

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 201 of 2017
with
IA Nos. 875, 514 & 861 of 2017 and IA No. 48 of 2018

Dated: 19th April, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N K Patil, Judicial Member

In the matter of :-

BLA Power Pvt. Ltd.
84, Maker Chambers III,
Nariman Point, Mumbai.
Maharashtra-400021

... Appellant

Versus

- 1. State of Madhya Pradesh (GoMP)**
Energy Department, Bhopal Mantralaya,
Vallabh Bhawan,
Bhopal – 462004
...Respondent No. 1
- 2. Madhya Pradesh Power**
Management Co. Ltd., (MPPMCL)
Block No. 16, Shakti Bhawan,
Rampur,
Jabalpur – 482008
...Respondent No. 2
- 3. Madhya Pradesh Poorva Kshetra**
Vidyut Vitran Co. Ltd., (MPPKVVCL)
Shakti Bhawan, Rampur,
Jabalpur – 482008
...Respondent No. 3
- 4. Madhya Pradesh Madhya Kshetra**
Vidyut Vitran Co. Ltd., (MPMKVVCL),
Nishtha Parisar, Govindpura,
Bhopal – 462023
...Respondent No. 4
- 5. Madhya Pradesh Paschim Kshetra**
Vidyut Vitran Co. Ltd., (MPPKVVCL)

**GPH Compound,
Pologround,
Indore – 452003**

...Respondent No. 5

**6. Madhya Pradesh Electricity
Regulatory Commission
5th Floor, “Metro Plaza”,
E-5 Arera Colony, Bittan Market,
Bhopal – 462016**

...Respondent No. 6

Counsel for the Appellant(s):

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Mr. Varun Kumar**

for R-2

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Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
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Mr. Vikas Upadhyay
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Mr. Alok Shankar
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for R-6

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s BLA Power Pvt. Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) challenging the Order dated 2.6.2017 (“**Impugned Order**”) passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in Tariff Petition No. 13/2017 regarding rejection of the tariff petition of the Appellant by holding it as not maintainable at the admission stage itself.
2. The Appellant is a company incorporated under the Companies Act, 1956 having registered in Mumbai and is having a 90 MW (2 x 45 MW) thermal power Station at Niwari, Madhya Pradesh (M.P.).
3. The Respondent No. 1 is the State of Madhya Pradesh represented through its Energy Department.
4. The Respondent No. 2 i.e. Madhya Pradesh Power Management Co. Ltd., Jabalpur, is the holding company of all the distribution licensees in the State of Madhya Pradesh.
5. The Respondent Nos. 3 to 5 i.e. Madhya Pradesh Poorva Kshetriya Vidhyut Vitran Co. Ltd. (the Eastern Distribution Licensee), Madhya

Pradesh Madhya Kshetriya Vidhyut Vitran Co. Ltd. (the Central Distribution Licensee) and Madhya Pradesh Paschim Kshetriya Vidhyut Vitran Co. Ltd. (the Western Distribution Licensee) respectively are the distribution licensees in the State of Madhya Pradesh.

6. The Respondent No. 6 i.e. Madhya Pradesh Electricity Regulatory Commission is the Electricity Regulatory Commission in the State of M.P. discharging functions under the provisions of the Act.

7. Facts of the present Appeal:

a) The Appellant has signed Memorandum of Understanding (MoU) on 10.08.2007 and an Implementation Agreement (IA) on 01.09.2008 with the Respondent No.1 regarding setting up of a power project in the State of M.P. Thereafter the Appellant executed a Power Purchase Agreement (PPA) dated 05.01.2011 with Respondent No. 2 for sale of 30% of the installed capacity of the Project, for a period of 20 years on regulated tariff to be determined by the State Commission. This PPA have provisions related to Fuel and Fuel Supply Agreement (s). The Respondent Nos. 3 to 5 are Confirming Parties to the said PPA.

b) On 4.5.2011 the Appellant has entered into another PPA ("5% PPA") with the Respondent No.1 for sale of 5% of net power generated from the Project at Variable Charge as determined by the State Commission. Under the said PPA, the Respondent No.2 is the nominated agency for purchase of such 5% power and the validity of this PPA is till the operation of the Project.

- c) The Appellant has established a 2 x 45 MW thermal power station at Village Niwari, Distt. Narsinghpur M.P. (hereinafter referred to as the “**Project**”). The Unit- 1 of the Project achieved Commercial Operation Date (“COD”) on 03.04.2012. The Unit-2 of the Project achieved COD on 20.03.2017.
- d) On 25.4.2011, the Appellant executed Fuel Supply Agreement (“**FSA**”) with M/s BLA Industries Pvt. Ltd. (“**Fuel Seller**”) in terms of the PPA. The FSA contains provisions related to coal, coal mine, alternate sources, alternate supplies etc. The supply of coal to the Project was envisaged from Gotitoria mine allocated to the Fuel Seller.
- e) The State Commission vide order dated 07.09.2012 in Petition No. 10 of 2012 approved the said PPA with certain conditions by adding new clauses regarding obtaining concurrence of the Respondent No. 2 for fuel supply arrangements including rates and terms and conditions thereof. The Appellant filed for a review of the said order before the State Commission in relation to the direction for seeking concurrence on the terms of the FSA. The State Commission vide order dated 07.02.2013 accepted the submissions of the Appellant and disposed of the review petition and deleted the conditions earlier prescribed in its order 07.09.2012. As per the terms of the PPA the Appellant submitted the copy of the FSA to the Respondent No. 1 on 20.9.2012. Subsequent to the order dated 07.02.2013, the Appellant and Respondent No. 2 executed the “First Addendum” to the said PPA on 26.08.2013.

- f) The State Commission vide order dated 24.7.2012 in Petition No. 28 of 2012 determined provisional tariff of Unit-1 of the Project in terms of the MPERC Tariff Regulations, 2012 which were applicable up to the FY 2015-16. The Appellant filed Petition No. 16 of 2014 for true up of the provisional tariff for FY 2012-13 & FY 2013-14 and for approval of the provisional tariff for FY 2014-15 and FY 2015-16 for Unit-1 of the Project. During the pendency of the order after completion of hearings in tariff Petition No. 16 of 2014, the Fuel Seller on 1.4.2015 issued notice under FSA to the Appellant declaring Force Majeure arising out of the judgement of the Hon'ble Supreme Court dated 25.8.2014/24.9.2014 in WP(CRL) No. 120 of 2012 declaring allocation of coal block by Government of India (GoI) through Screening Committee Route or Government Dispensation Route as illegal and cancelling the allocation of coal block by GoI. After enactment of the Coal Mines (Special Provisions) Act, 2015 the coal mine of the Fuel Seller was taken over by the Custodian from the mid night of 31.3.2015. The State Commission vide order dated 22.05.2015 in Petition No. 16 of 2014 trued up the provisional tariff for FY 2012-13 & FY 2013-14 and approved the provisional tariff for FY 2014-15 and FY 2015-16 for Unit-1 of the Project.
- g) On non-payment of complete dues by the Respondent No. 2 to the Appellant as per the order dated 22.5.2015 of the State Commission, the Appellant approached the State Commission through Petition No. 36 of 2015 seeking direction for payments by the Respondent No. 2. The State Commission vide order dated 25.7.2015 disposed of the said petition on the issue of maintainability and directed the parties to amicably resolve the issues.

- h) In October 2015 the Appellant initiated arbitration proceedings with the Fuel Seller under the FSA and approached Bombay High Court with Arbitration Petition No. 2029 of 2015. The Bombay High Court appointed Mr. V N Khare former Chief Justice of India as the Sole Arbitrator. In the mean time the Appellant and the Respondent No. 2 were trying to settle the issues amicably and held a meeting on 7.11.2015 and Minutes of the Meeting (MoM) were drawn.
- i) On 30.3.2016 the State Commission by an order extended the applicability of the retail supply order of the distribution licensees including the quantum of supply from the Appellant for FY 2015-16 valid up to 31.3.2016 till the tariff order for FY 2016-17 is issued by the State Commission which was issued on 5.4.2016.
- j) The Appellant in April 2017 filed a tariff Petition No. 13 of 2017 before the State Commission for true up of the tariff of Unit-1 for FY 2014-15 & 2015-16 and Multi Year Tariff (MYT) for FY 2016-17, FY 2017-18 & FY 2018-19 in accordance with the provisions of the 30% and the 5% PPA and the MPERC Tariff Regulations. The true-up of FY 2014-15 and FY 2015-16 was to be carried out in accordance with MPERC Tariff Regulations, 2012 and multi-year tariff beginning from FY 2016-17 was to be carried out in accordance with MPERC Tariff Regulations, 2015. During the pendency of the said petition the Arbitrator passed the award on 27.5.2017 holding that FSA is valid and subsisting despite of prolonged Force Majeure event.

- k) The State Commission vide Impugned Order dated 2.6.2017 held that the tariff Petition No. 13 of 2017 is not maintainable. Aggrieved by the Impugned Order the Appellant has preferred the present Appeal before this Tribunal.
- l) On 8.6.2017, the Appellant and the Respondent No. 2 executed second addendum to the PPA by amending the definition of 'fuel' including pet coke as fuel. Thereafter in September 2017 the Respondents 2 to 5 filed Petition No. 39 of 2017 before the State Commission for approval of the second addendum to the PPA. On 21.9.2017, this Tribunal directed the State Commission to dispose of the said petition as early as possible. The State Commission vide Order dated 30.12.2017 rejected the second addendum to the PPA.

8. Questions of Law:

The Appellant has raised the following questions of law in the present appeal:

- a) Whether the State Commission while passing the Impugned Order failed to act in accordance with the mandate cast under Section 62 read with Section 61 of the Act?
- b) Whether the State Commission while passing the Impugned Order ignored the fact that tariff determination is a continuous process and there is no *res judicata qua* tariff?
- c) Whether the State Commission erred in failing to recognize that Continuity of tariff for a Generating Company is in-built in law, rules

as well as in all relevant regulations of CERC and SERCs, as having interruption in tariff would be fatal for any Generating Company and also for the reliability of the electricity grid?

- d) Whether the State Commission while passing the Impugned Order erroneously and / arbitrarily interfered / and modified its past tariff order dated 22.05.2015 passed in Petition No. 16/2014, by curtailing the period of its past tariff from FY 14-15 & FY 15-16 to making it applicable only till 31.03.2015?
- e) Whether the State commission failed to take into account the fact that there is valid & subsisting PPA between the parties?
- f) Whether the State commission failed to take into account the terms of the PPA and the obligation of the parties in relation thereto particularly the definition of fuel etc.?
- g) Whether the State Commission erred in not determining the tariff applicable to the Appellant for its PPAs, while at the same time giving a tariff shock to the Appellant?
- h) Whether the State Commission erroneously passed the Impugned Order creating a tariff vacuum for the period from FY 15-16 onwards in violation of provisions of Act and also in violation of Article 19 of the Constitution of India with regard to Appellant's right to carry on operations?

- i) Whether the Impugned Order is contrary to the order dated 13.02.2013 passed by the Hon'ble Commission in Review Petition No. 85 of 2012 approving the PPA of the Appellant with the Respondent No. 2?
- j) Whether the State Commission while passing the Impugned Order erroneously held that the order dated 22.05.2015 passed in Petition No. 16/2014 was applicable only till the normative coal stock from the Fuel Sellers' coal mine was available, when the PPA does not in any manner refer to procurement of coal from any particular coal mine?
- k) Whether the State Commission erroneously observed that the said PPA between the Appellant and Respondent No. 2 is linked with the long-term FSA between the Appellant and the Fuel Seller, without due deference to terms of the MoU, Implementation Agreement, or the said PPA?
- l) Whether the State Commission can at all hold that an operating Generating Station having a valid PPA can be denied tariff on account of non-availability of fuel from a particular mine, when otherwise fuel is available and the Generating Station has been in a position to declare availability and schedule power in terms of said PPA?
- m) Whether the State Commission can ignore the terms of supply of power and the surrounding facts related to availability of coal, including the steps taken by the Appellant and the Fuel Seller

pursuant to the Hon'ble Supreme Court Judgment on cancellation of allocation of coal blocks?

- n) Whether the State Commission failed to act in accordance with Regulation 7.8 of the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 (RG-26 (III) of 2015)?
 - o) Whether the State Commission erroneously passed the Impugned Order while ignoring the award passed by the Hon'ble Arbitrator on 27.05.2017?
9. We have heard learned counsel for the Appellant and the Respondents at considerable length of time and we have carefully perused their respective written submissions. Gist of the same is discussed hereunder.
10. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Appellant are as follows-
- a) The State Commission has erred in non-determination/denial of tariff to the operational power plant of the Appellant. The State Commission has failed to discharge its obligations under the Act and dismissed the tariff petition of the Appellant on various extraneous considerations. As a result of the Impugned Order, the Appellant being a small generator has been denied tariff by the Respondent No. 2 for the power supplied in terms of the provisions of a valid and subsisting PPA which was duly approved by the same State Commission.

- b) The State Commission while passing the Impugned Order has ignored the fact that tariff determination is a continuous process and there is no *res judicata qua* tariff. Tariff determination process in respect of the Appellant's power station commenced in 2012 with the provisional tariff order dated 24.07.2012 passed in Petition No. 28 of 2012. The present True-up and MYT petition was in continuation of the same tariff determination process. There is no discretion available to the State Regulatory Commissions to dismiss an original tariff petition and deny the tariff to a Generating Company. The Hon'ble Supreme Court in the case of U.P. Power Corporation Ltd. vs. NTPC Ltd., (2009) 6 SCC 235 has held that tariff determination is a continuous process and there is no *res judicata qua* tariff.
- c) The State Commission vide the Impugned Order has erred in holding that the applicability of tariff order dated 22.05.2015 was restricted to 31.03.2015. A bare perusal of the tariff order dated 22.05.2015 demonstrates that the State Commission had determined the tariff applicable to Unit-1 of the Project as on 31.03.2016. The State Commission has failed to appreciate the fact that as per the first proviso to Regulation 7.11 of the MPERC Tariff Regulations 2015, a Generating Company can continue to bill the beneficiaries at the tariff approved by the State Commission and the same shall be applicable until 31.3.2016 for the period starting from 1.4.2016 till the approval of tariff by the State Commission.
- d) The State Commission has erred in observing that the tariff order dated 22.05.2015 was applicable only till 31.03.2015 and the purpose and

intent for using the words *“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”* was only to consider the balance normative stock of coal from Gotitoria Coal Mines in the FSA with the Fuel Seller for generation and supply of electricity to Respondent No.2. The Impugned Order results in an absurdity of restricting the applicability of a post-dated order (22.05.2015) to a previous date (31.03.2015). This is an afterthought. Further, the observation that the tariff order dated 22.05.2015 was applicable only till the balance normative stock of coal from Fuel Seller’s Coal Mines was available to the Appellant is also incorrect. The tariff order dated 22.5.2015 does not place reliance upon Regulation 37.1 of the MPERC Tariff Regulations, 2012 to restrict applicability till 45 days after 31.3.2015. Further, the Respondent No. 2 has been scheduling power from the Project beyond 31.3.2015 and has been making payments with the understanding of applicability of the order dated 22.5.2015 for the whole FY 2015-16.

- e) There is no provision in the PPA that links the procurement of coal to a particular coal block. In any event, after the takeover of the Fuel Seller’s coal mine by WCL and pending resolution of dispute between the parties, on the issue of coal, the Appellants’ Project cannot be shut down. The FSA clearly provides for supply from alternate source in certain cases including Force Majeure events and the State Commission cannot selectively ignore parts of the FSA. The Appellant and Fuel Seller had made alternate arrangements under the FSA for supply of fuel to ensure continuity of operations of the Project. In view of the arbitral award, dated

27.5.2017 passed by the Arbitrator, the fuel received from the alternate source, in terms of Clause 3.3.2 of the FSA, is supply under the FSA.

- f) The State Commission has erred in observing that the long term PPA between the Appellant and Respondent No. 2 is linked with the long-term FSA between the Appellant and the Fuel Seller with reference to the coal mine which has been taken over by WCL. The PPA was executed on 05.01.2011 and the FSA was executed subsequently on 25.04.2011. Accordingly, the PPA is not dependent on the FSA. The PPA does not refer to and/or identify any single source of coal, so as to restrict procurement of coal from alternate sources.
- g) The State Commission passed the Impugned Order without taking into account the award passed by the Arbitrator in the arbitration proceedings between the Appellant and the Fuel Seller. The Arbitrator by an award dated 27.05.2017 held that the FSA executed between the Appellant and the Fuel Seller was valid and subsisting, despite the prolonged Force Majeure event. The Arbitrator relied upon the judgment passed by the Hon'ble Supreme Court in the case of Energy Watchdog v. Central Electricity Regulatory Commission and Ors. [2017 (4) SCALE 580], whereby the Hon'ble Supreme Court has conclusively held that merely because the performance of a contract becomes more onerous upon one party, courts will not absolve the said party of its performance. A force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance.
- h) The State Commission failed to act in accordance with the mandate under Section 62 read with Section 61 of the Act. The State Commission

dismissed the petition as being not maintainable without deciding the core issues in the matter. Regulation 7.8 of the MPERC Tariff Regulations, 2015 specifically provides that in case a tariff petition is inadequate in any respect, the staff of the Commission can point out such deficiencies to the generating company, which can correct the same within a month.

- i) The power purchase cost from Unit-1 constitutes a mere 0.1 % of the total ARR of Respondent No. 2. Non- determination of tariff applicable to the Appellant's Unit-1 has artificially created tariff vacuum for FY 2015-16, threatens the existence/ viability of the Appellant. Should power be scheduled from the Project and tariff be paid in terms of existing tariff order the impact on the consumers in the State of MP would be insignificant. The jurisdiction of the State Commission was to ensure that the steps taken by the Generating Company and Fuel Seller after the cancellation of the coal block were reasonable and prudent or not. The State Commission cannot impose new conditions which directly results in shutting down the Project.
- j) The State Commission failed to recognize that being a small generating company, the Appellant has a fragile financial condition and the interruption in tariff as also the tariff vacuum caused by the State Commission is detrimental to the very existence of the Appellant.
- k) In support of its contentions the Appellant has also relied on various propositions and judgements. On the issue that the State Commission has a duty to determine the tariff it has relied on judgement of this Tribunal in case of SEIL Ltd. Vs. PSERC &Ors. in Appeal Nos. 4,12,14,

23, 25, 26, 35, 36, 54 & 55 of 2015. On the issue that tariff determination is a continuous process and there is no re judicata qua tariff, the Appellant has relied on the judgement of this Tribunal in Appeal No. 133 of 2007 in case of Delhi Transco Ltd. Vs. DERC, judgement of Hon'ble Supreme Court in case of UPPCL vs. NTPC and Ors. (2009) 6 SCC 235 and on the provisions of MPERC tariff Regulations, 2012/2015. On the issue that fuel is the responsibility of the generator, the Appellant has relied on the judgements of this Tribunal in case of NTPC Ltd. Vs. CERC &Ors in Appeal No. 110 of 2012, Reliance Infrastructure Ltd. Vs. MERC in Appeal No. 115 of 2011 and Vidharva Industries Power Ltd. Vs. MERC &Anr. in Appeal No. 192 of 2016. Further, the Appellant has also relied on the judgements of Hon'ble Supreme Court in case of Sri Athmanathaswami Devasthanam vs. K Gopaldaswami Aiyangar (AIR 1965 SC 338) and in case of T K Lathika vs. Seth Karsandad Jamnadas (AIR 1999 SC 3335).

- l) The Respondent No. 3 in its submissions before this Tribunal has raised various extraneous issues which were not raised before the State Commission and does not find reference to in the Impugned Order. Similarly the State Commission in the hearings before this Tribunal placed reliance on documents, orders etc. which do not find any reference in the Impugned Order. Accordingly, the Impugned Order cannot be improved by relying on external aid and subsequent orders etc.

- m) The Appellant has taken all the possible steps to arrange coal for the Project post the judgement of Hon'ble Supreme Court. The Appellant could not participate in the auction of the coalmines as it was made

ineligible being sister concern of the Fuel Seller as per the definition of “prior allottee” in the tender conditions. On this issue, the Appellant has filed petition before the Hon’ble Supreme Court and the same has been tagged with the contempt proceedings case filed by Gol and is pending adjudication before the Hon’ble Supreme Court.

- n) After Unit-1 of the Project being classified as Captive Generating plant on 7.6.2016, the Appellant participated in e-auction of linkages as per revised policy of Gol and has secured coal linkages from WCL, SECL and NCL. As per the bidding documents and respective FSAs, the coal under said linkages can be used for entire capacity of Unit-1. Accordingly, the Appellant is taking all the possible steps necessary to reduce the cost of coal.
- o) The reliance on Captive Power Plant Regulations 2009 (CPP Regulation) by the Respondent No. 3 for paying different tariff as per the said regulations is misplaced, as the said regulation has no application in the present case. In terms of proviso under Section 9 of the Act, the supply by CPP to a licensee has to be regulated in a manner as that of a generating company to a licensee i.e. under Section 62 of the Act. The CPP Regulation is not a tariff regulation, as no tariff has been determined under these regulations. Tariff could be determined/adopted under Section 62/63 of the Act for supply of power to a licensee. In the present case, there are valid PPAs for supply of power under regulated tariff.
11. The submissions of the learned counsel appearing for the Respondents on issues raised for our consideration in the instant Appeal are as follows-

- a) The Respondent No. 2 has submitted that after issuance of the Impugned Order in view to safeguard the interest of the consumers of the State and to fulfil its obligations under the PPA it has been scheduling power from Unit-1 of the Project of the Appellant till February 2017 irrespective of whether the purchases from the said power plant is included in Aggregate Revenue Requirement (ARR) or not as idling of the power station would any how resulted in payment of only fixed charges to the Appellant. There is no concept of tariff holiday in the Act. Further, the scheduling has been carried out based on principle of Merit Order Despatch (MoD). The tariff payment was made in accordance with the provisions of MPERC Tariff Regulations, 2015 which provide for payment of tariff as per orders issued under MPERC Tariff Regulations 2012 and until tariff is determined in accordance with MPERC Tariff Regulations, 2015. The Respondent has put a ceiling on payment of variable charges @2.18/kWh as per the order dated 22.5.2015 as the Appellant was sourcing coal from other sources like e-auction etc. pursuant to de-allocation of coal mine as per the judgement of Hon'ble Supreme Court. This decision of scheduling power was also intimated to the State Commission vide letters dated 30.6.2015 and 29.7.2015.
- b) The Appellant was supposed to file petition for re-determination of tariff in view of Hon'ble Supreme Court judgement due to change in status of coal linkage.
- c) Further, the Respondent No. 2 has stopped scheduling of power from the Appellant and payment to it due to delay by the Appellant in making application to the State Commission for determination of tariff. The State

Commission vide Impugned Order disposed of the tariff petition of the Appellant citing that use of pet coke is not included in PPA and also there has been no amendment to the PPA for use of pet-coke as a fuel.

- d) The Appellant intimated the Respondent No. 2 that the boiler of its Project is CFBC type and is capable of firing petroleum coke (pet-coke) and blending it with coal could reduce the variable charges. As the proposal can reduce the variable cost and in view of MoD scheduling it was not objectionable by the Respondent No. 2 for going with the said blending subject to approval by the competent regulatory authority. The Appellant was advised to take up the matter with the State Commission for its approval. The Appellant did not approach the State Commission for long time for approval of use of pet coke and determination of tariff for 2016-17, the Respondent No.2 stopped making payments from March 2017 onwards.
- e) In view of rejection of approval of the second addendum to the PPA vide order dated 30.12.2017 by the State Commission, Appeal No. 2 of 2018 (filed by Prism Cement) to be listed with the current Appeal before this Tribunal and possible status change of the Appellant as part Captive Power Plant (CPP) and part IPP, which is not allowed under law it would not be possible for it to pay any charges to the Appellant until its tariff is determined.
- f) The order dated 22.5.2015 itself provides for the continuity of the tariff for the FY 2015-16 as the State Commission has determined the tariff for the said FY based on the coal parameters for coal sourced under FSA i.e. Gotitoria mine. This can be established by careful reading of the para

9.89 and 9.91 of the said order. The State Commission has directed that the tariff for 2015-16 as applicable for coal under the FSA is used for generation and supply of electricity to the Respondent No. 2. The same FSA also speaks about supply of coal from alternate source. The State Commission has passed the said order being aware of the cancellation of coal mine and thereby expressly applied the principle of tariff continuity as per Regulation 7.11 of the MPERC Tariff Regulations, 2015.

- g) The State Commission was aware of the terms and conditions of the approved PPA and the definition of the FSA which is “an agreement between the Appellant and Fuel Suppliers and others for the purchase, transportation and handling of the fuel”. Accordingly, the approved PPA had an in-built flexibility for supply of fuel either from the principal supplier or from ‘others’ which is nothing but the ‘alternate source supply’ principle under FSA. Accordingly, the tariff was applicable until 31.3.2016 and not until 15.5.2015 (45 days).
- h) The term FY acronym for Financial Year used in the order dated 22.5.2015 is defined in Section 3(21) of the General Clauses Act, 1897 and the same has been defined as “shall mean the year commencing from April”. In support of this argument the Respondent No. 2 has relied on the judgement of the Hon’ble Supreme Court in case of Feroze N Dotivala vs. P M Wadhvani and others (2003) 1 SCC 433. In view of the same the FY means the entire Financial Year from April to March and not a part of it i.e. for 45 days until 15.5.2015. Further in terms of the MPERC Tariff Regulations the tariff as on 31.3.2016 is also applicable

for FY 2016-17 onwards until tariff for the period from FY 2016-17 is approved by the State Commission.

- i) In the order dated 25.7.2015 the State Commission has directed the parties first to resolve the issues amicably and if the same cannot be resolved then the parties may approach the State Commission. In this backdrop a meeting was held between the Appellant and the Respondent No. 2 wherein mainly two issues were discussed. First, it was the responsibility of the Appellant to assess the suitability of fuel to be fired in the boiler for which the Respondent No. 2 had no objection to the type of fuel to be fired in the boiler as the power was to be scheduled on the principle of MoD. Secondly, the fixed charges and variable charges shall be paid to the Appellant in accordance with the order dated 22.5.2015 of the State Commission and the demand of the Appellant for payment of actual variable charges was rejected. Based on the above premise the Respondent No. 2 has been scheduling power from the Project at variable charge of Rs. 2.18/kWh as determined in the order dated 22.5.2015 and based on MoD principle. MoD from November 2015 to March 2017 for the Appellant was in the range of Rs 2.40/kWh to Rs. 3.40/kWh for scheduling purpose however, the Respondent No. 2 has made payment of variable charges @ 2.18/kWh for the scheduled energy from the Project. Accordingly, the Respondent No. 2 has acted in the interest of the consumers in the State. Further, the scheduling and payment has been stopped from April, 2017.
- j) The Respondent No. 2 has submitted that the Appellant has acted prudently post cancellation of the coal mine allocated to BLA industries by the Hon'ble Supreme Court. "Prudently" is a subjective word and is to

be seen in the facts and circumstances of the case. In this regard the Respondent No. 2 has placed reliance on the affidavit of State of M.P. before the Hon'ble Supreme Court in WP No. 63 of 2015 wherein it has been submitted that cancelled Gotitoria coal mine does not fall under the screening committee route therefore there is no irregularity in the award of coal mine to the Fuel Seller.

- k) The submission of the counsel for the State Commission before this Tribunal that the power purchase has been "disallowed" in the ARR for 2016-17 and 2017-18 is erroneous as the ARR orders issued by the State Commission have not used any term like "disallowed, disapproved, not permitted". The State Commission has simply stated that "at present" it has not considered Unit- I & II of the Project in view of State Commission's earlier Orders dated 22.5.2015 and 25.7.2015.
- l) The amendment to the PPA was done on 8.6.2017 pursuant to the direction given in the order dated 25.7.2015 by the State Commission and it has been decided by the parties that the Appellant may use pet coke for generation of power instead of only using domestic/ imported/ blended coal. This amendment was carried out after the approval of Board of Directors of the Respondent No. 2. However, the State Commission vide order dated 30.12.2017 rejected the amendment to the PPA.
- m) This Tribunal based on facts and circumstances needs to consider interpretation of Section 61 of the Act read along with the Regulation 6 of the MPERC Tariff Regulations, 2015 which pertains to various factors with which the State Commission is to be guided.

- n) The submissions made by the Respondents in this Appeal are without prejudice to the submissions/ reply made by it in the Appeal No. 2 of 2018 which pertains to levy of Cross Subsidy Surcharge (CSS) on Prism Cement Ltd. The claim of the Appellant for a unit being part CPP and part IPP is not allowed. The Appellant has entered into PPA with the Respondent No. 2 for supplying power under PPA based on regulated tariff. The State Commission has issued separate CPP Regulations, 2009 for supply of surplus power to the distribution licensees at different tariff decided under the ARR of the distribution licensees. Thus the Appellant cannot be both CPP and IPP at the same time.
12. The submissions of the learned counsel appearing for the State Commission on issues raised for our consideration in the instant Appeal are as follows-
- a) The State Commission has not modified the tariff order dated 22.5.2015 vide the Impugned Order. The order dated 22.5.2015 was applicable only till coal from Gotitoria mine was used by the Appellant for supply of power to the Respondent No. 2 as the State Commission has determined the tariff for the Appellant based on coal from Gotitoria mine. The same is evident from the order dated 24.7.2012 in Petition No. 28 of 2012 wherein the provisional tariff of Unit-1 of the Project was determined based on GCV and landed cost of coal sourced from the Gotitoria mine, order dated 22.5.2015 in Petition No. 16 of 2014 wherein true up of tariff for FY2012-13 & FY 2013-14 and determination of tariff for FY 2014-15 & FY 2015-16 was done based on GCV and landed cost of coal from Gotitoria mine (the tariff was applicable till 31.3.2015 i.e. the

date the coal mine was taken over by the Custodian based on Hon'ble Supreme Court Order), the letter dated 29.7.2015 of the Respondent No. 2 which reveals that both the Appellant and the Respondent No. 2 were aware that the order dated 22.5.2015 was applicable till the Appellant was using coal sourced from Gotitoria mine to generate & supply power under the PPA, order dated 25.7.2015 in Petition No. 36 of 2015 wherein the Appellant has repeatedly submitted that new long term FSA have to be approved by the State Commission and retail supply tariff orders for FY 2016-17 & FY 2017-18 wherein the State Commission has disallowed the Appellant's power purchase cost.

- b) The State Commission has acted in accordance with the provisions of the Act and has not created any tariff vacuum. It was the Appellant who has filed Petition No. 13 of 2017 in April 2017 with a delay of one and half year for true up of tariff order for FY 2014-15& FY 2015-16 and determination of tariff for 2016-17 to 2018-19. In the said Petition the Appellant has submitted that in view of the State Commission's order dated 25.7.2015 it has held meeting with the Respondent No. 2 on 7.11.2015 for use of blended coal with pet-coke for power generation. In the said meeting the Respondent No. 2 agreed to the use of pet coke subject to approval from the competent authority in law. There was exchange of communications between the Appellant and the Respondent No. 2 to amend the definition of 'fuel' to include pet-coke which was agreed by the Respondent No. 2 vide letter dated 3.8.2016. The Appellant instead of complying with the PPA filed petition-seeking tariff based on pet coke and this was for the first time the State Commission came to know about the use of pet coke in the Project of the Appellant. The State Commission vide Impugned Order directed the

Appellant and the Respondent No. 2 first to comply with the provisions of the PPA by amending the definition of 'fuel' to include pet coke as fuel source then only it could take cognizance of such fuel. It would have been detrimental to the interests of the consumers in the State of M.P. if the State Commission had allowed use of unrecognised fuel pet coke, which is also not recognised in the MPERC Tariff Regulations.

- c) If there is any tariff vacuum it is on account of the Appellant and the Respondent No. 2. Despite the minutes of meeting dated 7.11.2015 they approached the State Commission only in September 2017 for approval of the amended PPA. In the interim period despite disallowance of purchase of power from the Appellant's Project, the Respondent No. 2 continued scheduling power from the Project for 2 years and only stopped scheduling and making any payments from March 2017.
- d) The Appellant cannot be granted continuity of tariff till compliance with the PPA. It is also important to take stock of subsequent developments in the present case. The Respondent No. 2 has filed Petition No. 39 of 2017 on 26.9.2017 before the State Commission for the approval of the amended PPA seeking pet coke as fuel source. The State Commission vide order dated 30.12.2017 disallowed the amendments sought in the PPA. The State Commission further observed that the FSAs entered into by the Appellant were not in accordance with the provisions of the PPA. The Appellant has submitted expired MoU (valid until 31.3.2017) with IOCL for supply of pet coke. Thus, there was no FSA in place as per PPA to support amendment recognising pet coke as fuel. Further, the Hon'ble Supreme Court vide order dated 13.12.2017 in WP(C) No. 13029/1985 has upheld the order of CPCB banning use of pet coke in

the States of Haryana, Rajasthan and U.P. w.e.f. 1.11.2017. The Hon'ble Supreme Court also ordered that other States may also under take similar measures for banning use of pet coke. Accordingly, the State Commission has disallowed the amendment to PPA for use of pet coke. Till date this order has not been challenged by the Appellant or the Respondent No. 2.

- e) The Appellant has also produced the FSAs signed with subsidiaries of Coal India Ltd. (CIL) during hearings in Petition No. 39 of 2017. After perusal of the same it was found that these FSAs were pursuant to auction of coal linkage in the non-regulated CPP sub-sector. Accordingly, these FSAs executed by the Appellant as a non-regulated entity i.e. CPP cannot be used to supply coal for a regulated entity i.e. IPP and the Appellant cannot be a CPP and IPP simultaneously. Use of CPP coal for supply of power to the Respondent No. 2 would be in violation to the extant policies of Gol.
- f) The contention of the Appellant that in case BLA Industries is not able to supply coal to the Appellant, the Appellant is undertaking supply from 'alternate sources' under Article 3.3.3 of the FSA. On this issue, the State Commission has observed that presently the Appellant has failed to comply with Article 4.1.1 (iii) of the PPA and no tariff can be granted to the Appellant.
- g) The Appellant vide this Appeal is trying to seek continuity of the tariff determined by the State Commission vide order dated 22.5.2015. The said order has not been challenged by the Appellant and has attained finality. The Appellant in the present Appeal cannot challenge the

decision of the State Commission in the order dated 22.5.2015 and subsequent orders dated 25.7.2015, retail supply orders dated 5.4.2015 and 31.3.2017 which were based on the decision of the State Commission in the order dated 22.5.2015.

- h) The Appellant also cannot declare availability of its contracted capacity in terms of PPA and MPERC Tariff Regulations, 2015 as it does not have approved fuel arrangement in compliance with Article 4.1.1 (iii) of the PPA for undertaking supply from 'alternate sources'.
 - i) The contention of the Appellant being a very small generator will have only a paisa per unit is not a valid defence and the Appellant cannot be treated differently on account of its capacity/size.
13. After careful consideration of the submissions of the learned counsel appearing for the Appellant and the Respondents on various issues raised in the present Appeal, our observations are as follows:-
- a) The core issues raised by the Appellant in the present Appeal are regarding continuity of tariff beyond 31.3.2015, use of coal from alternate sources for generation of power from the Project in terms of the PPA and use of pet coke for generation of power from the Project.
 - b) All the Questions of law raised by the Appellant at S.No. 8. a) to 8. o) are inter-related and boil down to the basic question that whether the State Commission can disallow tariff of the Appellant to be determined under Section 62 of the Act in terms of the PPA entered into between the Appellant and the Respondent No. 2 in view of long term FSA fuel

being not available due to cancellation of Gototoria coal mine of the Fuel Seller by Hon'ble Supreme Court. Our observations are as below:

- i. To find the answer to the question we need to analyse the findings of the State Commission in the Impugned Order, order dated 22.5.2015, 25.7.2015, 30.12.2017, provisions of MPERC Tariff Regulations 2012/2015, provisions of the PPA/ FSA, various judgements of the Hon'ble Supreme Court and this Tribunal relied upon, etc.
- ii. Let us first consider the findings of the State Commission in the Impugned Order. The relevant findings are reproduced below:

“7.”

(x) With regard to the issues in contention of Learned Counsel of the petitioner on the last two sentences in Para 9.91 of Commission's tariff order dated 22nd May' 2015 (in Petition No. 16 of 2014), it is noted that the petitioner had neither sought any clarification nor raised any issue on aforesaid Para 9.91 of Commission's order (dated 22nd May' 2015) till date however, it is made clear in this order that the tariff determined in Commission's aforesaid order was basically applicable upto 31.03.2015. However, the purpose and intent for using the words “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” was only to consider the balance normative stock of coal from Gotitoria Coal Mines in the FSA with M/s. BLA Industries for

generation and supply of electricity to Respondents. The aforementioned normative coal stock was considered as per Regulation 37.1 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2012. As the generation and supply of electricity (by BLA Power to the respondents) from the aforesaid normative coal stock was also considered in aforesaid Para 9.91 of Commission's order dated 22.05.2015 therefore, the Annual Fixed (Capacity) Charges were determined for FY 2015-16 also for the purpose of billing and payment of Capacity charges and Energy charges by the parties only for the period of normative coal stock.

(xi) The petitioner had neither sought any clarification nor raised any issue on Para 9.91 of Commission's order dated 22nd May' 2015. Even the petitioner has not filed any review before this Commission or challenged Commission's order dated 25th July' 2015 in Petition No. 36 of 2015 or Commission's order dated 23rd July' 2015 in Petition No. 35 of 2015 before any appropriate forum till date after a period of almost two years of aforementioned Commission's orders. Therefore, any argument of petitioner on its interpretation of Para 9.91 of Commission's order dated 22.05.2015 at this stage is misleading and devoid of any merit.

(xii) It is evident from the submission and documents placed on record in this matter that the petitioner has been procuring itself and using fuel other than the coal from Gotitoria Mines of BLA Industries after 31.03.2015 (i.e. the

date on which the coal mines under FSA took over by Western Coal Fields Ltd. as per judgment dated 24.09.2014 of Hon'ble Supreme Court of India and also under provisions of The Coal Mines (Special Provisions) Second Ordinance, 2014). It is observed that "Blended Coal" is mentioned as primary fuel and "Petcoke" is mentioned as Alternative fuel in Form No. 2 for MYT at page 127 of the subject petition. It is also mentioned in Para 6.2.3 at page 31 of the subject petition that "The cost of primary fuel for FY 2016-17 is based on the actual cost incurred by the petitioner for the use of fuel from 'Alternate Source' under the FSA dated 25th April 2011 The cost includes the cost of 'blended coal". As mentioned in the subject petition, the 'blended coal' is coal blended with petroleum coke.

(xiii) It is further observed from the contention in subject petition and the submissions during hearing held on 30.05.2017 that the amendment in PPA for so called blended coal/ arrangement of fuel supply mentioned in the subject petition has not taken place till date. The issue of coal procured by the petitioner through short term arrangements i.e, via E-Auction and through coal traders has been decided by this Commission in its order dated 25th July'2015 in petition No. 36 of 2015 filed by the petitioner. Therefore, the discussions about other arrangements for procurement of coal as developments in this matter have no relevance before this Commission at this stage in light of Para 9.91 of Commission's order dated 22.05.2015 wherein it is mentioned that "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". The other arrangements for procurement of coal as mentioned in the subject petition may be dealt with by the Commission at an appropriate stage on compliance with Article 4.1.1(iii) and 3.2 (iii) of PPA entered into by the parties on 05.01.2011. The details of arbitration between BLA Power and BLA Industries in respect of FSA between them is also not considered at this stage.

(xiv) As per Article 4.1.1(iii) of PPA, "The Company shall provide a copy of duly executed Fuel Supply Agreement to the Procurer". Secondly, the procurers i.e. MPPMCL including other respondents are required to approach the Commission seeking approval for PPA or any amendment in the PPA in terms of Article 3.2 (iii) of PPA.

8. In view of all above mentioned facts and observations, the proposal of Multi Year Tariff for FY 2016-17 to FY 2018-19 in the subject petition is not considerable until and unless it is filed after obtaining approval of this Commission on any so called amendment in the PPA. As mentioned in preceding paragraph, the proposal seeking approval of any amendment in PPA by this Commission has to be in compliance with the provisions articulated in PPA itself which was executed between the parties in this matter and approved by the Commission. Therefore, the subject petition is not maintainable in the present form. The petitioner is directed to file a fresh petition for true-up of its

tariff determined vide Commission's order dated 22.05.2015 in Petition No. 16 of 2014. The petitioner shall be at liberty for adjustment/refund of fee deposited with this petition. With the aforesaid directions, the subject petition is disposed of."

From the above it can be seen that the State Commission has held that the tariff determined vide order date 22.5.2015 was basically applicable till 31.3.2015 (i.e. date of take over of Goritoria mine by the Custodian) and the meaning of the words till the coal under the FSA is used for generation and supply of electricity to Respondent No. 2 was only to consider the balance normative stock (45 days) of coal from Gotitoria Coal Mines as per the FSA for generation and supply of electricity to Respondent No. 2. The State Commission has observed that the Appellant was using blended coal i.e. coal blended with pet coke for generation of power and has claimed the same in the tariff petition without signing any amendment/approval of the PPA. Further, the State Commission has held that in view of de-allocation of the Goritoria coal mine there was a need for signing of the FSA and providing the copy of the same to the Respondent No. 2 in terms of PPA for generation and supply of electricity to the Respondent No. 2. The State Commission has also not considered the arbitration proceedings between the Appellant and the Fuel Seller. The State Commission has also mentioned that the use of coal from alternate sources have already dealt by it vide order dated 25.7.2015. As the above mentioned conditions were not fulfilled the State Commission has held the MYT for

period from FY 2016-17 to FY 2018-19 of the Appellant as non-maintainable and also directed the Appellant to file the true up petition for the tariff determined vide order dated 22.5.2015 afresh.

- iii. Now let us consider the findings of the State Commission in the tariff order dated 22.2.2015. The relevant extract from the said Order is reproduced below:

“3.7 Accordingly, the scope of this order is summarised as under:

.....

b. Determination of the final generation tariff of Unit No. 1 for FY 2012-13 and FY 2013-14 based on the audited accounts and the generation tariff for the remaining control period of FY 2014-15 and FY 2015-16 without annual audited accounts subject to true up.

.....

9.87 The base rate of the energy charges shall however, be subject to month to month adjustment of fuel price and GCV of main fuel. The above energy charges have been calculated for the purpose of calculation of two month's billing, which is used for calculation of interest on working capital. However, the actual billing of energy charges shall be as per the formula and other provisions detailed in Regulation 41 of MPERC (Terms and Conditions for determination of generation tariff) Regulations, 2012.

9.88 Vide order dated 24th July' 2012 in petition No. 28 of 2012, the Commission had calculated the energy charges as ` 1.71 per kWh based on the norms applicable for 45 MW capacity of the generating unit and the information furnished by the petitioner. The aforesaid energy charges were calculated for the purpose of computing the interest on working capital. However, the actual billing of energy charges for FY 2012-13 and FY 2013-14 have been made as per formula and other provisions detailed in Regulation 39 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations' 2009 and Regulations 2012.

.....
9.89.....Accordingly, the same energy charges as determined in provisional order are considered for computation of working capital for FY 2012-13 and FY 2013-14.

.....
9.91 For the next financial year i.e, FY 2015-16, the energy charges for FY 2014-15 are considered for FY2015-16 also for the purpose of working capital considered in the Annual Fixed cost for this financial year. 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.

.....

Implementation of the order

9.93 The final generation tariff for FY 2012-13 and FY 2013-14 is determined for Unit No. 1 of BLA Power Ltd. from its CoD. The generation tariff determined in this order for FY 2014-15 and FY 2015-16 is provisional and shall be trued-up subsequently as per Audited Accounts of FY 2014-15 and FY 2015-16.”

From the above it is clear that the State Commission was truing up the tariff of the Appellant for the FYs 2012-13 & 2013-14 and was determining the tariff for the FYs 2014-15 & 2015-16 i.e. for the balance control period. The State Commission has determined the base variable charges (Rs. 2.18/kWh) which were to be used for calculation of the Interest on Working Capital (IWC). The State Commission has further held that the actual billing of variable charges shall be as per the formula and provisions in Regulation 41 of MPERC Tariff Regulations, 2012. The State Commission for the FY 2012-13 and FY 2013-14 has kept the IWC same as determined in the provisional tariff order dated 24.7.2012. The State Commission while considering the tariff for FY 2015-16 has kept the variable charge same as that for FY 2014-15 for the purpose of calculating IWC. In view of cancellation of Gotitoria coal mine allocated to the Fuel Seller, the State Commission has held that the tariff determined in the above order is applicable till the coal under the FSA executed between the Appellant and the Fuel Seller is used for generation and supply of electricity to the Respondent No. 2. The State Commission granted liberty to the Appellant to approach it in terms of the PPA, as and when there is any change in the status of coal linkage for its Project. The State Commission has further held that the generation tariff determined for FY 2014-15 and FY 2015-16 is provisional and shall be trued- up subsequently as per Audited Accounts of FY 2014-15 and FY 2015-16.

- iv. Now let us consider the findings of the State Commission in its order dated 25.7.2015. The relevant extract is reproduced below:

“(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.

.....

(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:

*.....
.....*

(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 abovementioned 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 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.”

In the above order the State Commission has held that the Appellant and the Respondent No. 2 have not gone through the dispute resolution mechanism before approaching the State Commission for the same and held the petition of the Appellant as non-maintainable.

- v. Now let us examine the relevant provisions of the MPERC Tariff Regulations, 2012. The relevant extract is reproduced below:

“1.3 These Regulations shall come into force from 1.4.2013, and unless reviewed earlier or extended by the Commission, shall remain in force for a period up to 31.03.2016 from the date of commencement:

.....

2. Scope and extent of application

2.1 These Regulations shall apply in all cases of determination of generation tariff for a generating station or a unit thereof (other than those based on non-conventional

energy sources) under Section 62 of the Electricity Act, 2003 for supply of electricity to a Distribution Licensee,..... Section 63 of the Electricity Act, 2003.

.....

4 (s) “Gross Calorific Value (GCV)” in relation to a thermal power generating station means the heat produced in kCal by complete combustion of one kilogram of solid fuel or one litre of liquid fuel or one standard cubic meter of gaseous fuel, as the case may be;

.....

15.3 In case of the existing Projects, the Generating Company shall continue to provisionally bill the Beneficiaries based on the Tariff approved by the Commission and applicable as on 31.3.2013 for the period starting from 1.4.2013 till approval of Tariff by the Commission in accordance with these Regulations:

.....

37 Working Capital

37.1 The Working Capital for Coal based generating stations shall cover: (i) Cost of coal for 45 Days for pit-head generating stations and two months for non-pit-head generating stations, corresponding to the normative availability;

.....

(iv) Receivables equivalent to two months of capacity charges and energy charges for sale of electricity calculated

on the Normative Annual Plant Availability Factor; and

.....

37.2 The cost of fuel shall be based on the landed cost incurred (taking into account normative transit and handling losses) by the Generating Company and Gross Calorific Value of the fuel as per actual for the preceding three months and no fuel price escalation shall be provided during the Tariff period.

.....

41 Energy charges (Variable charges)

41.1 The energy (variable) charges shall cover main fuel costs and shall be payable for the total energy scheduled to be supplied to such Beneficiary during the calendar month on ex-power plant basis, at the specified variable charge rate (with fuel price adjustment).

41.2 Energy (variable) Charges in Rupees per kWh on ex-power plant basis shall be determined to three decimal places as per the following formula:

(i) For coal fired stations

$$ECR = (GHR - SFC \times CVSF) \times LPPF \times 100 / \{CVPF \times (100 - AUX)\}$$

Where, AUX= Normative Auxiliary Energy Consumption in percentage. ECR = Energy Charge Rate, in Rupees per kWh sent out. GHR = Gross Station Heat Rate, in kCal per kWh. SFC = Specific Fuel Oil Consumption, in ml/kWh CVSF = Calorific value of Secondary Fuel, in kCal/ml. LPPF =Weighted average Landed price of Primary Fuel, in Rupees per kg, per liter or per standard cubic meter, as

applicable, during the month. CVPF = Gross Calorific Value of Primary Fuel as fired, in kCal per kg, per liter or per standard cubic meter.

Provided that Generating Company shall provide details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal with details of the variation in energy charges billed to the beneficiaries along with the bills of the respective month:

Provided further that a copy of the bills and details of parameters of actual GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal shall also be displayed on the website of the Generating Company.”

These regulations were applicable for the control period from 1.4.2013 to 31.3.2016 for determination of tariff under Section 62 of the Act. The above regulations provide for IWC based on cost of fuel based on the landed cost incurred by the Generating Company and Gross Calorific Value of the fuel as per actuals for the preceding three months and no fuel price escalation to be provided for the purpose of IWC during the Tariff period. The monthly variable charges are to be paid based on actual landed price of the fuel during the month. From the above it is also clear that until the tariff under MPERC Tariff Regulations, 2012 is determined the generator can carry out billing as per the tariff as

on 31.3.2013. Further, the definition of GCV uses the term ‘solid fuel’.

- vi. Now let us consider the provisions of the MPERC Tariff Regulations, 2015, The relevant extract is reproduced below:

“ 1.3 These Regulations shall come in force with effect from 01.04.2016, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of three years i.e., upto 31.03.2019:

.....

2. Scope and extent of application. These Regulations shall apply in all cases of determination of generation tariff for a generating station or a unit thereof (other than those based on renewable sources of energy) under Section 62 of the Electricity Act, 2003 read with Section 86 of the Act for supply of electricity to a Distribution Licensee.....

.....

7.8. If the petition is inadequate in any respect as required under these Regulations, the petition shall be returned to the generating company for resubmission of the same within one month after rectifying the deficiencies as may be pointed out by the staff of the Commission.

.....

7.11. In case of the existing projects, the generating company may be allowed tariff on Commission based on the admitted capital cost as on 1.4.2016 and projected additional capital expenditure for the respective years of

the tariff period 2016-17 to 2018-19 as per the provisions as these Regulations:

Provided that:

(i) the generating company shall continue to bill the beneficiaries at the tariff approved by the Commission and the same shall be applicable as on 31.3.2016 for the period starting from 1.4.2016 till approval of tariff by the Commission in accordance with these Regulations:

.....

29. Landed Fuel Cost for Tariff Determination:

The landed fuel cost of primary fuel and secondary fuel for tariff determination shall be based on actual weighted average cost of primary fuel and secondary fuel of the three preceding months, and in the absence of landed costs for the three preceding months, latest procurement price of primary fuel and secondary fuel for the generating station, before the start of the tariff period for existing stations and immediately preceding three months in case of new generating stations shall be taken into account.

.....

34.2 The cost of fuel shall be based on the landed cost incurred (taking into account normative transit and handling losses) by the generating company and gross calorific value of the fuel as per actual for the three months preceding the first month for which tariff is to be determined and no fuel price escalation shall be provided during the tariff period.

.....

36.6 Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to three decimal places in accordance with the following formulae:

(a) For coal based stations $ECR = \{(GHR - SFC \times CVSF) \times LPPF / CVPF + SFC \times LPSFi\} \times 100 / (100 - AUX)$ Where, AUX = Normative auxiliary energy consumption in percentage. CVPF=(a) Weighted Average Gross calorific value of coal as received, in kCal per kg for coal based stations (b) In case of blending of fuel from different sources, the weighted average Gross calorific value of primary fuel shall be arrived in proportion to blending ratio. CVSF = Calorific value of secondary fuel, in kCal per ml. ECR = Energy charge rate, in Rupees per kWh sent out. GHR = Gross station heat rate, in kCal per kWh. LPPF = Weighted average landed price of primary fuel, in Rupees per kg, during the month. (In case of blending of fuel from different sources, the weighted average landed price of primary fuel shall be arrived in proportion to blending ratio) SFC = Normative Specific fuel oil consumption, in ml per kWh.

LPSFi=Weighted Average Landed Price of Secondary Fuel in Rs./ml during the month

36.7 The generating company shall provide to the beneficiaries of the generating station the details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, etc., as per the forms prescribed to these Regulations:

.....

36.9 In case of part or full use of alternative source of fuel supply by coal based thermal generating stations other than as agreed by the generating company and beneficiaries in their power purchase agreement for supply of contracted power on account of shortage of fuel or optimization of economical operation through blending, the use of alternative source of fuel supply shall be permitted to generating station:

Provided that in such case, prior permission from beneficiaries shall not be a pre- condition, unless otherwise agreed specifically in the power purchase agreement:

Provided further that the weighted average price of use of alternative source of fuel shall not exceed 30% of base price of fuel computed as per clause (36.10) of this Regulation:

.....”

These regulations were applicable for the control period from 1.4.2016 to 31.3.2019 for determination of tariff under Section 62 of the Act. The above regulations also provide for IWC based on cost of fuel based on the landed cost incurred by the Generating Company and Gross Calorific Value of the fuel as per actual for the preceding three months and no fuel price escalation to be provided for the purpose of IWC during the Tariff period. The monthly variable charges are to be paid based on actual landed price of the fuel during the month. From the above it is also clear that until the tariff under MPERC Tariff Regulations, 2015 is

determined the tariff as on 31.3.2016 shall continue to be billed by the generator.

These regulations also envisage use in part or full alternative source of fuel supply by coal based thermal generating stations other than as agreed by the generating company and beneficiaries in their PPA for supply of contracted power on account of shortage of fuel or optimization of economical operation through blending. The use of such alternative source of fuel supply shall be permitted to generating station.

- vii. Now let us consider the following provisions of the PPA based on which the whole issue revolves:

“

PROCUREMENT OF POWER ON REGULATED TARIFF BASIS
January 2011

.....

1.1

.....

“Appropriate Commission” shall mean the Madhya Pradesh Electricity Regulatory Commission and.....

.....

“Fuel” means primary fuel (coal) used to generate electricity namely, domestic coal/imported coal/blended coal (as applicable);
“Fuel Supply Agreement(s)” shall mean the agreement(s) entered into between the Company and the Fuel Supplier and others for the purchase, transportation and handling of the Fuel;

.....

4.1 Company's Obligations

.....

4.1.1 (iii) 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.

.....

Article 10: Tariff, Billing and Payment

10.1.1. The Tariff shall comprise Capacity Charge, Variable Charge and any other charges as may be determined by the Appropriate Commission under Law and as per norms contained in the tariff regulations notified by the Appropriate Commission.

.....

16.2.1 This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary.”

As per the PPA the primary fuel for generation of power is coal which can be domestic coal/imported coal/blended coal (as applicable). Fuel supply arrangements were required to be made by the Appellant for all or part of the capacity of the Unit(s) upon prudent terms and conditions materially consistent with the extant policy of the GoI, if any. Further the Appellant was required to provide a copy of the executed FSA to the Respondent No. 2.

The tariff of the Appellant was to be determined by the State Commission as per norms in the tariff regulations issued by the State Commission. Further, the amendment to the PPA can only be carried out by written agreement between the parties and with the approval of the State Commission where required.

- viii. Now let us consider the provisions of the FSA entered into between the Appellant and the Fuel Supplier. The relevant extract of the same is reproduced below:

“1.1

“Alternate Source(s)” means the imported coal, open market purchase of coal or any other arrangement available under applicable laws, from which the Seller shall arrange the supply of Coal or the Purchaser may source Coal in accordance with Article 3.3.

“Alternate Supplies” means the coal supplied by the Seller from Alternate Sources, or procured by the Purchaser from Alternate Sources in accordance with Article 3.3.

“Applicable Laws” means any law, rule, regulation, ordinance, notification, order, code, treaty, judgement, decree, injunction, permit or decision of any central, state or local government, authority, agency, court or other body having jurisdiction over the matter in question, as in effect from time to time.

“Coal” shall mean the coal mined and raised from the Coal Mine and washed by the Seller or coal supplied by Seller from Alternate Sources (s); in either case meeting the specifications set forth in Article 6 and Schedule I; or the coal procured by the

Purchaser from Alternate Sources in accordance with Article 3.3 of this Agreement.

“Coal Mine” shall mean the Dhramsthal Coal Project at Gotitoria in Madhya Pradesh, allotted under Section 3 (3) (c) of the Coal Mines (Nationalisation) Act, 1973 and operated by the Seller under a lease executed with the Government of Madhya Pradesh, under Applicable Laws.

.....
3.3 Alternate Source(s)

3.3.1 (i) In the event that the Seller is unable to supply the Monthly Required Quantity of Coal from the Coal Mine, whether due to an event of Force Majeure or due to default of Seller, the Seller shall supply or cause the supply of the Coal from Alternate Sources in accordance with the provisions of this Agreement and Applicable Laws.

(ii) The Alternate Supplies shall be made at the Coal Stockyard at Plant Site in conformity with the Delivery Schedule and the specifications set forth in Schedule I read with Article 6. The supply of Coal from such Alternate Source(s) shall be in accordance with provisions of this Agreement and Applicable Laws.

From the above it can be seen that there is a provision for supply of Coal from Alternate Source(s) in the FSA in case the Seller is unable to supply the Monthly Required Quantity of Coal from the Coal Mine, whether due to an event of Force Majeure or due to default of Seller in accordance with the provisions of FSA and Applicable Laws. As per the above provisions the Procurer (i.e.

the Appellant) can also procure coal from alternate sources if the Fuel Seller is unable to supply the Monthly Required Quantity of Coal from the Coal Mine, whether due to an event of Force Majeure or due to default of the Fuel Seller.

- c) We observe that the PPA was signed between the Appellant and the Respondent No. 2 for the Project for supply of power based on the regulated tariff to be determined by the State Commission under the Section 62 of the Act based on the MPERC Tariff Regulations notified by the State Commission from time to time. Accordingly, the State Commission has determined the scope of order dated 22.5.2015 which includes determination of tariff of the Appellant for FY 2015-16 being the last FY of the control period as per the MPERC Tariff Regulations, 2012.
- d) From the order dated 22.5.2015 and from the provisions of the MPERC Tariff Regulations, 2012 it is clear that the State Commission has determined the variable charge of Rs. 2.18/kWh for the Project of the Appellant based on the coal received from the Goritoria mines. The significance of determination of the base variable charge is to determine the IWC component of the fixed charges of the Project. The actual variable charges were however payable by the Respondent No. 2 to the Appellant based on GCV and landed price of the fuel during the month but the Respondent No.2 was paying only to the tune of Rs. 2.18/kWh during the intervening period as per the State Commission's order. Thus, the variable charge determined by the State Commission was mainly for the purpose of calculating IWC.

- e) The term 'fuel' used in the MPERC Tariff Regulations, 2012 means domestic coal, imported coal, e-auction coal, liquid fuel etc., and also envisages blending of imported coal with domestic coal and with e-auction coal etc. Similar terms are also used for fuel in case of coal in the MPERC Tariff Regulations, 2015. The term 'fuel' in the PPA defines coal as primary fuel which includes domestic coal/ imported coal/ blended coal. MPERC Tariff Regulations, 2015 also recognise use of coal from alternate sources by the generating company in deviation with what is agreed in the PPA between the generator and the beneficiaries in case of shortage of fuel shortage or optimization of economical operation through blending. The use of such alternative source of fuel supply has been permitted to generating station in terms of the MPERC Tariff Regulations, 2015.
- f) The issue at hand is related to be dealt in two parts i.e. tariff during FY2015-16 and tariff beginning from 1.4.2016 for the next control period. The State Commission vide Impugned Order has directed the Appellant to file revised true up petition for FY 2014-15 & FY 2015-16. Further, the State Commission in the order dated 22.5.2015 has held that *"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."* Vide the Impugned Order the State Commission has clarified that the tariff determined vide order dated 22.5.2015 is applicable only upto 31.3.2015 and beyond 31.3.2015 till the normative coal stock lasts from the said mine. The State Commission further held that as there is

no valid FSA under PPA and as such the petition for the period from 1.4.2016 is not maintainable. The State Commission while deciding the same has basically relied on the fact that there is no underlying long term FSA under the PPA pursuant to deallocation of coal mine vide judgement of the Hon'ble Supreme Court and taking over of the said mine by the Custodian (WCL) and terming that there is no approved amendment to the PPA for the use of blended fuel i.e. coal with pet coke and no provision in the tariff regulations regarding the use of pet coke as a fuel. Subsequently, the application filed by the Respondent No. 2 for use of pet coke as fuel through amendment in the PPA was also rejected by the State Commission vide order dated 30.12.2017.

- g) The determination of tariff of the Appellant is under Section 62 of the Act based on the Tariff Regulations notified by the State Commission from time to time. The provisions of the MPERC Tariff Regulations 2012/2015 and the provisions of the PPA are to be seen in light of supplementing each other. Fuel as per the PPA is coal (domestic or imported)/ blended coal. In case where there is conflicting provisions in the PPA and the regulations then as per the landmark judgement of Hon'ble Supreme Court judgement in PTC vs. CERC case the provisions of the regulations will prevail. While as per the tariff regulations the term fuel means domestic coal, imported coal, blended coal, e-auction coal, liquid fuel etc. The word etc. used in the MPERC Tariff Regulations 2012 do not limit the type of fuel to be used for the purpose of power generation which may also include use of pet coke / blended coal with pet coke. The Tariff Regulations 2012/2015 also specifically mention e-auction coal which is any how as per the extant guidelines issued by Ministry of Coal, Gol.

- h) Force Majeure conditions have emerged due to cancellation of the Gotitoria coal mine of the Fuel Seller from which it was supplying coal to the Project of the Appellant. The Appellant being a small generator having 45 MW units only also does not qualify for linkage of coal from CIL as per the policy of Gol. Fuel Seller was also not qualified to participate in the bidding process of auction of coal mines pursuant to cancellation of coal mine. Further, the Fuel Seller has also challenged the de-allocation of Gotitoria coal mine before the Hon'ble Supreme Court, the outcome of which is awaited. In these circumstances, the Appellant in order to keep the Project operational sourced e-auction coal, coal from the traders. The Appellant and the Respondent No. 2 also had meeting in terms of the order dated 25.7.2015 of the State Commission to amicably resolve the disputes in terms of the PPA. Vide MoM dated 7.11.2015 the Appellant and the Respondent No. 2 also agreed for use of blending of coal with pet coke and scheduling of power by the Respondent on MoD subject to taking up of the issue by the Appellant before the State Commission. The proposition of blending with pet coke was agreeable to the Respondent No. 2 as it would reduce the variable charge.
- i) The blending of coal with pet coke was possible only as the boiler of the Project was Circulating Fluidised Bed Combustion (CFBC) type, which can be used to fire any solid fuel including coal, blended with pet coke. This is an additional technological advantage the Appellant was having in terms of having installed CFBC boiler that could not be ignored. The Respondent No. 2 also agreed to this proposition as it would have resulted in reduction of variable charges while it was the responsibility of the Appellant for firing such type of blended fuel on other aspects.

The Respondent No. 2 also continued to schedule power from the Appellant based on MoD principle and continued to pay variable charges at the rate of Rs. 2.18/kWh determined by the State commission. The scheduling by the Respondent No. 2 continued till March 2017.

- j) The Arbitrator in arbitrator proceedings between the Appellant and the Fuel Seller has also held that in view of alternate arrangement (supply of fuel from alternate sources) available in the FSA, the FSA is valid and subsisting. This aspect has not been dealt by the State Commission in the Impugned Order. After perusal of the provisions of the FSA we are also of the view that there are provisions of dealing for supply of coal from alternate sources even in case of Force Majeure conditions which has emanated from the cancellation of the coal mine allocated to the Fuel Seller. Accordingly, the coal sourced by the Appellant in the intermediate time till regular long term fuel supplies are restored by the Appellant under the present FSA or by entering into new FSA cannot be said to be supplies outside FSA/PPA. Further, the MPERC Tariff Regulations, 2015 also provide for supplies from alternate sources in case of shortage of fuel in part or full even it is not in terms of the PPA and is to be allowed. Accordingly, the tariff for the period beginning from 1.4.2016 could have been determined by the State Commission for the Project.
- k) The Appellant has relied on several judgements of this Tribunal including in case of Vidharva Industries Power Ltd. Vs. MERC & Anr. in Appeal No. 192 of 2016 on the issue that fuel is the responsibility of the generator. The relevant extract from the said judgement is extracted below:

“j)

.....
.....Once the State Commission has approved the PPA under Section 62, the basic principles of Tariff determination as per Section 62 have to be followed by the State Commission......

j) Even as per the provisions of the Tariff Policy 2016, in case of Competitively Bid projects under Section 63 of the Electricity Act, the cost of imported/ market based e-auction coal procured for making up the shortfall due to reduced quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/ FSA, has been made a pass through by the Appropriate Commission on a case to case basis.

k) The basic philosophy of allowing such additional coal cost as pass through in the Tariff is to deal with the situations where the shortfall in coal supply is beyond the control of the Developer/Generator. Here in the present case the Appellant, in absence of supply of Domestic coal at notified prices, was forced to use Cost Plus coal as well as use coal from other sources (e-Auction/ Imported) .To safeguard the interest of the consumers, the prudence check of the Appropriate Commission has also been well recognised. In the present case while deciding on the True Up petition filed by the Appellant, the State Commission ought to have considered the factors for arranging coal from other sources despite putting up best

efforts to get coal from CIL/ WCL/ SECL sources by the Appellant. The State Commission while applying its prudence check must allow the actual fuel mix used by the Appellant while determining the Energy charges for FY 14-15 and FY 15-16. While giving this observation, we would like to underline the fact that it is the prime responsibility of the Appellant to ensure supply of domestic linkage coal from CIL to have most competitive energy charges for the supply of its power to Respondent No 2. Further as the domestic coal availability position in the country has eased out, the Appellant as well as the State Commission has to ensure the supply and use of Domestic coal to the extent possible for supply of power under the current agreements.”

Vide above judgement, this Tribunal has held that for situations where shortfall of coal supply is beyond the control of the generator additional coal cost is to be made pass through in the tariff. Further, it has also been held that upon approval of the PPA by the State Commission, basic principles of determination of tariff under Section 62 of the Act have to be followed. In the present case too, the shortage of fuel situation was created due to the de-allocation of coal mine of the Fuel Seller and handing over of the same to the Custodian from midnight of 31.3.2015.

- I) The MPERC Tariff Regulations 2012/2015 envisage continuity of tariff without any tariff holiday as discussed in previous paragraphs. The Hon'ble Supreme Court in the case of U.P. Power Corporation Ltd. vs.

NTPC Ltd., (2009) 6 SCC 235 relied by the Appellant has also held that tariff determination as a continuous process.

- m) While dismissing second addendum to the PPA (which was sought for blending of coal with pet coke) in order dated 30.12.2017, the State Commission has also relied on the order dated 13.12.2017 of Hon'ble Supreme Court in WP No. 13029/1985 wherein the decision of banning use of pet coke in U.P., Rajasthan and Haryana by CPCB was upheld in view of pollution in National Capital Region (NCR). In the said order the Hon'ble Court desired similar ban in other states also. It is also observed that the Hon'ble Supreme Court in the said WP has allowed the use of pet coke for cement industry based on representation from the industry in the said states. In our view, the ban on use of pet coke in other states including M.P. is yet to be imposed by CPCB/ Hon'ble Supreme Court. The State Commission has over relied to such observation of the Hon'ble Supreme Court in the said order. This could have been avoided.
- n) In view of our discussions as above and after considering the provisions in the Act, MPERC Tariff Regulations 2012/2015, provisions of the PPA, provisions of FSA, arbitral proceedings, judgement of this Tribunal/ Hon'ble Supreme Court, technological advantage of CFBC boiler in using any solid fuel etc. as discussed above we are of the considered opinion that the State Commission has erred in allowing the tariff of the Appellant for FY 2015-16 only till the normative coal stock lasts from the Gotitoria coal mine and rejecting the tariff application for the next control period beginning from 1.4.2016. Accordingly, the State Commission ought to have considered the true up petition for FY 2014-

15 & FY 2015-16 and petition for determination of tariff of the Appellant for the control period from FY 2016-17 to FY 2018-19 based on the agreement of the Respondent No. 2 for use of coal blended with pet coke for power generation and coal sourced from alternate sources like e-auction, purchases from traders etc. after applying prudence check until coal under long term FSA is available to the Appellant.

- o) After careful evaluation of the entire relevant material available on record and the submissions of the learned counsel appearing for the parties and after perusal of the relevant regulations and law laid down by the Apex Court and this Tribunal, the issues are decided in favour of the Appellant.

- p) After having allowed the Appellant to source coal from alternate sources and blending of pet coke with coal, there is a need to protect the interest of the consumers and also to keep pressure on the Appellant to arrange coal by entering into long term FSA and requisite amendment to the PPA, we are capping the variable charges to be paid by the Respondent No.2 on the scheduled energy to Rs. 2.18/kWh or actual variable charges as per the provisions of MPERC Tariff Regulations, 2012/2015 whichever is lower till such time the amendment to the PPA based on coal sourced under the long term FSA is approved by the State Commission. This will not harm the interest of the consumers as the Project will be scheduled by the Respondent No. 2 on the principle of MoD and will only get scheduled when its variable charge is competitive in respect of other generators with whom the Respondent No. 2 has contracted power. The Appellant is also directed to source coal either under the existing long-term FSA or by signing of new FSA at the earliest.

- q) A question regarding status of the Appellant as CPP and IPP at the same time has been raised in the submissions made by the Respondents. Since the issue is not the subject matter in the present Appeal the same is not being dealt with

ORDER

We are of the considered opinion that the issues raised in the present Appeal have merits as discussed above. For the foregoing reasons as stated supra, the Appeal is hereby allowed. The Impugned Order dated 2.6.2017 passed by the State Commission in Petition No. 13 of 2017 is hereby set aside.

The matter stand remanded to the State Commission to reinstate the Petition No. 13 of 2017 of the Appellant and pass consequential orders in light of our decisions as stated supra after applying prudence check as expeditiously as possible at any rate within a period of three months from the date of receipt of copy of this order or from the date of appearance of the parties whichever is earlier.

The Appellant and the Respondents are directed to appear before the State Commission without notice on May 28th, 2018 without fail.

Accordingly, the IA Nos. 875, 514 & 861 of 2017 and IA No. 48 of 2018 stand disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **19th day of April, 2018.**

(Justice N. K. Patil)
Judicial Member

√

REPORTABLE/NON-REPORTABLE

mk

(I.J. Kapoor)
Technical Member