

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition for adjudication u/s. 86(1)(f) read with Section 61, 62, 86(1)(a), 86(1)(b) of the Electricity Act, 2003

Petition No. 36 of 2015

ORDER

(Date of Motion Hearing: 21st July, 2015)

(Date of Order: 25th July, 2015)

M/s. BLA Power Pvt. Ltd.

- Petitioner

Vs.

M.P. Power Management Company Ltd., Jabalpur

- Respondent

Shri Sanjay Sen, Senior Advocate and Shri Prateek Bhurat, Authorized Representative appeared on behalf of the petitioner.

2. M/s. BLA Power Pvt. Ltd. has filed the subject petition under Section 61, 62, 86(1)(a), 86(1)(b) and 86(1)(f) of the Electricity Act, 2003. The petitioner has submitted the following in its prayer:

- “(a) *Direct the Respondent/ MPPMCL to make payments of the fixed charges as determined by this Hon’ble Commission vide its order dated 22.05.2015, based on the Plant Availability;*
- (b) *Direct the Respondent/ MPPMCL to make payments of the applicable actual variable (energy) charges as against the invoices raised by the Petitioner Company.*
- (c) *In the interim, direct the Respondent/ MPPMCL to make payments against the invoices raised by the Petitioner Company for the variable (energy) charges @ Rs. 2.18 per kWh, as determined by this Hon’ble Commission in order dated 22.05.2015 passed in Petition No. 16 of 2014.”*

3. While going through the contents in the subject petition, it is observed that the issues raised in the subject petition pertain to the period post cancellation of Gotitoria (East) and Gotitoria (West) coal mines of M/s BLA Industries Pvt. Ltd *w.e.f* 31st March 2015 by the Hon’ble Supreme Court of India vide its Order dated 24th September’ 2014. The petitioner has approached the Commission for the following reasons:

- (i) The energy charges billed by it for the electricity generated and supplied to MPPMCL after 31st March’ 2015 have not been paid to it by the respondent.

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(ii) The fixed charges for the electricity generated and supplied by it to MPPMCL after 31st March' 2015 have also not been paid by MPPMCL.

(iii) The petitioner has approached this Commission as per following directions in Para 9.91 of the Commission's order dated 22nd May' 2015 for determination of tariff for Unit No. 1 of its power plant:

".....The petitioner may approach the Commission in terms of relevant provisions under PPA, as and when there is any change in the present status of coal linkage for its power plant....."

4. The petitioner has broadly submitted the following in its petition:

(i) *On account of de-allocation of the Dharmasthal Coal Project, B L A Industries Private Limited was in no position to fulfill its obligations under the FSA dated 25.04.2011. Consequently, the FSA entered into between the Petitioner Company and B L A Industries Private Limited has become 'impossible to perform' on account of the force majeure event.*

(ii) *With a view to secure constant and uninterrupted fuel supply for its power plant, the Petitioner Company participated in the allocation of coal mines under the Coal Mines (Special Provisions) Act, 2015. As envisaged under the Coal Mines (Special Provisions) Act, 2015 (then known as the Coal Mines (Special Provisions) Second Ordinance, 2014), the Petitioner Company submitted its Technical Bid for Gotitoria (East) and Gotitoria (West) on 31.01.2015, the result of which is still not been declared. Such participation of the Petitioner was permitted under an interim order passed by the Hon'ble High Court of Madhya Pradesh dated 29.01.2015 in writ petition no. 846.*

(iii) *Subsequently, B L A Industries Private Limited vide its letter dated 01.04.2015 informed the Petitioner Company that as on 31.03.2015 a team of officials from Western Coalfields Limited took over the control of the Dharmasthal Coal Project in terms of the provisions of the Coal Mines (Special Provisions) Act, 2015 (then known as the Coal Mines (Special Provisions) Second Ordinance, 2014. Vide same letter, B L A Industries Private Limited*

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invoked Clause 10.3 of the FSA dated 25.04.2011 being the Force Majeure clause. Vide its letter dated 03.04.2015, the Petitioner Company requested BLA Industries Private Limited to continue supply of the contracted quantity of coal by arranging for the same from alternate sources till the subsistence of the Force Majeure event as envisioned under Clause 3.3.2 of the FSA. However, vide letter dated 06.04.2015, B L A Industries informed the Petitioner Company that despite its best efforts it was unable to supply coal from any alternate source at the equivalent price as was supplied under earlier from its coal mine under the FSA. It is stated that for the period immediately following the invocation of the Force Majeure event by B L A Industries Private Limited, the Petitioner Company was able to generate power by utilising the stock of coal available with the Petitioner Company, which has since been exhausted.

- (iv) *With the view to secure coal for the purpose of generating power and supplying the same as per the PPA, the Petitioner Company was compelled to purchase coal via e-auction, and also through coal traders, the cost of which has come up to an average Rs. 5070.23 per MT in the month of April 2015. Such cost is inclusive of the applicable transportation charges, the relevant taxes/duties and unloading charges at the power plant. The aforementioned primary fuel cost translates into a variable component of **Rs. 3.138 per kWh.***

With respect to the above variable charges, the Petitioner Company has been raising invoices upon the Respondent, which include the fixed charges also. The said invoices which have been raised by the Petitioner Company pertain to the electricity supplied in the month of April, 2015.

- (v) *The above procurement of coal through e-auction and from coal traders is a short term arrangement until the Petitioner Company enters into a long term fuel supply agreement and the same is approved by this Hon'ble Commission.*
- (vi) *Hence, the captioned petition has a limited scope in as much as the fact that it seeks relief with respect to the above procurement of coal till the Petitioner Company enters into the relevant long term fuel supply agreement which is approved / recognized by this Hon'ble*

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Commission. For the said purpose the Petitioner Company also craves leave of this Hon'ble Commission to file a separate petition upon the execution of a long term fuel supply agreement, for the approval of the same.

- (vii) MPPMCL vide letter dated 01.06.2015 has asked the Petitioner Company to approach this Hon'ble Commission seeking redetermination of tariff on account of the changed fuel supply arrangement.*
- (viii) It is submitted that the Petitioner Company vide this instant petition is approaching this Hon'ble Commission as per the liberty granted to the Petitioner Company by this Hon'ble Commission in its final tariff order dated 22.05.2015. In the said order, this Hon'ble Commission has categorically allowed the Petitioner Company to approach this Hon'ble Commission in the event of any change to the status of the coal linkage for the Petitioner Company Power Plant.*
- (ix) The FSA dated 25.04.2011 entered into between B L A Industries Pvt. Ltd. and the Petitioner Company has become infructuous on account of the Hon'ble Supreme Court's judgment in M. L. Sharma (supra), thereby forcing the Petitioner Company to procure coal from e-auction / coal trader(s) as a temporary measure until the Petitioner Company executes a long term fuel supply agreement.*
- (x) Thus, on account of the evident change to the status of the coal linkage, the Petitioner Company is compelled to approach this Hon'ble Commission seeking recognition of the same and consequential directions upon MPPMCL to release payments as per the invoices raised or to be raised by the Petitioner Company until the execution of a long term fuel supply agreement.*
- (xi) In the order dated 22.05.2015, the energy charges fixed for the Petitioner Company were Rs. 2.18 per kWh. This energy charge was based upon the then existing FSA the Petitioner Company had with B L A Industries Pvt. Ltd.*
- (xii) For that the PPA dated 05.01.2011 executed by the Petitioner Company with the Respondent falls under Section 62 of the Electricity Act, 2003. As such, the fixed as well*

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as energy charges of the power plant of the Petitioner Company need to be paid by the Respondent as per the Generation Tariff Regulations, 2012.

- (xiii) *The Petitioner has to enter into another long term fuel supply agreement so as to fulfill the obligation contained in Article 4.1.1 of the PPA. In the interregnum, the Petitioner is sourcing coal from e-auction, and through coal trader(s), so as to maintain supplies as per the said PPA. It cannot be contended / presumed by the Respondent that until the Petitioner executes another long term fuel supply agreement, and the same is approved by this Hon'ble Commission, the said Petitioner does not have the ability to generate power.*
- (xiv) *The Petitioner is filing the present petition in order to get the present arrangement for procuring coal recognized by this Hon'ble Commission. Once this Hon'ble Commission recognizes the said temporary arrangement, the obligation contained in Article 4.1.1 of the PPA gets fulfilled.*
- (xv) *The Hon'ble Commission may be pleased to take judicial notice of the fact that under the NCDP, 2007, read with the amendment of coal linkage policy for the 12th Plan Power Projects dated 18.03.2011 issued by the Ministry of Power vide letter bearing reference no. F.No. FU-9/2009-IPC, the Petitioner is not eligible for coal linkage. Hence, the options available are limited at the stage, pending availability of coal stock through the auction route. It is in these circumstances that the petitioner is purchasing coal on regular intervals through e-auction.*
- (xvi) *It is further stated that, without prejudice to the submission made in the present petition, the Respondent is bound to make payments to the Petitioner of the variable cost @ Rs. 2.18 per kWh. Therefore, at the said variable cost, plus the approved fixed cost, the Respondent has to buy power from the Petitioner on account of the fact that the PPA has been executed as per section 62 of the Electricity Act, 2003. When the variable cost increases on account of certain factors, and in the event this Hon'ble Commission approves the same, then the Respondent again has to continue purchasing power from the Petitioner.*

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- (xvii) *In other words there is no ability for the said Respondent to not purchase or give schedules to the Petitioner on account of reasons of fuel arrangements since the said arrangements are always subject to the final recognition / approval of this Hon'ble Commission.*
- (xviii) *Article 4.1.1 of the PPA was required so as to ensure that at the time of execution of the PPA, the Petitioner had necessary supply of coal for generating power. Once the said PPA has triggered, the fuel supply arrangement can change subject to the approval of the Hon'ble Commission, and the Respondent does not have any power to unilaterally and arbitrarily not provide schedules. If despite declaration of Plant Availability by the Petitioner the Respondent fails to provide schedule(s), then the said Respondent is liable to pay the applicable fixed charges as per the relevant tariff regulations.*
- (xix) *For that till this Hon'ble Commission decides finally the present petition, the Petitioner Company in the interim, seeks directions upon the Respondent to start making payments to the Petitioner Company of the energy charges at Rs. 2.18 per kWh which cost has already been approved by this Hon'ble Commission in the order dated 22.05.2015.*
- (xx) *The Petitioner craves leave to execute a long term FSA and as such, place the same with the procurer in order to ensure long term continuity of coal at the best available prices. That the present petition is bonafide and in the interest of justice."*

5. The case was fixed for motion hearing on 21st July' 2015. During the course of hearing, Learned Counsel of the petitioner explained the genesis of the issues in the subject petition. In support of his contention, he submitted the same grounds as mentioned in the subject petition. In his submission during the hearing, he laid emphasis on certain definition like "Fuel" and "Fuel Supply Agreement(s)" besides provisions under Article 4.1.1 (iii) in the Power Purchase Agreement (PPA) entered into by both the parties in this matter on 5th January' 2011.

6. Learned Counsel of the petitioner informed the Commission that the respondent has now paid **75 %** of the disputed amount of bills raised by the petitioner on the basis of the Energy Charges @ ₹ 2.18 per kWh as determined by the Commission for FY 2014-15 in its order.

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

- (i) It is mentioned in the petition that post cancellation of the Gotitoria Coal mines by Hon'ble Apex court, the basic Fuel Supply Agreement with M/s BLA Industries, based on which the PPA was executed and the tariff has been determined by the Commission, has become "impossible to perform" or infructuous.
- (ii) It is further mentioned in the petition that the petitioner is able to generate electricity from the coal procured by it through some short term arrangements i.e, via E-Auction and through coal traders.
- (iii) The petitioner is not eligible for coal linkage from CIL as per the coal linkage policy for the 12th Plan Power projects.
- (iv) The Energy (Variable) charges are translated to ₹ 3.138 per kWh from generation of electricity from above mentioned short term arrangements whereas, the energy charges of ₹ 2.18 per kWh were determined by the Commission for FY 2014-15 for generation of electricity from coal supplied from Gotitoria mines under FSA.
- (v) The petitioner is not having any Fuel Supply Agreement as on date for its power plant however, it was submitted that the petitioner is intending to execute a Fuel Supply Agreement to fulfill its obligation under Article 4.1.1 (iii) of Power Purchase Agreement which provides that,

*"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 the duly executed Fuel Supply Agreement to the Procurer (emphasis supplied);"*
- (vi) In terms of the aforesaid Article under PPA, the petitioner is required to submit a duly executed Fuel Supply Agreement upon prudent terms and conditions materially consistent with the extant policy of the Government of India, to the procurer. The

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compliance of the aforesaid condition is not observed in the instant petition. In PPA, there is no mention of any short term arrangement of coal without any FSA.

- (vii) In Para 9.91 of the Commission's order dated 22nd May'2015 in Petition No.16 of 2014, the Commission has already mentioned about the Energy (Variable) charges and tariff with reference to the cancellation of Gotitoria coal mines w.e.f, 31st March 2015 by the Hon'ble Supreme Court of India. However, the relevant portion of the aforesaid Paragraph is reproduced below:

“The coal block of M/s. BLA Industries who is having Fuel Supply Agreement with the petitioner has been cancelled w.e.f. 31st March' 2015 vide order passed on 24th September 2014 by the Hon'ble Supreme Court of India in Writ Petition (CRL) No. 120 of 2012. The Commission is determining the tariff pursuant to a long term Power Purchase Agreement entered into by both the parties in PPA and the subject petition also. The aforesaid long term PPA is linked with the long term FSA between the generating company and the coal company (M/s BLA Industries) with reference to the coal mines which are presently out of the scene in the subject petition, PPA and FSA. The Energy (Variable) charges considered in this order of the Commission are based on the variable parameters of coal supplied from the coal mine under FSA which has now been cancelled as per aforesaid Order of the Apex court. Further, the Annual Fixed Cost determined in this order is also having a component which is based on the coal under the provisions of long term FSA. Therefore, the tariff determined in this order is applicable till the coal under the FSA executed between the petitioner and the coal company (M/s BLA Industries) is used for generation and supply of electricity to Respondents in this matter. The petitioner may approach the Commission in terms of relevant provisions under PPA, as and when there is any change in the present status of coal linkage for its power plant.

- (viii) As mentioned above by the Commission, such type of short term arrangement as mentioned by the petitioner may not be considered as “*change in the present status of coal linkage for its power plant*”. There is no change in the status of coal linkage through a duly executed Fuel Supply Agreement which is required to be submitted by the petitioner to the respondent under its obligation in Article 4.1.1 (iii) of PPA. Therefore, the approach of the petitioner on the issue of short term arrangement of

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coal in the subject petition is not considered in accordance with the directions under Para 9.91 of the Commission's order dated 22nd May 2015 in Petition No.16 of 2014.

- (ix) The petitioner has approached the Commission under Section 86(1) (b) and (f) for adjudication on the issues in its prayer in this petition, 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.
- (x) Pursuant to the same PPA, the petition for determination of tariff for both the units of Petitioner's power plant was filed with the Commission and the tariff has been 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.
- (xi) Sub-Articles 13.5.2 and 13.5.3 provide as under:

“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:*

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- (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”

- (xii) 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 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.

8. 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 complied

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with by the petitioner before approaching the Commission for adjudication under Sub Article 13.5.3 of the PPA. Therefore, this petition is not maintainable in terms of the provisions under the Power Purchase Agreement entered into between the parties in this matter.

With the above observations, this petition is disposed of.

(Alok Gupta)
Member

(A.B.Bajpai)
Member

(Dr. Dev Raj Birdi)
Chairman