

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of Review Petition filed under Section 94(1)(f) of Electricity Act, 2003 read with Regulation 40 of MPERC (Conduct of Business) Regulations, 2004

Petition No. 67/2016

ORDER

(Date of Order: 30th November'2017)

M.B. Power (Madhya Pradesh) Ltd.,
239, Okhla Industrial Estate, Phase-III,
New Delhi - 110020

Petitioner

V/s

M.P. Power Management Company Ltd.,
Block No. 11, Shakti Bhawan,
Rampur, Jabalpur – 482008

Respondent

Shri Amit Kapur Advocate, Shri Vishal Anand, Advocate, Shri Akshat Jain, Advocate, Shri Ravi Arya, President, Ms. Minni Katariya, Head Legal, Shri Rameshwar Dubey, AVP and Shri Abhishek Gupta, DGM appeared on behalf of the petitioner.

Shri Aashish Bernard, Advocate and Shri R.V. Saxena, AGM appeared on behalf of Respondent.

M/s. MB Power (Madhya Pradesh) Ltd. (Review Petitioner) has filed the subject petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 40 of MPERC (Conduct of Business) Regulations, 2004 for review of Commission's order dated 24th August' 2016 in IA No. 1 of 2016 in Petition No. 14 of 2016.

2. The petitioner had also filed an application for condonation of delay in filing the subject review petition mentioning the reasons for the same. The delay in filing the subject petition was condoned and the subject review petition was admitted by the Commission in view of certain observations of the Commission mentioned in its order dated 1st February' 2017 in the subject matter.

3. In the subject review petition, the petitioner again stated all details of chronological events/communications held between the petitioner and WRLDC or PGCIL from 22.03.2016 to COD (i.e,07.04.2016) of its Unit No.2. All aforesaid details with documents had already been placed by the petitioner before this Commission in its IA No. 1 in petition No. 14 of 2016. With the aforesaid details, the review petitioner broadly

submitted the following grounds for review of Commission's order dated 24th August 2016 in IA No. 1 of 2016 in Petition No. 14 of 2016:

- (i) There was no dispute raised by the Review Petitioner vis-à-vis the Western Load Despatch Centre in its Petition No. 14 of 2016 under Section 29(5) of the Electricity Act. As such, the Impugned Order erred in its premise to observe that this Hon'ble Commission has no jurisdiction to intervene in the matter in terms of provisions under Section 29(5) of the Electricity Act.*
- (ii) Being distracted by the above impression, this Hon'ble Commission has not considered that the case of the Review Petitioner was that due to the instructions given by WRLDC, the Review Petitioner was unable to achieve the Commercial Operation Date ("COD") of Unit 2 of the Review Petitioner's Project by 31.03.2016. As such due to instruction given by WRLDC the COD of Unit 2 of the Project instead of falling under the MPERC (Terms and Conditions for Determination of Tariff) Regulations, 2012 ("**MPERC Tariff Regulations 2012**") came within the purview of the MPERC (Terms and Conditions for Determination of Tariff) Regulations, 2015 ("**MPERC Tariff Regulations 2015**"). The Review Petitioner prayed that this Hon'ble Commission may relax the Tariff Regulations notified by the Hon'ble Commission to bring the Review Petitioner's Project within the control period of the MPERC Tariff Regulations 2012.*
- (iii) The Impugned Order is silent on the issue of relaxation of Regulations. As such, in the absence of consideration of the prayers of the Review Petitioner, the Review Petition is maintainable.*
- (iv) While disallowing the prayer of the Review Petitioner to extend the control period of the MPERC Tariff Regulations 2012, this Hon'ble Commission:*

 - (a) Did not consider that the power to extend the applicability of the control period of the Tariff Regulations is exercised by the Hon'ble Commission only in individual/ specific cases.*
 - (b) Did not consider the judgment dated 11.05.2016 passed by the Hon'ble Appellate Tribunal in Appeal No. 170 of 2014 relied upon by the Review Petitioner which holds that the Commissions have the power to extend the applicability of control period of Regulations.*
- (v) This Hon'ble Commission ignored the basic/ material aspect that neither the MPERC Tariff Regulations 2012 nor the PPA dated 05.01.2011 provides for a separate trial run for 72 hours. It only prescribes that the generating company shall achieve CoD after demonstrating the Maximum Continuous Rating (MCR) or*

the Installed Capacity (IC) through a successful trial run after notice to the beneficiaries.

- (vi) In passing the Impugned Order, this Hon'ble Commission acknowledged that it has not gone into the merits of the case and has proceeded on the premise that there was a dispute under Section 29(5) between the Review Petitioner and WRLDC qua delay in achieving the COD of Unit 2 of the Review Petitioner's Project. It is submitted that there was no dispute between the Appellant and WRLDC and the Petition filed did not seek any adjudication of the dispute. In fact, the case of the petitioner was that due to circumstances narrated above and the timing, CoD of Unit 2 the Project fell 7 days beyond the control period in the MPERC Tariff Regulations 2012 and would attract MPERC Tariff Regulations 2015. The petitioner had completed the installation and erection of Unit 2 in January 2016 and it issued notices to MPPMCL on 01.02.2016 and 15.02.2016 to designate representatives for witness and monitor the commissioning test of Unit 2 expected to be accomplished by March 2016. Accordingly, the Review Petitioner had approached this Hon'ble Commission for seeking relief ex debito justitiae to declare that the MPERC Tariff Regulations 2012 shall apply to Unit 2.*
- (vii) It is submitted that under this wrong impression, this Hon'ble Commission in the Impugned Order held that the Hon'ble Commission has no jurisdiction to intervene in the matter in terms of provisions under Section 29(5) of the Electricity Act and as such it has not gone into the merits of the case. It is submitted that this Hon'ble Commission has the power to relax the rigours of its Regulations as also to extend the applicability of control period of the MPERC Tariff Regulations 2012.*
- (viii) The Impugned Order has not discussed or even dealt with the issue of relaxation of Regulations. It is submitted that this Hon'ble Commission has the power to relax the rigors of the Regulations framed by this Hon'ble Commission and to remove difficulties for applicability of the MPERC Tariff Regulations 2012 in the interest of justice after examining each case on merits.*
- (ix) It is settled law that Commissions have the power to relax the applicability of the Regulations framed by the Commission. In this regard, the Review Petitioner had relied on certain judgments which escaped attention and due consideration by this Hon'ble Commission in the Impugned Order.*
- (x) The review petitioner had sought for extension of the applicability of the control period of the MPERC Tariff Regulations 2012 for a period of 7 days since Unit 2 of*

the Review Petitioner's Project achieved COD on 07.04.2016 due to reasons beyond the control of the Review Petitioner and due to reasons not attributable to the Review Petitioner. In support, the Petitioner had relied upon the judgment dated 11.05.2016 passed by the Hon'ble Appellant Tribunal in Appeal No. 170 of 2014 which escaped due consideration of this Hon'ble Commission in the Impugned Order.

- (xi) It is submitted that in view of the above, this Hon'ble Commission has the power to extend the applicability of the control period of MPERC Tariff Regulations 2012 specific to one entity to include the period of seven days till 07.04.2016, i.e. CoD of Unit 2 of the Petitioner's Project. However, the Hon'ble Commission did not consider this position of law when it proceeded to hold that it did not find any merit in the Petitioner's contention seeking extension of the control period of the MPERC Tariff Regulations 2012 for an individual/ specific case. It is submitted that such powers to extend the applicability of the provisions of the Regulations notified by the Hon'ble Commission have to be exercised on a case to case basis. Thus, the observation in the Impugned Order that the power to relax cannot be exercised for individual cases is an error apparent on the face of record.*
- (xii) It is respectfully submitted that the PPA executed between the Review Petitioner and MPPMCL does not contain any provision for conducting a separate test for commissioning for 72 hours. Also, as is evident from the above provisions in the MPERC Tariff Regulations 2012, there is no requirement to conduct the 72 hours trial run for achieving COD. The CoD can be achieved after demonstrating MCR or IC through a successful trial run.*
- (xiii) As stated earlier, the commissioning of Unit 2 was completed on 30.03.2016, effectively resulting in completion of the trial run. A certificate has also been issued by Independent Engineer as well as CEA. The fact that the Review Petitioner chose to follow a higher standard/ benchmark and that the 72 hours trial run was conducted by the Review Petitioner must not be the basis to penalize the Petitioner especially since the commissioning was already done on 30.03.2016 and even the 72 trial run ended on 07.04.2016. This Hon'ble Commission may kindly consider that the entire investment in the Project was made with the objective of commissioning of the Project within the control period of the MPERC Tariff Regulations 2012. This formed the premise of the financial closure and loan terms – which if not granted shall impair the sustainability of the Project undeservedly. The provisional Tariff for Unit 1 of the Review Petitioner's Project has already been determined by this Hon'ble Commission under the MPERC*

Tariff Regulations 2012 by the Order dated 29.07.2015 passed in Case No. 31/2015. All approvals including the financial closure and investment approvals for the Project have been obtained premised on the MPERC Tariff Regulations 2012. It is respectfully submitted that it would be unfair to destroy the viability of the entire investment in the Project due to a delay of 7 days in achieving 72 hour test, i.e. a delay from 31.03.2016 to 07.04.2016 which was caused due to no fault of the Review Petitioner.

4. Motion hearing in the subject petition was held on 24.01.2016 when Learned Counsel on behalf of the petitioner stated the following grounds for review of Commission's order dated 24th August' 2016 in IA No. 1 of 2016 (in Petition No. 14 of 2016):

- (i) The Commission has not gone into the merits of the case and proceeded on the premise that there was a dispute under Section 29(5) between the review petitioner and WRLDC whereas, there was no dispute between the review petitioner and WRLDC and the petitioner had not sought any adjudication of the dispute.
- (ii) The Commission has not discussed and dealt with the issue of relaxation of Regulations. He emphasized that this Commission has the power to relax the rigors of Regulations framed by this Commission, on case to case basis. The Commission has the power to extend the applicability of the control period of "MPERC Tariff Regulations, 2012" specific to one entity to include the period of seven days till 7th April' 2016 i.e, CoD of Unit No. 2 of the Petitioner's project. There is no requirement to conduct 72 hours trial run for achieving COD under provisions of "MPERC Tariff Regulations, 2012"
- (iii) He submitted that the PPA executed between the Review Petitioner and MPPMCL does not contain any provision for conducting a separate test for commissioning for 72 hours.
- (iv) He stated that the 72 hours trial run was conducted by the review petitioner as it was insisted by the Respondent No. 1 i.e. MPPMCL to conduct the same.

5. It has been mentioned in Commission's order dated 01.02.2017 in the subject review petition that the arguments placed by the review petitioner, as mentioned at S. No. (i) and (ii) in the above para of this order, do not make any case for review of Commission's order in the subject review petition. However, in view of other two arguments mentioned at S.No. (iii) and (iv) above with regard to the provisions under PPA and insistence by MPPMCL for conducting 72 hours trial run as contended by the review petitioner, the subject petition was admitted to provide an opportunity of being

heard in the interest of justice and also to hear the respondents in this matter since the performance test of Unit No.2 in the subject matter was witnessed and monitored by the designated representative of MPPMCL (the procurer) in line with Article 5.3 of the PPA and the declaration of COD as **07.04.2016** was accepted by the procurer (MPPMCL) for scheduling the contracted capacity from Unit No. 2 under the same PPA.

6. The following observations of the Commission have been recorded in its above mentioned order dated 01.02.2017:

- (i) The review petitioner in its IA No. 01 of 2016 in petition No. 14 of 2016 (in which the Commission's order under review was issued) had not submitted that the 72 hours trial run was conducted on its Unit No. 2 at the insistence by Respondent No.1 i.e, MPPMCL (the procurer)
- (ii) The above issue regarding provisions for the 72 hours trial run under the PPA now raised in the subject review petition was not submitted by the review petitioner in its IA No. 01 of 2016 in petition No. 14 of 2016 (in which the Commission's order under review was issued). However, the Learned Counsel of the review petitioner stated that the aforesaid issue regarding 72 hours trial run under PPA, was raised during proceedings in the said IA.

Submissions of the Review Petitioner and Respondent (MPPMCL)

7. Vide letter dated 6th February' 2017, the review petitioner confirmed the service of the copies of petition to all respondents in the matter.

8. By affidavit dated 14th February' 2017, MPPMCL (Respondent) filed its response on the review petition. The review petitioner also filed its rejoinder to the aforesaid reply of MPPMCL.

9. During the course of hearing held on 21st February' 2017, the representatives of the review petitioner sought adjournment in the matter as their Counsel was not available to attend the hearing. Considering the request of the review petitioner, the case was fixed for hearing on 21st March' 2017.

10. In its aforesaid reply by affidavit dated 14th February'2017, Respondent No. 1 (MPPMCL) broadly submitted the following:

- “(i) In this regard, it is respectfully submitted that the basic prayer of the Review Petitioner in I.A. No. 1/2016 in Petition No. 14 of 2016 was seeking relief/declaration that the alleged delay in CoD of Unit-2 of the petitioner project was for reasons beyond control of the petitioner.*

- (ii) *In this regard, the Petitioner gave its detailed submissions in Petition No. 14/2016, which was duly considered by this Hon'ble Commission vide order dated 24.08.2016 from para 6(iv) onwards. In this regard, this Hon'ble Commission, after duly recording the submission of the Petitioner and after considering the various facts and contentions raised by the Petitioner, held in para 10 of the said order dated 24.08.2016 that there appears to be a dispute between the Petitioner and WRLDC with respect to commencement of trial run and completion of 72 hours CoD Test of Unit-2. Therefore, this Hon'ble Commission is totally correct in holding that it does not have jurisdiction to intervene or adjudicate the instant matter in accordance with Section 29(5) of the Electricity Act 2003 and that the Petitioner has to approach Central Commission for adjudicating its dispute, which has not been done.*
- (iii) *It is prayed that the Order dated 24.08.2016 should not be reviewed by this Hon'ble Commission because of reasons mentioned below:*
- (a) *It is respectfully submitted that there is no perversity, illegality or error apparent on the face of record in the order dated 24.08.2016.*
 - (b) *It was on the basis of the submission of the Petitioner that this Hon'ble Commission has rightly held that there is a dispute between Petitioner and WRLDC with respect to CoD of Unit-2.*
 - (c) *Therefore, in accordance with the provisions of Electricity Act, 2003, this Hon'ble Commission directed the Review Petitioner to approach the Central Commission, which the Review Petitioner has not done.*
 - (d) *Further, the Review Petitioner cannot be permitted to approbate and reprobate in its submissions. It is on the basis of the submissions of the Petitioner that this Hon'ble Commission has adjudicated the I.A. No. 1 of 2016 in Petition No. 14 of 2016 as not maintainable. There is, therefore, no error apparent on face of record.*
 - (e) *It is further submitted that a Review has limited scope and cannot be argued as an Appeal.*
- (iv) *In this regard, it is further submitted that the Order dated 24.08.2016 cannot be reviewed by this Hon'ble Commission as:*
- (a) *A perusal of the instant Petition, in particular submissions made in paras 3.9, 3.10, 3.12, 3.14 etc., clearly highlight that due to certain issues between WRLDC and the Review Petitioner, the Review Petitioner could not demonstrate 72 hours trial run and hence the CoD of Unit-2 was not achieved by 31.03.2016.*

- (b) *It is submitted that these are the clear submissions/ admissions of the Review Petitioner and therefore, no case for review is made out by the Petitioner.*
- (v) *It is respectfully submitted that once there are issues and disputes between the Petitioner and the WRLDC with respect to who is liable for the alleged delay in CoD of Unit-2, it was correct and proper for this Hon'ble Commission who have passed the impugned order directing the petitioner to first adjudicate its dispute with WRLDC with respect to the alleged delay in CoD of Unit-2. Therefore, there is no error apparent on the face of record for review of the order dated 24.08.2016.*
- (vi) *Without prejudice to the above, fact remains that the CoD of Unit-2 was declared by Review Petitioner on 07.04.2016 which is well beyond the period of MPERC Regulations, 2012. The Review Petitioner submits that although power to relax is available with this Hon'ble Commission, the same has not been exercised in the fact of the present case. However, it is respectfully submitted that the alleged delay is attributable to the certain issues/ reasons between WRLDC and the Review Petitioner and this Hon'ble Commission has rightly rejected the prayer of the Petitioner in IA No. 1 of 2016 in Petition No. 14 of 2016 to extend the control period of the Tariff Regulations, 2012.*
- (vii) *It is admitted position that the CoD of the Project was declared by Review Petitioner on 07.04.2016 after issuance of final Test Certificate by Independent Engineer on 06.04.2016 as per PPA and, therefore, it is completely incorrect and illegal for the Review Petitioner to seek declarations as prayed for in IA No. 1 of 2016 in Petition No. 14 of 2016 and thereby seek a higher tariff. It is further reiterated that the Hon'ble Commission has rightly held in para 11 of the Impugned Order dated 24.08.2016 that on the instant facts and circumstances of the case, no merit is found in prayer of the Petitioner seeking extension of the Tariff Regulations, 2012 and that they should approach Hon'ble Central Commission. It is relevant to mention here that any undue benefit to the Petitioner will adversely impact the consumers of the State.*
- (viii) *It is further submitted that it is settled law that a Review Petition is not an appeal and, therefore, as there is no error apparent on the face of record, the instant petition should be dismissed.*

11. By affidavit dated 20.02.2017, the review petitioner (M/s. M.B. Power (MP) Ltd). filed its rejoinder to the above response filed by MPPMCL(Respondent) broadly mentioning the following:

“(i) It is submitted that the MPPMCL has failed to consider the grounds on which the Review Petition has been filed by the Review Petitioner seeking review of the Order dated 24.08.2016 (“Impugned Order”) passed in IA No. 1 of 2016 in Petition No. 14 of 2016, viz:

(a) Error in the Hon’ble Commission’s findings regarding Section 29(5) of the Electricity Act, 2003 (“Electricity Act”) and the observation that the Hon’ble Commission has no jurisdiction is misplaced.

(b) Omission in considering the Review Petitioner’s submissions and prayer to relax the applicability of the Regulations.

(c) Power to extend the applicability of provisions of the Regulations is applied specifically in individual/ specific cases.

(ii) It is submitted that the scope of the Review Petition has been misinterpreted by MPPMCL since MPPMCL has failed to demonstrate that there is no error apparent on the face of record of the Impugned Order. MPPMCL has only reiterate the contents on the Impugned Order without providing any reasoning as to how the findings in the Impugned Order are correct. Such bald submissions made by MPPMCL ought not to be allowed by this Hon’ble Commission in the interest of justice.

*(iii) **No dispute raised by the Review Petitioner with WRLDC***

It is submitted that there was no dispute between the Review Petitioner and WRLDC and the Petition filed did not seek any adjudication of the dispute. In fact, the case of Review Petitioner was that due to circumstances beyond the control of the Review Petitioner as detailed in Petition and I.A., COD of Unit 2 the Project fell 7 days beyond the control period of the MPERC Tariff Regulations 2012 and would attract MPERC Tariff Regulations 2015. The Review Petitioner had completed the installation and erection of Unit 2 in January 2016 and it issued notice to MPPMCL on 01.02.2016 and 15.02.2016 to designate representatives for witness and monitor the commissioning test of Unit 2 expected to be accomplished by March 2016. Accordingly, the Review Petitioner had approached this Hon’ble Commission for seeking relief ex debito justitiae to declare that the MPERC Tariff Regulations 2012 shall apply to Unit 2.

(iv) It is submitted that being distracted by the above impression of dispute with WRLDC and consequent applicability of Section 29(5) of the Electricity Act, this

Hon'ble Commission has not considered that the case of the Review Petitioner was that due to the instructions given by WRLDC, the Review Petitioner was delayed in achieving the CoD of Unit 2 of the Project. The Review Petitioner prayed that this Hon'ble Commission may relax the Tariff Regulations notified by the Hon'ble Commission to bring the Review Petitioner's Project within the control period of MPERC Tariff Regulations 2012.

(v) No requirement for separate trial run for 72 hours under the MPERC Tariff Regulations 2012, Grid Code or the PPA dated 05.01.2011

It is submitted that this Hon'ble Commission ignored the basic/ material aspect that the MPERC Tariff Regulations 2012, the Indian Electricity Grid Code (as on the date of commissioning) nor the PPA dated 05.05.2011 (executed between the Review Petitioner and MPPMCL) provides for a separate trial run for 72 hours. It is submitted that the aforesaid documents only prescribe that the generating company shall achieve CoD after demonstrating the Maximum Continuous Rating ("MCR") or the Installed Capacity through a successful trial run of full load of 600 MW after notice to the beneficiaries. In this regard, it is noteworthy that:

- (a) The commissioning of Unit 2 after achieving the full load of 600 MW (i.e. its Installed Capacity) was completed on 30.03.2016 (i.e. within the control period of MPERC Tariff Regulations 2012), effectively resulting in completion of the trial run.*
- (b) A certificate of commissioning to the above effect has also been issued by the CEA on 30.03.2016. The Review Petitioner seeks a recognition of this position of fact and law. The same was also certified by the Independent Engineer (Desein Pvt. Ltd.) on 31.03.2016.**
- (c) On 06.04.2016, MPPMCL issued certificate of witnessing and monitoring the 72 hours Performance Test of Unit 2 from 23.30 hrs. of 02.04.2016 to 02.15 hrs. of 06.04.2016.*
- (d) On 06.04.2016, the Independent Engineer (Desein Pvt. Ltd.) issued Final Commissioning Test Certificate for Unit 2 based on 72 hours test.**

Thus, 30.03.2016 ought to be seen as the dated when the COD requirements in terms of the PPA were met in compliance with the MPERC Tariff Regulations 2012.

(vi) It is submitted that when the Review Petitioner was constrained by the insistence of MPPMCL, the Review Petitioner further demonstrated full load

capacity for 72 hours on 07.04.2016. Thus, by way of abundant caution, the Review Petitioner posited 07.04.2016 to be the CoD. However, this does not alter the legal position wherein this Hon'ble Commission is obliged to determine and uphold that the MPERC Tariff Regulations 2012, the Grid Code and the PPA require a generating company to achieve CoD by demonstrating the MCR or IC through a successful trial run of full load of 600 MW after notice to the beneficiaries, which was admittedly done on 30.03.2016, i.e. within the control period of MPERC Tariff Regulations 2012.

- (vii) **It is submitted that the fact that the Review Petitioner met a higher standard/ benchmark and that the 72 hours trial run was conducted by the Review Petitioner as an abundant caution must not be the basis to penalize the Petitioner especially since the CoD requirements were already met on 30.03.2016 and even the 72 hours trial run ended on 07.04.2016. As such, this Hon'ble Commission is obliged to determined and uphold that the MPERC Tariff Regulation 2012, the Grid Code and the PPA require a generating company to achieve CoD by demonstrating the MCR or IC through a successful trial run of full load of 600 MW after notice to the beneficiaries. It is settled position that law does not allow alteration of statutory requirements by consent or acquiescence.**
- (viii) **It is submitted that the 72 hours trial run was insisted by MPPMCL, de hors the statutory requirements, which is evident from:**
- (a) **On 20.02.2015, the Review Petitioner wrote to MPPMCL informing that the testing and commissioning of Unit 1 were being planned on 14.03.2015 and that the letter may be taken as prior written notice to witness and monitor testing and commissioning of Unit 1 as per Article 5.3 of the PPA. A copy of the Review Petitioner's letter dated 20.02.2015 is annexed hereto and marked as Annexure A.**
 - (b) **On 05.03.2015, the Review Petitioner wrote to MPPMCL requesting MPPMCL to appoint an authorized representative as per Article 5.3.2 of the PPA for witnessing and monitoring the Commissioning Test of Unit 1. A copy of Review Petitioner's letter dated 05.03.2015 is annexed hereto and marked as Annexure B.**
 - (c) **On 12.03.2015, MPPMCL wrote to the Review Petitioner informing that the Superintending Engineer of Madhya Pradesh Power Generation Company Ltd. ("MPPGCL") was authorized on behalf of MPPMCL for witnessing and monitoring the commissioning test of Unit 1 of the Project in compliance**

with Article 5.3 of the PPA. A copy of MPPMCL's letter dated 12.03.2015 is annexed hereto and marked as **Annexure C**.

- (d) On 23.03.2015, the Review Petitioner wrote to the Superintending Engineer, MPPGCL, informing that Unit of the Project was successfully synchronized on 19.03.2015. The Review Petitioner requested MPPGCL to witness and monitor the Commissioning Test of Unit 1 from 30.03.2015 to 01.04.2015. A copy of Review Petitioner's letter dated 23.03.2015 is annexed hereto and marked as **Annexure D**.
 - (e) On 01.04.2015, the Superintending Engineer, MPPGCL wrote to the Review Petitioner requesting the Review Petitioner to convey the schedule date for witnessing the Full Load Performance Test in advance to avoid the inconvenience of late receipt of information. The Review Petitioner was requested that before intimating the scheduled date, the Load Trial Data of the Unit evidencing that the Unit is running on stable load be conveyed so that performance of the Unit could be witnessed at "**not less than 95% Av. Load for 72 hrs.**". A copy of MPPGCL's letter dated 12.03.2015 is annexed hereto and marked as **Annexure E**.
 - (f) On a perusal of para 7(a) of MPPMCL's Reply, it is observed that MPPMCL's averment is that the Review Petitioner could not demonstrate 72 hours trial run and hence the COD of Unit 2 was not achieved by 31.03.2016. Thus, it is evident that the 72 hours trial run was insisted by MPPMCL which was not required either under the MPERC Tariff Regulations 2012 or the PPA.
- (ix) It is submitted that this Hon'ble Commission has the power to relax the rigors of the Regulations framed by this Hon'ble Commission and to remove difficulties for applicability of the MPERC Tariff Regulations 2012 in the interest of justice after examining each case on merits in terms of :
- (a) Regulation 61 and 63 of MPERC Tariff Regulations 2012;
 - (b) Regulation 54 and 55 of MPERC Tariff Regulations 2015; and
 - (c) Regulation 50 of MPERC (Conduct of Business) Regulations 2004.
- (x) It is settled law that Commissions have the power to relax the applicability of the Regulations framed by the Commissions. In this regard, the Review Petitioner had relied on the following judgments which escaped attention and due consideration by this Hon'ble Commission in the Impugned Order;
- (a) *Ratnagiri Gas and Power Ltd. v. CERC: 2011 ELR (APTEL) 0532*
 - (b) *MPPPTCL V. Torrent Power Limited & Ors.: 2009 (APTEL 0124*

(c) *NTPC v. Madhya Pradesh SEB: 2007 ELR (APTEL) 7*

(xi) ***Power to extend the applicability of provisions of the Regulations is applied specifically in individual/ specific cases***

It is submitted that in the instant case, the Review Petitioner had sought for extension of the applicability of the control period of the MPERC Tariff Regulations 2012 for a period of 7 days since Unit 2 of the Review Petitioner's Project achieved CoD on 07.04.2016 due to reasons beyond the control of the Review Petitioner and due to reasons not attributable to the Review Petitioner. In support, the Petitioner had relied upon the judgment dated 11.05.2016 passed by the Hon'ble Appellant Tribunal in Appeal No. 170 of 2014 which escaped due consideration of this Hon'ble Commission in the Impugned order.

(xii) *It is submitted that MPPMCL has not even referred to the above judgment relied upon by the Review Petitioner, let alone distinguishing the same for applicability in the facts of the present case. It is submitted that MPPMCL has merely reiterated the finding in the Impugned Order without appreciating that the present case is an appropriate case for extension of the control period of the MPERC Tariff Regulations 2012 as demonstrated by the Review Petitioner.*

(xiii) *It is submitted that MPPMCL has made baseless allegations that the Review Petitioner is seeking a higher tariff and any undue benefit to the Review Petitioner will adversely impact the consumers of the State. MPPMCL ought to be put to strict proof thereof and ought to be directed to refrain from making any such bald submissions.”*
(Emphasis supplied)

12. The case was heard by the Commission on 21st February' 2017 when the review petitioner sought adjournment due to unavailability of its Counsel. The matter was fixed for hearing on 21st March' 2017 when the review petitioner again sought adjournment in the matter. In the same hearing, Counsel of the Respondent requested the Commission to fix the hearing in May'2017 or June'2017. Considering the request of the parties, the case was fixed on 16th May '2017. During the course of hearing held on 16th May'2017, the respondent sought adjournment in the matter and the matter was fixed for hearing on 25th July'2017. The review petitioner had again sought adjournment in the matter on 25th July'2017. By providing the last opportunity to the parties, the case was fixed for hearing on 22nd August'2017.

13. The review petitioner filed a written submission on 22nd August'2017 and the matter was fixed for final arguments on 26th September'2017. Learned Counsel of the

review petitioner and Respondent placed their oral arguments and counter arguments on 26th September'2017. The Respondent filed its additional reply in the subject matter on 25th September'2017 and the review petitioner also filed its reply on 26th September'2017 to the aforesaid submission of Respondent. The case was reserved for orders on 26th September'2017.

14. By affidavit dated 15th September'2017, the Respondent (MPPMCL) submitted the following:

- (i) *In para 3.9 (v) of the submission dated 28th Nov. 2016, taking reference to Annexure A-14 of the Petition on the Page 182, the petitioner has stated that WRLDC had restricted the commencement of trial run of Unit-2 not before 28.03.2016 stating that "..... since in last 12-13 days inspite of our full support to accommodate you, and to complete your 72 hours COD test, the same could not be done **due to various reasons attributable to you**, and now it will not be possible to allow you the 72 Hrs full load test till Sunday, i.e., 27th March 2016". (Emphasis supplied).*
- (ii) *In this context, it is humbly submitted that it is apparent that WRLDC extended its full support to the petitioner for conducting trial run as per CERC Regulations. But due to various reasons attributable to the petitioner, the same could not be completed. So the petitioner's contention that trial run could not be performed due to restrictions imposed by WRLDC does not adhere to the truth. The Petitioner may be asked to place on record any communication received either from WRLDC or PGCIL in support of their claim. The fact is that the petitioner themselves were unable to perform the trial run when the chances were provided by WRLDC before 31.3.2016.*
- (iii) *In para 3.12 (v) of the submission dated 28th Nov. 2016, the petitioner has stated that:-*

*"..... Such toggling of Auto-Reclosure from auto to non-auto mode for hotline works **may lead to** tripping of the Anuppur-Jabalpur line....."(Emphasis supplied)*

Similarly in para 3.14, the petitioner has submitted that:-

"On 28.3.2016, at 18:43 hrs, Review Petitioner apprised WRLDC of its inability to commence trial run for COD of Unit-2 due to directions of WRLDC for keeping the Auto Reclosure of Anuppur-Jabalpur lie in non-auto mode, thereby leading to risk of tripping of the 400 kV Anuppur-Jabalpur line during hotline stringing works....."

In this context, it is humbly submitted that the decision to postpone the trial run of Unit-2 for its COD till the time the hotline works get completed was solely the

- Petitioner's decision and **had no concurrence of WRLDC**. Had WRLDC foreseen any problem in this regard, they would have certainly prevented the petitioner from conducting trial run, but it did not happen. Thus, the apprehension/submission of the petitioner (Annexure A-34 of the Petition, Page 203) should not translate into financial burden on the end consumers of the State.
- (iv) In para 15 of the submission dated 28th Nov. 2016, the petitioner has stated that under MPERC Tariff Regulation 2012, there is no requirement to conduct 72 Hrs trial run to achieve COD. The respondent humbly submits that the applicability of MPERC Tariff Regulation, 2012 ceased from midnight of 31st March 2016 and were superseded by MPERC Tariff Regulation, 2015, which stipulated for 72 Hrs trial run before COD. The petitioner, although well aware that MPERC Tariff Regulation 2012 will cease to exist from 31st March 2016, did not declare the COD of Unit-2, which is the prerogative of the generator.
- (v) That, the declaration of COD is a prerogative of generator is well established by the fact that the petitioner, while declaring the COD of Unit-1, completed the 72 hrs trial run on 15th May 2015 but declared the COD of Unit-1 **after 5 days**, i.e., on 20th May 2015. In page 257 of the submission dated 28.11.2016, in para 10, the petitioner has provided detailed description of multi activity process starting from synchronization to declaration of COD. The petitioner has admitted that 72 Hrs trial run was undertaken to test comprehensively the performance of various associated system and auxiliaries so as to ensure reliable continuous operation.
- (vi) In para C (I) (6) of the Additional submission dated 21.08.2017, the petitioner has stated that MPERC Tariff Regulation 2012 do not provide for a separate trial run for 72 Hrs. But the petitioner failed to appreciate that the applicability of said Regulations ceased from midnight of 31st March 2016. **Further, the Commissioning Test Certificate date 31.03.2016 issued by Independent Engineer which was annexed as Annexure A-41 of the original submission dated 28.11.2016 has not been duly signed by the designated representative of the Procurer and hence is not acceptable.**
- (vii) In para C (I) (9) of the Additional submission dated 21.08.2017, the petitioner has stated that 72 Hrs trial run for Unit-2 was insisted by this Respondent and have submitted letter dated 01.04.2015 as a proof. It is submitted that the petitioner has failed to highlight that the above mentioned letter was issued in the year **2015** at the time of COD of Unit-1. The petitioner did not raise objection at that time. The COD of Unit-2 was declared on 7th April **2016**. So obviously, the letter issued in 2015 for Unit-1 will not have any bearing in 2016 for COD of Unit-2.
- (viii) Further, the project of the Petitioner is directly connected to the Inter State Transmission System (ISTS) of the Central Transmission Utility (CTU), i.e.,

PGCIL and hence the scheduling and other such associated activities are being undertaken by the concerned Regional Load Dispatch Centre (RLDC), i.e., Western Regional Load Dispatch Centre (WRLDC) and not the State Load Dispatch Centre. Since the RLDCs are governed by the Hon'ble CERC Regulations, hence the CERC Regulations stipulating 72 Hrs. trial run as a pre-requisite for declaration of COD are automatically applicable to the Petitioner's project. Hence, whether this Respondent insisted for 72 Hrs. trial run or not the fact remains that the Petitioner was bound to undertake 72 Hrs. trial run as per CERC Tariff Regulation 2014.

- (ix) *In para C (III) (13) of the Additional submission dated 21.08.2017, the Review Petitioner has stated that this Respondent, in its reply dated 17.2.2017, has not provided any reason as to why should Hon'ble Commission not exercise its power to relax the provision of the Tariff Regulations. It is submitted that the petitioner has failed to grasp the flow of reply wherein it has been specifically prayed a number of times that end consumers of the State should not be made to bear the financial burden by relaxing the applicability of Regulations. The Gross Station Heat Rate (GSHR) and auxiliary consumption of not only Unit-2, but also that of Unit-1 will increase, thereby increasing the energy charge rate of power to be supplied to Madhya Pradesh. The reason cited by the petitioner for relaxation of norm is that "if not granted, (it) shall impair the sustainability of the project undeservedly." However, it is humbly submitted that Hon'ble Commission must consider the welfare of end consumers of the State before considering any other aspect, since any relaxation of applicability of Regulations will result in financial burden to the end consumers of the State.*
- (x) *That, in view of the aforesaid fact and circumstances of the case, the petitioner is not entitled to any relief; hence, the instant review petition filed by the petitioner is liable to be dismissed summarily.*

15. In response to the above, by affidavit dated 26th September 2017, the review petitioner submitted that the Respondent in its additional reply dated 23rd September 2017 has not presented the complete factual background and selectively placed reliance on the Commission's order dated 01.10.2016 to mislead the Commission. It was further stated by the review petitioner that the allegations made by MPPMCL are baseless since the review petitioner had filed the affidavit dated 12.09.2016 in Petition No. 14 of 2016 without prejudice to the review petitioner's right to challenge the order dated 24th August 2016.

Observations and Findings:

16. On review of Commission's order dated 24th August'2016 under the present review, detailed examination of the subject review petition and the reply/ rejoinder filed by the Petitioner and Respondent in this matter, the observations and findings of the Commission are discussed below:

Background of Commission's order dated 24th August' 2016 in IA No. 1 of 2016 under present Review

17. The subject petition has been filed for review of Commission's order dated 24th August' 2016 in Interlocutory Application No. 1/2016 in Petition No. 14 of 2016. On review of the contents and prayer of the petitioner in its IA No. 1 of 2016 and the observations/ findings in Commission's order under review, it is noted that the aforesaid Interlocutory Application No. 1 of 2016 was filed by the petitioner with the following two prayers:

- (a) *Hold and declare that the delay in CoD of Unit No.2 of Petitioner's project was for the reasons beyond the control of the petitioner.*
- (b) *To declare that MPERC Tariff Regulations 2012, applied to the Unit No. 2 of the Petitioner's project for the CoD of Unit No. 2 AND/ OR extend the control period of MPERC Tariff Regulations 2012 by 7 days for the purpose of achieving CoD.*

18. In its aforesaid IA No. 1 of 2016, the petitioner had mentioned several facts/ events enclosing a number of communications (about 42 Nos. as Annexure 1 to Annexure 42) exchanged with Western Regional Load Dispatch Centre to commence full load trial run on Unit No. 2 for achieving its CoD. The aforesaid facts/events and communications are again mentioned in the present review petition also. It was explicitly mentioned by the petitioner in its aforesaid IA No.1 of 2016 that the petitioner could not operate the plant continuously towards commencement of seamless trial run to achieve its CoD on account of the instructions issued by WRLDC from time to time for reduction of loading of Unit No. 2. It was also mentioned by the petitioner that WRLDC issued directions specifically denying permission to commence trial run for CoD of Unit No. 2 for period of 24.03.2016 to 27.03.2016 on the pretext of holidays. Further, the Petitioner was again directed by WRLDC to put its Auto Re-closure Switch of Jabalpur Anuppur line in 'Non Auto Mode' on account of execution of hot line works by PGCIL.

19. While mentioning the above reasons, it was submitted by the petitioner in IA No. 1 of 2016 that it could not commence the trial run within the required period, thereby the petitioner was left with insufficient time to complete **72 hours trial run** for declaration of CoD of Unit No. 2 of its project by 31st March' 2016. It was also mentioned in the aforesaid Interlocutory Application that the CoD of Unit No. 2 got delayed by 7 days due to withholding of permission by WRLDC.

20. After going through the communications exchanged between the petitioner and WRLDC, Mumbai, the Commission has mentioned in its order dated 24th August' 2016 (under review) that this Commission has no jurisdiction to intervene in the matter in terms of provisions under Section 29(5) of the Electricity Act, 2003. With regard to the prayer of extending the control period of MPERC Tariff Regulations 2012, the Commission after review of Regulations 61 and 63 of MPERC Tariff Regulations 2012 and Clause 50 of MPERC (Conduct of Business Regulations) 2004 as mentioned in IA No.1 of 2016 did not find any merit in the request of the petitioner to extend the control period of MPERC Tariff Regulations 2012 for Unit No.2 of petitioner's power project.

Prayer and issues under the present Review petition

21. In the present Review Petition No. 67 of 2016, while mentioning the reasons for review of the Commission's order dated 24.08.2016 passed in IA No. 1 of 2016 (in Petition No. 14 of 2016), the review petitioner has prayed the following:

- (a) Allow the present petition and review Commission's order dated 24.08.2016 in IA No. 1 of 2016 in Petition No. 14 of 2016 to the extent mentioned in the present review petition.
- (b) Declare that norms of MPERC Tariff Regulations 2012 will apply to Unit No. 2 and its COD.

22. In nut-shell, the review petitioner has filed the subject review petition within the following structure of arguments:

- (a) There was no dispute between the review petitioner and WRLDC.
- (b) The Review Petitioner was unable to achieve COD of its Unit No. 2 due to instruction given by WRLDC therefore, the CoD of Unit 2 of the Project came within the purview of MPERC (Terms and Conditions for Determination of tariff) Regulations, 2015 ("MPERC Tariff Regulations 2015").
- (c) Neither the MPERC Tariff Regulations 2012 nor the PPA dated 05.01.2011 provides for a separate trial run for 72 hours. It only prescribes that the generating company shall achieve COD after demonstrating the Maximum Continuous Rating

(MCR) or the Installed Capacity (IC) through a successful trial run after notice to the beneficiaries.

- (d) The Review Petitioner was constrained to conduct 72 hours trial run by the insistence of MPPMCL. The Review Petitioner met a higher standard/ benchmark and 72 hours trial run was conducted by the Review Petitioner as an abundant caution.
- (e) The Impugned Order is silent on the issue of relaxation of Regulations.
- (f) As per Judgment dated 11.05.2016 passed by the Hon'ble Appellate Tribunal in Appeal No. 170 of 2014, the Commission has the power to extend the applicability of control period of MPERC (Terms and Conditions for Determination of Tariff) Regulations, 2012 Regulations.

Findings

Issues under (a) and (b) of above Para 22:

23. As mentioned in Para 5 of this order, the issues at Para 22 (a) & (b) have not been considered by the Commission for review of its order. However, the following is required to discuss in this order:

- (a) As mentioned in its IA No. 01 of 2016 (in Petition No. 14 of 2016) and in the subject review petition also, the petitioner has time and again stated that it was unable to achieve COD of its Unit No. 2 by 31.03.2016 due to directions/instructions of WRLDC. In the present review petition, it is contended that no dispute was raised by the review petitioner with WRLDC and that it had not approached this Commission for adjudication of dispute between it and WRLDC. In one of the correspondences (Annexure 1 to 42) between the review petitioner and WRLDC filed with IA No. 1 of 2016, it is mentioned by WRLDC that WRLDC extended its full support to the petitioner for conducting trial run as per CERC Regulations. However, it has been agitated by the review petitioner that it was unable to achieve COD of Unit 2 of its Project by 31.03.2016 and achieved CoD on 07.04.2016 due to reasons beyond the control of the Review Petitioner and not attributable to the Review Petitioner. In fact, on perusal of the letter No. MBPMPL/ANP-1/WRPC/2016-17/7700 dated 06.04.2016 written by the review petitioner to WRPC, it is noted that the review petitioner in its aforesaid letter has declared its Unit No. 2 under Commercial Operation on 07.04.2016 without raising any issue/grievance with WRLDC which were placed by the review petitioner before this Commission in IA 01 of 2016 (in petition No. 14/2016) or stated in the subject review petition.

- (b) As already mentioned in Para 9 and 10 of the impugned order also, the facts/ events/reasons presented by the review petitioner (in its Interlocutory Application No. 1 in Petition No. 14 of 2016 and also in the subject review petition) for delay in achieving CoD of Unit No. 2 pertain to the directions/instructions issued by Western Regional Load Despatch Centre (WRLDC) and its compliance by the generating company/station. Therefore, the relevant Section 29 of the Electricity Act, 2003 has been referred by this Commission in its order under review in the subject petition. Therefore, it has been correctly held by this Commission in its order under present review that the State Commission has no jurisdiction to intervene in such matters where it is contended that the COD of generating unit is delayed due to certain directions/instructions of WRLDC or withholding permission by WRLDC as these matters are covered under Section 29 of the Electricity Act, 2003. Therefore, the Commission's order dated 24th August'2016 was correct in mentioning that this Commission has no jurisdiction to intervene in such matters which are under the purview of Section 29 of the Electricity Act 2003. In fact, the issues related to RLDC, which are to be dealt under Section 29 of the Electricity Act'2003, are beyond the jurisdiction of this Commission but the aforesaid Section of the Act has not restricted the review petitioner to approach the appropriate forum for such issues.

24. The core issue involved in the subject review petition is the **“Date of Commercial Operation”(COD) of Unit No.2**. Once the COD of any generating unit is declared and confirmed/accepted, the applicability of MPERC Tariff Regulations for determination of tariff for such generating unit is automatically decided in terms of provisions under the relevant Regulations. The following admitted/undisputed facts with regard to COD of Unit No.2, based on the documents placed before this Commission, are discussed below:

- (a) The Review petitioner had itself written/informed to WRLDC without any protest or allegation on MPPMCL that its Unit No. 2 achieved **CoD on 7th April' 2016**.
- (b) It has been concurrently certified/accepted/confirmed by all the three agencies i.e. Western Regional Load Despatch Centre, Independent Engineer and MPPMCL that the **Unit No. 2 achieved CoD on 7th April' 2016**.

25. In the subject case wherein the COD (07.04.2016) of Unit No. 2 has been declared by the review petitioner itself and the same has been undisputedly and concurrently confirmed /accepted by all concerned authorities and the procurer based on

certain certificates furnished by the review petitioner on record. Hence, it is an admitted/undisputed fact that the Unit No. 2 of petitioner's power plant was declared under commercial operation on **7th April' 2016**.

26. Regulation 1.3 of MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 clearly provides that these Regulations shall come in force **with effect from 01.04.2016** and these Regulations shall remain in force for a period of three years i.e., upto 31.03.2019 unless reviewed earlier or extended by the Commission.

27. In view of above discussions and the provisions under MPERC Tariff Regulations, 2015, it is explicitly clear that MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 are applicable for determination of tariff for Unit No. 2 of petitioner's power project.

On Issues under (c) and (d) of Para 22:

28. The review petitioner, vide its letter No. MBPMPL/ANP-1/WRPC/2016-17/7700 dated 06.04.2016 had informed Member Secretary, Western Regional Power Committee, Mumbai that its Unit No. 2 has been declared under Commercial operation on **7th April, 2016**. With the aforesaid letter, the petitioner has also enclosed the following certificates/confirmation letters:

- (i) Certificate in the prescribed format (Appendix-VI) as per Regulation 4 of CERC (Terms and Conditions of Tariff) Regulations, 2014.
- (ii) Copy of the Final Test Certificate issued by the Independent Engineer in terms of Article 5 of PPA..
- (iii) Copy of the Certificate issued by the Procurer's (MP Power Management Co. Ltd.) designated representative

Moreover, the review petitioner has itself issued a certificate for fulfilling all key provisions prescribed in Regulation 4 of CERC (Terms and Conditions of Tariff) Regulations, 2014.

29. The power project of the Petitioner is connected to the Inter State Transmission System (ISTS) of the Central Transmission Utility (CTU), i.e., PGCIL hence, the Review Petitioner itself approached the concerned Regional Load Dispatch Centre (RLDC), i.e., Western Regional Load Dispatch Centre (WRLDC) and not the State Load Dispatch Centre for confirmation of COD of its Unit No.2 along with all documents fulfilling the requirement for COD under CERC (Terms and Conditions of Tariff) Regulations,2014.

30. The relevant Regulations under CERC (Terms and Conditions of Tariff) Regulations, 2014 are reproduced below:

(A) Regulation 4 of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 provides that,

“The date of commercial operation of a generating station or unit or block thereof or a transmission system or element thereof shall be determined as under:

- (1) *Date of commercial operation in case of a generating unit or block of the thermal generating station shall mean the date declared by the generating company after demonstrating the maximum continuous rating (MCR) or the installed capacity (IC) through a successful **trial run** after notice to the beneficiaries, if any, and in case of the generating station as a whole, the date of commercial operation of the last generating unit or block of the generating station.....:*

.....

Provided that

- (i) *where the beneficiaries have been tied up for purchasing power from the generating station, the trial run shall commence after seven days notice by the generating company to the beneficiaries and scheduling shall commence from 0000 hr after completion of the trial run:*
- (ii) *the generating company shall certify to the effect that the generating station meets the key provisions of the technical standards of Central Electricity Authority (Technical Standards for Construction of Electrical plants and electric lines) Regulations, 2010 and Grid Code:*
- (iii) *the certificate shall be signed by CMD/CEO/MD of the company subsequent to its approval by the Board of Directors in the format enclosed at Appendix VI and a copy of the certificate shall be submitted to the Member Secretary, (concerned Regional Power Committee) and concerned RLDC before declaration of COD: (Emphasis supplied)*

(B) Regulation 5 of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 provides that:

*“**Trial Run and Trial Operation.-** (1) **Trial Run** in relation to generating station or unit thereof shall mean the successful running of the generating station or unit thereof at maximum continuous rating or installed capacity for **continuous period of 72 hours in case of unit of a thermal generating station** or unit thereof and 12 hours in case of a unit of a hydro generating station or unit thereof:*

Provided that where the beneficiaries have been tied up for purchasing power from the generating station, the trial run shall commence after seven days notice by the generating company to the beneficiaries.”

31. In accordance with the above provisions under CERC (Terms and Conditions of Tariff) Regulations, 2014 and in terms of criteria for control area jurisdiction for its generating station as provided under Regulation 6.4 of Indian Electricity Grid Code, the review petitioner vide its letter MBPMPL/ANP-1/WRPC/2016-17/7700 dated 06.04.2016 approached WRLDC with the following contention:

*“We are pleased to inform you that Unit No. 2(600 MW) of 1200 MW (2x600MW) Anuppur Thermal Power Project in District Anuppur of Madhya Pradesh of MB Power (Madhya Pradesh) Limited has been successfully commissioned on 30th March 2016 by achieving full load of 600 MW. **Further, it has also completed successful trial run i.e. successful running of the unit at maximum continuous rating or installed capacity for continuous period of 72 hours.**”*

Certificate in accordance with Regulation 4 of CERC (Terms and Conditions of Tariff) Regulations, 2014 is enclosed herewith.

We hereby declare Commercial Operation of Unit No. 2(600 MW) of our subject Project as 00:00 Hrs of 07th April 2016

We are thankful for the support and trust reposed by you on MB Power (Madhya Pradesh) Limited

This is for your kind information and record please.”

(Emphasis supplied)

32. The copy of above letter was endorsed to all concerned i.e. Secretary, Ministry of Power, Chairman CEA, MPPMCL (Respondent No. 1), CEO, POSOCO, WRLDC and MP-SLDC.

The following documents were enclosed with the aforesaid letter:

- (i) Certificate in the prescribed format (Appendix-VI) as per Regulation 4 of CERC (Terms and Condition of Tariff) Regulations,2014
- (ii) Copy of PPA executed between the review petitioner and Respondent No. 1
- (iii) Copy of Final Commissioning Test Certificate dated 06th April'2016 issued by the Independent Engineer with reference to Article 5 of PPA
- (iv) Copy of the Certificate issued by the representative designated by the Procurer (MPPMCL)

33. With reference to the above mentioned letter of the review petitioner, GM POSOCO (a wholly owned subsidiary of POWER GRID) vide its letter WRLDC/MO-II/1778/2016 dated 07th April'2016 informed the following to Member Secretary, WRLDC:

*“As per the decision of the 28th WRPC meeting, please find enclosed the following **documents/data pertaining to declaration of COD of Unit #2** having installed capacity of 600MW. As per the letter submitted by MB Power (Madhya Pradesh) Ltd., **the COD of Unit #2 has been declared wef 00:00 hrs of 07.04.2016.** MB Power (Madhya Pradesh) Ltd has declared their Auxiliary consumption of Unit # 2 as 7%.*

1. *COD declaration letter by MB Power (Madhya Pradesh) Ltd.*
2. ***72 hrs. trial run data from 23:030hrs of 2nd April 2016 to 23:30 hrs of 5th April 2016 (as soft copy)***
3. *Appendix-VI as per Terms and Conditions of Tariff Regulations 2014-19*
4. *IE certificate on **final Commissioning Test Certificate***
5. *Certification by MPPMCL, a long term procurer of MB Power (Madhya Pradesh) Ltd.*

Thanking you”

(Emphasis supplied)

34. Pursuant to the above, Member Secretary, WRPC vide his letter WRPC/OPN/MBPMPL-COD/2016/703 dated 07.04.2016 addressed to CEA, has confirmed that COD of Unit No.2 (600 MW) of 1200 MW Anuppur Thermal Power Project of the review petitioner may be taken from 00:00 hrs of 07.04.2016. In its aforesaid letter, Member Secretary WRPC mentioned the following:

“M/s MB Power (Madhya Pradesh) Limited, vide letter No. MBPMPL/ANP-I/WRPC/2016-17/7700 dated 06.04.2016 have intimated the date of Commercial Operation (COD) of Unit No. 2 (600 MW) of 1200 MW Anuppur Thermal Power Project in Distt Anuppur of Madhya Pradesh with effect from 00:00 hrs of 07.04.2016. In support of this M/s MB Power (Madhya Pradesh) Limited. have submitted certificate from CEO in prescribed format (Appendix-VI) as per Regulation-4 of CERC (Terms and Conditions of Tariff Regulation 2014) also certificate for COD from Independent Engineer viz. DESEIN Pvt. Ltd., Consulting Engineers, Design House, New Delhi, certifying the demonstration of installed capacity through successful trial run of the said unit between 23:30 Hrs of 2nd April,2016 to 23:30 Hrs of 5th April,2016 at 95% and above of its rated capacity & ramp down activities was completed at 02:15 hrs of 6th April 2016.

WRLDC Mumbai has furnished the verified data for continuous 72 hours running of the unit No. 2(600 MW) between 23:30 Hrs of 2nd April,2016 to

23:30 Hrs of 5th April,2016 at 95% and above of its rated capacity & ramp down activities was completed at 02:15 hrs of 6th April 2016.

In view of the above supporting document, all the formalities requisite for declaration of COD have been fulfilled. Therefore, it is to confirm that COD of Unit No. 2 (600 MW) of of 1200 MW Anuppur Thermal Power Project in Distt Anuppur of Madhya Pradesh may be taken from 00:00 hrs of 07.04.2016.

Thanking you,”

35. The designated representative of MPPMCL vide its Certificate dated 06.04.2016 has certified that he has witnessed and monitored the Performance Test of Unit No. 2 (600MW) of 1200 MW (2X600 MW) Anuppur, Thermal Power Project of MB Power, in presence of Independent Engineer, from 02.04.2016 to 06.04.2016 in line with Article 5 of PPA.

36. Subsequently, with regard to scheduling of power from Unit No. 2, the Respondent No. 1 i.e. MPPMCL vide its letter No. 05-01/429 dated 07.04.2016 addressed to WRLDC, mentioned the following for acceptance of the Performance Test and COD of Unit No.2 as 07.04.2016:

*“ Please refer to the Final Commissioning Test Certificate for the Second Unit (600 MW) of 1200 MW (2x600 MW), Anuppur Thermal Power Project submitted by M/s. MB Power (Madhya Pradesh) Ltd. vide letter referred above. The Commercial Operation has been defined in **Article 5.4.1 of the PPA**, which is quoted below:*

“5.4.1 A unit be commissioned on the day after the date when the Independent Engineer issues the Final Test Certificates stating that:

- (a) The Commissioning Tests have been carried out in accordance with the provisions of Article 5.3; and are acceptable to him; and*
- (b) The result of the Performance Test show that the Unit's Tested Capacity is not less than Ninety Five (95) percent in its Aggregate Capacity”.*

Accordingly, the Independent Engineer (IE) has given Final Commissioning Test Certificate dated 06.04.2016 showing that:

- (a) The Commissioning Tests have been carried out in accordance with the provisions of Article 5.3 of the PPA and are acceptable to the I.E.*
- (b) The result of the Performance Test show that the Unit's Tested Capacity is not less than ninety five (95) percent of its aggregated capacity.*

MBPL vide letter dated 06.04.2016 addressed to WRLDC and copy to MPPMCL and all other concerned has intimated they are declaring the start of Commercial Operation of Unit No. 2 (600 MW) of 2x600 MW, M.B. Power (Madhya Pradesh) Anuppur Thermal Power Project from 00:00 hrs. on 07.04.2016.

*In view of the above, **MPPMCL, as Procurer, accepts the Performance Test carried out by MB Power (Madhya Pradesh) Anuppur Thermal Power Project and certified by I.E. as on the declaration of its Commercial Operation of the Unit 2 (600 MW) on 07.04.2016 on the basis of the above.....*** (Emphasis supplied)

37. The review petitioner while informing commissioning and COD of its Unit No.2 (through its letter MBPMPL/ANP-1/WRPC/2016-17/7700 dated 06.04.2016) to Member Secretary, WRPC had enclosed a copy of PPA also. In view of the aforesaid and observing that the provisions under Article 5 of PPA have been quoted in various certificates and communications mentioned above, it is important to have a look on the following Articles in the Power Purchase Agreement dated 05.01.2011 entered into between the Petitioner and Respondent:

38. As per definitions in Article 1 of PPA, the “Commercial Operation Date” or “COD” and “Commissioning” or “Commissioned” are defined as under:

“Commercial Operation Date” or “COD” shall mean, in relation to a Unit the date on which the Unit is Commissioned and in relation to the Power Station the date on which all the Units of the Power Station are Commissioned;

“Commissioning” or “Commissioned” with its grammatical variations shall mean, in relation to a Unit, the relevant Unit or in relation to the Power Station, all the Units of the Power Station that have passed the Commissioning Tests successfully and the Procurer receives a **Final Test Certificate of the Independent Engineer as per the provisions of Article 5.4.1** in relation to the Unit or the Power Station as the case may be;”

39. Some Articles under PPA which are relevant to the subject matter are reproduced below:

(A) **Article 5.2** of the Power Purchase Agreement executed between the review petitioner and Respondent No. 1 provides the following:

“5.2 Appointment of Independent Engineer

- i. *The Company shall appoint an Independent Engineer for the purposes of carrying out the functions as specified in, Article 5 and Article 6 at least twelve (12) months prior to Scheduled COD or of the first Unit.*
- ii. *The Independent Engineer shall be appointed by the Company from the panel of competent firms as agreed to between the Company and the Procurer and annexed in Schedule-5 of this Agreement.*
- iii. *The fees and expenses of the Independent Engineer shall be borne by the Company.”*

(B) Article 5.3 of the Power Purchase Agreement provides the following:

“5.3 Testing and Commissioning

- 5.3.1. *The Company shall be responsible for ensuring that each Unit is commissioned at its own cost, risk and expense in accordance with the procedures enumerated in the Grid Code, Prudent Utility Practices, and complying with the directions of the SLDC/RLDC.*
- 5.3.2 *The Company shall give the Procurer and the Independent Engineer not less than twenty one (21) days prior written notice of Commissioning Test of each Unit.*
- 5.3.3 *The Company, the Procurer and the Independent Engineer shall each designate qualified and authorized representative to witness and monitor Commissioning Test of each Unit.*
- 5.3.4 *Testing and measuring procedures applied during each Commissioning Test shall be in accordance with the codes, practices and procedures mentioned in the contract with the EPC contractor, and operating manuals*
- 5.3.5 *Within five (5) days of a Commissioning Test, the Company shall provide the Procurer and the Independent Engineer copies of the detailed Commissioning Test results. Within five (5) days of receipt of the Commissioning Test results, the Independent Engineer shall provide to the Procurer and the Company in writing, his findings from the evaluation of Commissioning Test results, **either in the form of a Final Test Certification certifying the matters specified in Article 5.4.1** or the reasons for non-issuance of Final Test Certificate. ”*

(C) Article 5.4.1 of the Power Purchase Agreement provides the following:

*“5.4.1.A Unit shall be Commissioned on the day after the date **when the Independent Engineer issues the Final Test Certificate** stating that:*

- (a) *the Commissioning Tests have been carried out in accordance with the provisions of Article 5.3; and are acceptable to him; and*
 - (b) *the results of the Performance Test show that the Unit's Tested Capacity, is not less than ninety five (95) percent of its Aggregate Capacity."*
- (Emphasis supplied)*

40. In view of all above discussions and all above mentioned correspondences with various certificates regarding COD of Unit No. 2 (as 07.04.2016) furnished by the review petitioner to WRLDC/WRPC as per the provisions regarding COD under CERC (Terms and Conditions for tariff) Regulations, 2014 and the above provisions under PPA, it is explicitly clear that the provisions under Regulation 4 and 5 of CERC (Terms and Conditions for tariff) Regulations, 2014 were applicable for declaration of COD of Unit No. 2 of petitioner's power plant and the petitioner was bound to undertake 72 Hrs. trial run as per CERC Tariff Regulation 2014.

41. As per above mentioned definitions and provisions under Article 5 of PPA, the Unit No. 2 of petitioner's power plant could not be declared under Commercial Operation until and unless the Final Test Certificate is received from Independent Engineer in terms of Article 5.4.1 of PPA. In the subject matter, the Final Test Certificate was issued by IE on 06.04.2016 and COD was declared on 07.04.2016. The Commission has also noted that while declaring the COD of its Unit No.1, the review petitioner had followed the same procedure and had placed same certifications for Unit No. 1 also before WRLDC those have been followed and submitted for declaration of COD of its Unit No.2 in the subject matter. Before declaration of COD of its Unit No.1 in 2015, the review petitioner has completed the 72 hrs trial run on 15th May 2015 and declared the COD of Unit-1 **after 5 days**, i.e., on 20th May 2015.

42. It is worthwhile to mention in this order that the MPPMCL's letter dated 01.04.2015 referred by the review petitioner (at Annexure E of its letter dated 20.02.2017 / affidavit dated 18.02.2017) was pertaining to Full load performance test of **Unit No. 1 and not the Unit No.2 under subject review petition**. Further, on perusal of the aforesaid letter, it is observed that the Designated Representative of MPPMCL has mentioned the following:

"It is also requested that before intimating for the scheduled date, please convey the Load-Trial Data of the Unit evidencing that the unit is running on stable load so that the performance of the Unit could be witnessed at "not less than 95% Av Load for 72 Hrs." as per the regulatory requirements."

Accordingly, the contention of MPPMCL's designated representative in its aforesaid letter was not pertaining to Unit No. 2 and it was with reference to Regulatory requirements which were subsequently complied with by the review petitioner without any protest while declaration of its both the Units under commercial operation. Hence, the issues raised in the present review petition regarding "72 hours trial run" before achieving COD and conducting 72 hours trial run of Unit No. 2 on insistence by MPPMCL are found misplaced and devoid of merit therefore, all such issues and grounds made in the subject review petition with regard to 72 hours trial run are not considered by the Commission.

Issues under (e) and (f) of Para 22.

43. MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 had been notified by the Commission on 21st December'2015 and notified in the official gazette on 01st January'2016 after following a due procedure of pre- publication of draft Regulations seeking comments from all stakeholders followed by the public hearing, All generating companies including the petitioner were having adequate time to go through the applicability, principles and norms prescribed in the aforesaid Regulations. There was no shadow of doubt on the applicability of MPERC Tariff Regulations'2012 which was applicable up to **31.03.2016**. Further, the principles and norms which are specified under aforesaid Regulations are applicable to all generating units/stations of similar capacities. The operating norms for new power plants / generating units like the petitioner's power plant have been specified almost in line with the norms specified by the Central Commission. It is pertinent to mention here that in line with CERC Tariff Regulations, the operating norms like Gross Station Heat Rate and Auxiliary Energy Consumption etc have been made more stringent in MPERC Tariff Regulations, 2015 as compared to MPERC Tariff Regulations, 2012 to improve the efficiency and economy of operations. Hence, relaxation in norms/Regulations for a new generating unit of the review petitioner would not only affect the efficiency and economy of its operation but it will also distort the level playing field and fair competition for other generating units achieved COD after 31.03.2016 and supplying power under Merit Order Despatch to the same procurer (MPPMCL) in the state. Further, as correctly mentioned by Respondent No.1 that relaxation of Regulations or extension of control period of MPERC Tariff Regulations, 2012 shall lead to inefficient operating norms and higher energy charges and the end consumers of electricity shall unnecessary bear the burden of such higher tariff. It is evident that the financial burden on account of any relaxation of Regulations/ norms or extending the applicability of MPERC Tariff Regulations, 2012 shall pass on to the end consumers of the state. In almost similar issues, the judgment of

Hon'ble Supreme Court of India, which have been passed recently are mentioned below:

- (a) Hon'ble Supreme Court of India in its Judgment dated 8th December' 2016 in ***Civil Appeal No. 5881-5882 of 2016 in the matter of All India Power Engineer Federation and Others Vs. Sasan Power Ltd. a nd Ors etc*** held that:

“if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest”

- (b) Hon'ble Supreme Court of India in its recent Judgment dated 25th October'2017 in Civil Appeal No. 6399 of 2016 in the matter between ***Gujarat Urja Vikas Nigam Limited Versus Solar Semiconductor Power Company (India) Private Limited and Others*** held the following:

“...Therefore, there cannot be a extension of the control period under the inherent powers of the Commission. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.

Extension of control period has been specifically held to be outside the purview of the power of the Commission as per EMCO (supra)...”

44. In view of above mentioned discussions and the Judgments of Hon'ble Supreme Court of India, the request in the subject review petition for relaxation of Regulations and/or Extension of the applicability of Regulations is also not considered by the Commission.

45. Based on all foregoing observations and findings of the Commission, the subject review petition is found devoid of merits hence, dismissed and disposed of.

Ordered accordingly

(Alok Gupta)
Member

(A. B. Bajpai)
Member

(Dr. Dev Raj Birdi)
Chairman