

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of disputes between the generator and the procurer of electricity regarding the fixed charge/ interest bills raised by the petitioner in terms of the liberty given by the Hon'ble Appellate Tribunal for Electricity in the judgment dated 29.05.2018 in EP No. 2 of 2017 in Appeal No. 338 of 2016.

Petition No. 32/2018

ORDER

(Date of Hearing: 09th October, 2018)

(Date of Order: 16th November, 2018)

M/s. Arya Energy Ltd.

Third Floor, E-14, Shyam Plaza, Pandri

Raipur – 492 001.

- **Petitioner No. 1**

M/s. Orient Green Power Co. Ltd.

Sigappi Achi Building – 4th Floor,

No. 18/3, Rukmani Road (Marshalls Road)

Egmore, Chennai – 600 008.

- **Petitioner No. 2**

Vs.

M.P. Power Management Co. Ltd.

Shakti Bhawan, Rampur, Jabalpur – 482 008

- **Respondent**

Ms. Swapna Seshadri , Advocate appeared on behalf of the petitioners.

Shri Aashish Anand Barnard, Advocate & Dy. A. G. and Shri Sanjeev Khare, DGM appeared on behalf of Respondent.

2. The Commission had issued Tariff Order dated 30.11.2016 for procurement of power from Biomass based power projects in Madhya Pradesh. Because of fixed charge / interest bills raised by M/s. Arya Energy Ltd. on this order dated 30/11/2016 of the Commission and non-admissibility of the same by MPPMCL, the dispute was arised between the generator and procurer for execution of the order of the State Commission. Thereafter, an Executive Petition No. 02 of 2017 was filed by the petitioners along with other petitioners before the Hon'ble APTEL. By order dated 29.05.2018 the Hon'ble APTEL remanded back the case with following directions:

“For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the present Execution Petition have merits as discussed above which are to be first adjudicated by the State Commission.

Hence, we hereby direct the State Commission to first adjudicate the disputes between the parties as stated supra within a period of three months from the date of receipt of copy of this Order.”

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of disputes between the generator and the procurer of electricity regarding the fixed charge/ interest bills raised by the petitioner in terms of the liberty given by the Hon'ble Appellate Tribunal for Electricity in the judgment dated 29.05.2018 in EP No. 2 of 2017 in Appeal No. 338 of 2016.

3. Pursuant to the aforesaid directions, the instant petition was filed by the petitioners wherein the petitioners have broadly prayed to the Commission to

- a. Direct the respondent to pay the fixed costs bills raised by the petitioners for the period from 17.01.2017 onwards whereby despite the interim order passed by the Hon'ble Tribunal, Respondent took coercive steps and stopped giving schedule to the plant of the petitioners.
- b. Further direct the respondent to apply MOD principle only on variable component of the tariff.
- c. Direct the respondent to pay delayed payment surcharge @ 1.25% per annum on the above adjudicated fixed costs.

4. The case was first listed for motion hearing on 28.08.2018, wherein the Commission admitted the petition for further hearing. The petitioners were directed to serve a copy of the petition to the respondent within a weeks' time and the respondent was directed to file the reply in hard copy by 18.09.2018, with a copy to the other parties. The case was next listed for hearing on 25.09.2018.

5. During the hearing held on 25.09.2018 the respondent requested the Commission for additional time for filing the reply. The Commission accepted the request and directed the respondent to file the reply in hard copy by 03.10.2018 with copy to the other parties. The petitioners were asked to file rejoinder, if any, by 05.10.2018. The case was listed for hearing on 09.10.2018. The respondent filed the reply vide letter dated 03.10.2018.

6. During the hearing held on 09.10.2018, the petitioner argued at length in favour of its claim and prayer in the petition with regard to adjudication by the Commission in the matter as per the Section 86(1)(f) of the Electricity Act, 2003. Simultaneously, the respondent also contested in the matter stating that once the issue has finally been decided between the parties by the Hon'ble Apex Court, this Commission cannot sit over the order/judgment of the Hon'ble Supreme Court and seek to interpret the same.

7. The petitioner and the respondent asked for one week's time for final submission in the matter which the Commission agreed. The petitioners have filed the written submissions on 15.10.2018 and the Respondent on 17.10.2018.

8. The petitioners vide petition and submission dated 15.10.2018 broadly submitted as below:

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- i. The instant matter is with regard to the consequences of imposition of the Merit Order Dispatch by the respondent MP Power Management Company Limited (MPPMCL) on the biomass generating plants of the petitioners from 17.01.2017 onwards. The matter has also come by way of a remand from the Hon'ble Appellate Tribunal for Electricity in the Order dated 29.05.2018 in EP No. 2 of 2017, which is as under-

“h) We considered that the dispute has arisen because of arrear/ interest bills and fixed charge/ interest bills raised by the Petitioners based on the Order dated 30.11.2016 of the State Commission and non-admissibility of the same by MPPMCL. Fundamentally, the dispute is between the generator and the procurer of the electricity for execution of a particular order of the State Commission.

i) In view of our discussions as above and considering all the relevant aspects of the instant Execution Petition, we are of the considered opinion that the dispute between the Petitioners and MPPMCL is first required to be adjudicated before the State Commission. Accordingly, we direct the Petitioners to take up the matter with the State Commission for adjudication of the said disputes. The State Commission is also directed to adjudicate the disputes between the parties considering the case on merits in totality and judgments of this Tribunal and Hon'ble Supreme Court.

j) Having directed as above, we would like to clarify that the observations made by us, which touch on the merits of the case, based on submissions of the parties were to dispose of this EP and it will be open for this Tribunal to deal the same again if required in future.

ORDER

For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the present Execution Petition have merits as discussed above which are to be first adjudicated by the State Commission.

Hence, we hereby direct the State Commission to first adjudicate the disputes between the parties as stated supra within a period of three months from the date of receipt of copy of this Order.”

- ii. The issue of consequence of imposition of merit order dispatch has not been either raised or decided in any of the proceedings before the Commission or the Hon'ble APTEL or the Hon'ble Supreme Court. This is because MPPMCL continued to give schedule and take power from the biomass plants of the Petitioner till 17.01.2017. It was only after this date when Appeal No. 228 of 2016 against the Order dated 30.11.2016 was pending before the Hon'ble APTEL that

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the Merit Order Dispatch was applied by MPPMCL. Further, since the Hon'ble APTEL in the judgment dated 20.03.2017 set aside the conditions imposed by the Commission in the Order dated 30.11.2016 including the condition of Merit Order Dispatch, the Hon'ble APTEL never went into the issue of consequence of imposition of Merit Order Dispatch.

- iii. In the Review Order dated 02.08.2017 in the matter of Review Petitions moved by the Commission and MPPMCL for review of the judgment dated 20.03.2017, the Hon'ble APTEL held as under:

“.....we have also noticed that the Review Petitioner in Review Petition No. 4 of 2017 is not even paying the fixed costs.”

- iv. The only issue which was raised by MPPMCL in Civil Appeals No. 4550-4551/2017 was whether in terms of the Regulations, Tariff Order dated 02.03.2012 and PPAs, the MOD can be imposed on the Petitioners or not. The Hon'ble Supreme Court allowed the civil appeals only on the issue whether MOD can at all be applied to the Petitioners or not. No ground or issue was raised regarding the consequence of imposition of MOD. One of the reasons given by the Hon'ble Tribunal to hold that MOD cannot be applied was because there is a single part tariff fixed by the Commission. This was not accepted by the Hon'ble Supreme Court in Order dated 26.04.2018 and the observations in Para 8 of the Order have to read in the above context.

“8. We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulations, 2010. The fact remains that the said Regulation stands substituted by the MPERC tariff order 2012 and thereafter in the PPA it was agreed that clause 8.10 of the Tariff Order as amended on 03.05.2013 will apply. The said tariff order has now become final between the parties to the agreement which provides for single part tariff. Thus, the findings of two part tariff cannot be sustained. We are unable to uphold the findings that clause 8.10 of the tariff order dated 02.03.2012 will not apply in these circumstances.

9. Accordingly, we set aside the impugned order and restore the order of the MPERC dated 30.11.2016 insofar as condition (b) of Para 15 quoted above is concerned. The remaining conditions will remain unaffected.”

- v. If indeed the Hon'ble Supreme Court has rejected the claim for fixed charges in its Order dated 26.04.2018, there would be no reason for the Hon'ble APTEL to see merits in the EP No. 2 of 2017 and remand the matter back to the Commission.

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- vi. The issue is not as to whether the words of the Hon'ble Supreme Court are to be treated as '*ratio decidendi*' or '*obiter dicta*'. However, the Hon'ble Supreme Court cannot have decided an issue which was never raised before it.
- vii. The only reply of MPPMCL is that the issues sought to be raised by the Petitioners stands covered and decided by the order dated 26.04.2018 passed by the Hon'ble Supreme Court in Civil Appeal No. 4550-4551/2017. Res Judicata would mean that the very same issue between the very same parties is decided by the court in earlier proceedings. When the issue of consequence of merit order dispatch was not raised earlier, how could the Hon'ble Supreme Court have decided the same?
- viii. The claim of MPPMCL is incorrect, misleading and without any merit whatsoever. In Para 1 of the reply, MPPMCL has admitted that the matter has been preferred in terms of the Order dated 29.05.2018 passed by the Hon'ble APTEL in EP No. 02 of 2017 in Appeal No. 8/2013 passed by the Commission. The EP No. 2 of 2017 was taken up by the Hon'ble APTEL after the Order dated 26.04.2018 was passed by the Hon'ble Supreme Court. The petitioners had raised the issue of payment of fixed charges for the period when the plants are kept under merit order dispatch (MOD) before the Hon'ble APTEL. Further, the submission of MPPMCL that a specific finding has been returned by the Hon'ble Supreme Court in the Order dated 26.04.2018 is absolutely incorrect and misleading and only because MPPMCL has no answer to the merits of the petition.
- ix. The fact is that coterminous with the amendments in the Renewable Energy Regulations, the Commission also notified the Madhya Pradesh Electricity Balancing and Settlement Code, 2015. Neither the PPAs nor the Tariff Orders nor the Renewable Energy Regulations notified by the Commission deal with the consequences and how to apply merit order dispatch principles on the Petitioners.
- x. There is also no finding of the Hon'ble Supreme Court on the MP Electricity Balancing and Settlement Code as being contended by MPPMCL. The general principle for applicability of Merit Order is that it would apply when there is a two part tariff. When there is a single part tariff, as in this case, the same also has been derived by clubbing the fixed cost and the variable cost.
- xi. It is not that the Petitioners are asking the Commission to re-determine the tariff. The petitioners are only praying to decide what would be the consequence of imposition of MOD.
- xii. There is also no merit in the submissions of the MPPMCL, that since a common petition has been filed by 2 petitioners, the petition is not maintainable. Both

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petitioners have paid 2 sets of court fees and are part of the MP Biomass Energy Developers Association.

- xiii. The petitioners have also been raising the bills for fixed costs on the MPPMCL from 17.01.2017 but the same have not been processed. Since there will be substantial delay in the payment of fixed costs by the Respondents, interest/ delayed payment surcharge also needs to be paid on the same. In this regard, in terms of the LOI and the PPA, the interest is payable on the above amount at the Delayed Payment Surcharge @ 1.25% per month. The relevant clause of the LOI dated 11.10.2013 of Arya Energy Limited reads as "*2(e) Surcharge for Late payment – A surcharge of 1.25% per month shall be payable by MPPMCL on the amount outstanding after 30th day of the receipt of the bill. Surcharge shall be calculated on day to day basis.*" The relevant clause of the PPA executed by Orient Energy Limited reads as "*7.6.4 In case the Procurer makes full payment within 15 days from the date of submission of bill by Seller, an incentive @ 1% of billed amount shall be allowed by the Seller towards prompt payment. In case of delay beyond the 30 days payment period, the Procurer will pay delayed payment penalty on outstanding amount at the rate of 1.25% per month or part thereof.*"

9. The respondent vide reply dated 03.10.2018 and submission dated 17.10.2018 has contested the petition stating that the instant petition is not maintainable for the simple reason that the petitioner No. 1 and petitioner No. 2 are two different companies and are seeking to adjudicate a dispute pertaining to their specific companies from a single petition and the same is not permissible under the law. Further, there is no *lis* to be adjudicated, as the issues raised in the instant petition have been settled by the Hon'ble Supreme Court and therefore, the petition deserves to be dismissed on the ground of Res-Judicata with heavy costs awarded in favor of the respondent. The respondent broadly submitted as below:

- i. The instant matter is arising out of several rounds of litigation between the parties wherein the Hon'ble APTEL vide order dated 29/5/2018 had remanded the matter to this Commission for adjudication of disputes in light of the judgment of the Hon'ble Apex Court.

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- ii. The Petitioner has been seeking to re-open the issue of “Single Part Tariff”, which has already been decided by the Hon'ble Supreme Court in a *lis* between the parties vide order dated 26.04.2018. The principal ground raised by the petitioners is arising in para 31 of the petition, wherein the petitioner has stated that the “Single Part Tariff” in this case has been derived from the fixed cost and variable costs, wherefrom the petitioners have calculated the fixed charge rate and therefore is seeking payment of fixed cost of bills in its relief clause.
- iii. The instant issue is no longer open to be adjudicated between the parties as this matter has already been decided by the Hon'ble Supreme Court vide order dated 26/4/2018 in Civil Appeal No. 4550-4551/2017 very specifically stating in para 8 of the Order that the tariff order dated 3/5/2013 has now been final between the parties to the agreement (Petitioners and Respondent) and the agreement between the parties provides for a single part tariff and therefore, the findings of the “Two Part Tariff” cannot be sustained. The matter has not been now open for the petitioner to re-agitate the same issue before the Commission as the principle of res-judicata would also be applicable.
- iv. The petitioner has been seeking to rely on the M.P. Electricity Balancing and Settlement Code and also certain other documents, which was referred to by the parties before the Hon'ble Apex Court during the arguments and after due consideration of the arguments and the submissions of the parties, the Hon'ble Apex Court issued the finding in the judgment dated 26/4/2018.
- v. From the APTEL order dated 29/5/2018 it is very much clear that APTEL did not pass any verdict on the submissions made by this respondent rather it directed State Commission to first adjudicate the disputes between the parties considering the case on merits in totality and judgments of this Tribunal and Hon'ble Supreme Court and the order and judgment of the Hon'ble Supreme Court is clear and precise that it is only the Single Part Tariff which is applicable for the Petitioners.
- vi. Perusal of the judgement dated 26.04.2018 clearly provides for the following:
 - i. Merit Order Despatch principle shall apply with Single Part Tariff.

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- ii. Tariff shall be Single Part Tariff and not Two Part Tariff
- iii. Must Run Principle will not apply.
- iv. Tariff will be as per MPERC Tariff Order dated 03.05.2013, which has become final between the parties.

10. The Commission has observed that the respondent executed the agreement only with the petitioner No. 2, M/s. Orient Green Power Co. Ltd. on 18.01.2016 while the respondent has only issued the Letter of Intent (LOI) for purchase of the power from the petitioner No. 1, M/s. Arya Energy Ltd. i.e. the agreement has not been executed with the petitioner No. 1.

11. The Commission has also noted that the Hon'ble Supreme Court of India in the order dated 26.04.2018 at paras 7 & 8 stated that:

“7. We have heard learned counsel for the parties on the correctness of the issue whether the principle of MR will apply or of MOD in relation to respondents 2,3 and 4 having regard to the agreement with the said parties.

8. We find that the APTEL was in error in holding that MR principle will apply based on Regulation 9 of the MPERC Regulation 2010. The fact remains that the said Regulation stands substituted by MPERC Tariff Order 2012 and thereafter in the PPA it was agreed that Clause 8.10 of the Tariff Order as amended on 03.05.2013 will apply. The said Tariff Order has now become final between the parties to the agreement which provides for single part tariff. Thus the findings of two part tariff cannot be sustained. We are unable to uphold the findings that clause 8.10 of the tariff order dated 02.03.2012 will not apply in these circumstances.”

12. Having heard the petitioners and the respondent and on considering their written submissions, the Commission is of the view that:

- i. The petitioners have mentioned in their petition that consequences of MOD has not been dealt by the Hon'ble Supreme Court in its order dated 26.04.2018. Having signed the PPA on 18.01.2016 by the petitioner no. 2 with MPPMCL and

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having agreed to for MOD vide clause 5.1 of the PPA and for single part tariff as per clause 7.1, where single part tariff for 20 years is shown in the table, the petitioner no.2 has no ground to question the consequences of MOD or of single part tariff. Both things have been agreed between the petitioner no.2 and the respondent and finalized in the form of PPA on 18.01.2016. The Supreme Court in its order dated 26.04.2018 has also stated that having signed the PPA, the tariff order has now become final between the parties to the agreement, which provides for single part tariff.

- ii. Similarly, the LOI dated 11.10.2013 issued by the MPPMCL to the petitioner no. 1 also confirmed the single part tariff and the operation of MOD along with other terms and conditions requesting to acknowledge the receipt and acceptance of rate and terms and conditions. Based on the aforesaid LOI, the petitioner has raised the bills towards supply of power to the MPPMCL. As such, the petitioner no.1 has no ground to question the consequences of MOD or of single part tariff. Both things have been agreed between the petitioner no.1 and the respondent through LOI.
- iii. Since the two part tariff cannot be applicable in these cases, hence there cannot be any justification for claiming the fixed charges and consequential interest by the petitioners.

13. In view of above, the Commission does not find any merit in this petition in light of the judgment of the Hon'ble Supreme Court issued vide order dated 26.04.2018 in Civil Appeal No. 4550 – 4551 of 2017. Therefore, the petition no. 32/2018 stands disposed of.

Ordered accordingly.

sd/-

(Anil Kumar Jha)
Member

sd/-

(Mukul Dhariwal)
Member

sd/-

(Dr. Dev Raj Birdi)
Chairman