
- (iii) Sub-Articles 13.5.2 and 13.5.3 provide as under:

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“13.5.2 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 including its existence or validity or termination (collectively “Dispute”) by giving a written notice to the other Party, which shall contain:*
- (i) *as description of the Dispute;*
 - (ii) *the grounds for such Dispute; and*
 - (iii) *all written material in support of its claim.*
- (b) *The other Party shall, within thirty (30) days of issue of dispute notice issued under Article 13.5.2(a), furnish:*
- (i) *counter-claim and defences, if any, regarding the Dispute; and*
 - (ii) *all written material in support of its defences and counter-claim.*
- (c) *Within thirty (30) days of issue of notice by any Party pursuant to Article 13.5.2(a), or Article 13.5.2(b), both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days of receipt of the notice referred to in the preceding sentence, the Dispute shall be referred to Dispute Resolution in accordance with Article 13.5.3*

13.5.3 Dispute Resolution

All disputes and differences arising under or in relation to this Agreement including interpretation, construction, or otherwise in regard to Contracted Capacity and Tariff terms and conditions thereof shall be subject to adjudication of the Appropriate Commission in terms of section 86(1)(f) of the Electricity Act, 2003”

- (iv) In the above-mentioned article, there is no provision for bypassing any linked provision before invoking the succeeding provision of the PPA. A systematic framework for “Amicable Settlement” of any issue is articulated under above-mentioned Article 13.5 of the PPA before declaring any difference between the parties as a dispute in connection with PPA. As evident from the mechanism provided in the above article, the purpose of this framework is to eliminate such possibilities like misinterpretation of any provision under PPA or lack of communication between the parties etc, before concluding the issue

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as dispute which cannot be settled without adjudication of the Commission. Besides, the intent of the aforesaid amicable settlement mechanism is that the Commission shall have all claims and counter claims along with all documents including the minutes of meetings held between the parties (before declaring the issue as dispute) before initiating the proceedings for adjudication in the matter,.

6. During the hearing, Counsel of the petitioner was asked whether the provisions for amicable settlement under Sub Article 13.5.2 have been exhausted before approaching the Commission for dispute resolution under Sub Article 13.5.3 of the PPA. Counsel on behalf of the petitioner mentioned about some letter of the petitioner addressed to Principal Secretary (Energy), Government of Madhya Pradesh, Bhopal on 25th March’ 2015. He also referred some correspondences made between M.P. Power Management Co. Ltd., Jabalpur and the petitioner in reference to the afore- mentioned letter addressed to Principal Secretary (Energy), Government of Madhya Pradesh, Bhopal. Apart from the aforementioned correspondences, the petitioner could not submit any detail or document regarding the actions to be taken under Article 13.5.2 of the duly executed PPA before approaching the Commission in the subject petition.

7. In view of the above, the Commission has observed that the provisions as articulated in Sub Article 13.5.2 (a), (b) and (c) for amicable settlement of the dispute have not been appropriately and adequately exhausted before approaching the Commission for adjudication under Sub Article 13.5.3 of the PPA. Therefore, this petition is not maintainable at this stage in terms of the provisions under PPA itself. However, the petitioner is at liberty to approach the Commission with all details and documents in support of having followed the mechanism provided in Article 13.5.2 of the PPA.

With the above observations, this petition is disposed of.

(Alok Gupta)
Member

(A.B.Bajpai)
Member

(Dr. Dev Raj Birdi)
Chairman