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

Appeal No. 25 of 2016 & IA No. 71 of 2016

Dated: 13th February, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

M/s Jaiprakash Power Ventures Ltd.
Sector-128,
Noida- 201 304 (UP)

... Appellant

Versus

1. **Madhya Pradesh Electricity Regulatory Commission**
5th Floor, Metro Plaza,
Arera Colony, Bittan Market
Bhopal– 462 016 (M.P.) **...Respondent No.1**

2. **Madhya Pradesh Power Management Company Ltd.**
Shakti Bhawan, Vidyut Nagar,
Rampur,
Jabalpur- 482008 (M.P.) **...Respondent No.2**

2. **Madhya Pradesh Poorva Kshetra Vidyut Vitran Co. Ltd.**
Shakti Bhawan, Vidyut Nagar,
Rampur
Jabalpur- 482008 (M.P.) **...Respondent No.3**

3. **Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd.**
Bhopal Bijli Nagar Colony,
Nishata Parishar, Govindpura
Bhopal- 462023 (M.P.) **...Respondent No.4**

**4. Madhya Pradesh Paschim Kshetra Vidyut Vitran Co. Ltd.
Indore GPH Campus,
Polo Ground
Indore- 452003 (M.P.) ...Respondent No.5**

Counsel for the Appellant(s): **Mr. S Venkatesh
Mr. Shashank Khurana
Mr. Varun Singh
Mr. Pratyush Singh
Mr. N Bhattacharya
Mr. Anuj P Agarwala**

**Counsel for the Respondent(s): Mr. C K Rai,
Mr. Umesh Prasad,
Mr. Ashok Upadhyay,
Mr. Paramhans and
Mr. GajenderSinhafor for R-1**

**Mr. G Umapathy,
Mr. RishabhDonnel Singh,
Mr. Aditya Singh,
Ms. R Mekhala and
Ms. S Nithya for R-2**

JUDGMENT

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

1. The present Appeal is being filed by M/s Jaiprakash Power Ventures Ltd. (herein after referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 challenging the Order dated 26.11.2014 ("**Impugned Order**") passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as the **"State Commission"**), in Petition No.40 of 2012. The Appellant

also filed a Review Petition No. 5 of 2015, against the Impugned Order which was also substantially decided against the Appellant vide the State Commission's order dated 08.05.2015 (**"Review Order"**). The present Appeal is concerning about the part allowance of pre-commissioning fuel expenses, double deduction of revenue earned from the sale of infirm power injected to the grid, inadequate recovery of Capacity Charges and post facto adjustment on account of Non-Tariff Income of the Appellant by the State Commission.

2. The Appellant, M/s Jaiprakash Power Ventures Ltd.(Unit: Jaypee Bina Thermal Power Plant) is a power generating company within the meaning of Section 2 of the Electricity Act, 2003 in the State of Madhya Pradesh supplying power to Respondent Nos. 3, 4 & 5 through Respondent No.2.

3. The Respondent No.1, Madhya Pradesh Electricity Regulatory Commission is the State Commission for the State of Madhya Pradesh, exercising jurisdiction and discharging functions in terms of the Electricity Act 2003.

4. The Respondent No. 2, Madhya Pradesh Power Management Company Ltd. is a holding company for all the three State Distribution Companies of Madhya Pradesh, herein Respondent Nos. 3, 4 & 5(herein referred as '**discoms**') and is vested with the functions of bulk purchase of electricity from the Appellant and supply of electricity in bulk to the discoms, which are responsible for distribution of electricity within its licensed distribution area.

5. **Facts of the present Appeal:**

a) The Appellant has set up phase-I (2 x 250MW) of coal based power generating station at Bina, Distt. Sagar (M.P.) based on Memorandum of Understanding (MoU) dated 12.8.2008 signed between the Appellant and Govt. of M.P. The second phase comprises of 3 x 250 MW units are yet to be installed. As per the Implementation Agreement (**"IA"**) dated 30.01.2009, the Appellant has to provide to the Govt. of M.P. or its Nominated Agency (herein Respondent No. 2), 5% of net power generated by the project on annualised basis at Variable Charges as determined by the State Commission. Further, in case the Appellant was allocated captive coal block in the State of M.P., this quantum of power to be supplied at Variable Charges will be 7.5%.

b) The Power Purchase Agreement (PPA) was signed on 05.01.2011 between the Appellant and the Respondent No.2 wherein Respondent Nos. 3 to 5 were the Confirming parties for the contracted capacity of 65% from Phase-I i.e. 2 x 250 MW of the project.

c) The PPA for 5% energy on Variable Charges was signed between the Appellant and Govt. of M.P. on 20.7.2011. Govt. of M.P. on its behalf, nominated Respondent No.2 to receive this energy at Variable Charges as determined by the State Commission.

d) The Unit-1 and Unit-2 of the Jaypee Bina Thermal Power Station commenced commercial operations from 31.08.2012 and 07.04.2013 respectively.

e) In May, 2012 the Appellant filed tariff petition no. 40 of 2012 before the State Commission for determination of tariff for its Bina thermal Power Station. The State Commission vide order dated 12.12.2012 issued provisional tariff order of Unit-1 and vide order dated 29.06.2013 issued provisional tariff order of Unit-2 of the Appellant's Bina thermal power station.

f) In February 2014, the Appellant, under Section 62 of the Electricity Act, filed an application before the State Commission for determination of final tariff of the Bina thermal power station, Phase-I Units for the period 2012-13 to 2015-16. Vide Impugned Order dated 26.11.2014, the State Commission determined the final tariff for 2012-13 & 2013-14 and provisional tariff for years 2014-15 & 2015-16 subject to truing up. Aggrieved by certain aspects of the Impugned Order, the Appellant filed Review Petition No. 5 of 2015 before the State Commission on issues related to pre-commissioning fuel expenses, double deduction of revenue earned from sale of infirm power, interest & finance charges on loan capital and inadequate recovery of capacity charges. The State Commission passed order dated 8.5.2015 on the Review Petition rejecting all the claims of the Appellant except interest & finance charges on loan capital. In this order the State Commission has also made adjustment of Non-Tariff Income for the year 2013-14.

6. Aggrieved by the Impugned Order dated 26.11.2014 and order dated 8.5.2015 on the Review Petition passed by the State Commission, the Appellant has preferred the present appeal on following issues:

I. Pre-Commissioning Fuel Expenses.
II. Double deduction of infirm power.
III. Inadequate recovery of Capacity Charges.
IV. Post Facto Adjustment on account of Non-Tariff Income.

7. **QUESTIONS OF LAW**

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

a. Whether the State Commission correctly applied the methodology to arrive at the cost of coal to determine pre-commissioning expenses?

b. Whether the State Commission has correctly disallowed the blending usage of imported coal for the purpose of determination of pre- commissioning fuel expenses?

c. Whether the State Commission is correct in doubly reducing the earning from generation of infirm power contrary to the Regulations?

d. Whether the State Commission has failed to allow proportionate recovery of Capacity Charges left unrecovered due to concessional energy supplied?

e. Whether the State Commission in Review Proceedings can substantially alter the Tariff, which was determined through the Final Tariff Order on a ground, which was neither agitated nor urged by either of the parties? Was the State Commission justified in not giving an opportunity to the Appellant before delivering such Order which was prejudicial to the interests of the Appellant?

8. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.

9. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:

i) Disallowance of Pre-Commissioning Expenses:

a) The State Commission in the Impugned Order and Review Order failed to consider that amount of Rs. 20.79 Cr as incurred by the Appellant for pre commissioning expenses of Unit-1 were based on weighted average landed cost of consumption of 53,052 MT coal certified by Statutory Auditor vide certificate dated 15.4.2013. The State Commission has erred by holding that average purchase rate for domestic coal is the same as the weighted average price of consumption. The weighted average price of consumption is based on First in First Out (FIFO) basis and is correct method of calculating consumption.

b) The State Commission while calculating pre-commissioning expenses for Unit-2 has ignored the landed cost of imported coal which was purchased for blending with domestic Fuel Supply Agreement (FSA) coal and domestic non-FSA coal. This was required to achieve the Gross Calorific Value (GCV) of the coal for which the boiler was designed by blending with low GCV domestic coal. For achieving Commercial Operation Date (COD), the Appellant has to demonstrate the Maximum Continuous Rating (MCR) through successful trial run and also to demonstrate capability to raise load upto 105% or 110% of the MCR, which would have not been possible with low GCV domestic FSA coal. Based on weighted average price, the pre-commissioning expenses for consumption of 25,326 MT coal works out to Rs. 11.21 Cr as certified by the Statutory Auditor vide certificate dated 15.4.2013. The State Commission has considered only the rate of domestic coal for arriving at pre commissioning expenses for consumption of 25,326 MT coal for Unit-2.

c) The PPA dated 5.1.2011, signed between the Appellant and the Respondent No. 2 also provides that the primary fuel (coal) can be either domestic or imported coal. Hence the Appellant has rightfully used blended coal for the purpose of commissioning. The disallowance of pre-commissioning expenses by the State Commission is not justified which is based on erroneous grounds. The State Commission has held that the MPERC Tariff Regulations, 2012 do not specify that the coal consumption will be based on FIFO basis. On the other hand, these regulations specify that energy charges are based on landed cost of coal, hence the Appellant is entitled to the full amount incurred on pre-

commissioning expenses for Unit-1 and Unit-2. Further, the Electricity Act, 2003 and various regulations of the State Commission do not contemplate disallowance of imported coal for generation of infirm power.

d) The State Commission has also cited the CERC UI/ Deviation Settlement Mechanism Regulations and equated domestic coal based projects with imported coal based projects in terms of capping of rate of infirm power supplied by these generators. These CERC Regulations do not bar the domestic coal based power plant from blending the imported coal for generating infirm power but caps the rate of infirm power.

e) The State Commission has also erred in considering average purchase price of coal as against weighted average price of coal which is worldwide practice. Post COD of the Units, the Appellant is continuously billing the Respondent No. 2 based on the weighted average price basis. It is also logical to determine pre-commissioning expenses based on consumption of coal and not on purchase basis.

f) The State Commission is also trying to expand the scope of its defence by adding new facts related to design GCV of coal as per DPR which were neither discussed nor deliberated upon in passing the Impugned Order and Review Order. This is not allowed as per Hon'ble Supreme Court's judgement in Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405.

g) This Tribunal in various judgements like Appeal No. 170 of 2010 (MPPGCL Vs MPERC & others), Appeal No. 273 of 2007 (DVC Vs. CERC & others) and Appeal No. 152 of 2010 (M/s Dodson-Lindblom Hydro Power Pvt. Ltd. Vs. MERC) has held that expenditure so incurred by the Generator has to be justifiable, efficacious and aligned to project requirements.

ii) Double deduction of revenue earned from infirm power:

a) The State Commission has doubly deducted Rs 9.23 Cr., revenue earned from sale of infirm power before the COD of Unit-1 & Unit-2 from the Capital Expenditure. This revenue related to Unit-1 is Rs 5.92 Cr.& that related to Unit-2 is Rs. 3.31 Cr. These details were submitted by the Appellant to the State Commission vide affidavit dated 13.8.2014 in response to the query of the State Commission. The deduction of revenue earned from sale of infirm power was made by the Appellant as per the Regulation 19 of the MPERC (terms and conditions of tariff) Regulations, 2012 (herein referred as **"MPERC Tariff Regulations, 2012"**).

b) The Appellant in its affidavit dated 13.8.2014 before the State Commission also submitted that the pre-commissioning fuel expense of Rs. 95.83 Cr was merged with overheads and pre-operative expenses in its additional submissions dated 27.6.2014, before the State Commission. The State Commission failed to appreciate that income earned by sale of infirm power has already been adequately reduced by the Appellant in its final submissions. The State Commission has held that adequate information

regarding deduction was not made available by the Appellant at the time of hearing in Petition No. 40 of 2012.

c) The State Commission in the Impugned order has held that the Appellant has not considered the revenue earned from the sale of infirm power in the capital cost as per Regulation 19 of the MPERC Tariff Regulations, 2012. Accordingly, the State Commission has reduced the IEDC component of project capital cost by revenue earned from sale of infirm power leading to double deduction of the same from the capital cost.

iii) Inadequate Recovery of Capacity Charges:

a) The Appellant has prayed for pro-rata 68.42% annual capacity charges from the beneficiaries of the PPA signed for 65% contracted capacity. The State Commission has held that the burden of capacity charges corresponding to PPA signed for supply of 5% Concessional Energy to Govt. of M. P. at Variable Charges shall not be loaded to the consumers of the State as the PPAs for 65% and 5% are signed with the same beneficiaries. The State Commission has also held that MPERC Tariff Regulations, 2012 do not provide for recovery of such unrecovered capacity charges, from any other party on account of any concessional power agreed to by the generating company.

b) The State Commission failed to appreciate that there cannot be unrecovered capacity charges in a thermal plant as this will make it unviable. The burden of unrecovered capacity charges are to be allocated on the balance capacity for which beneficiaries are paying

full tariff. The purpose of free energy is to ensure that the host State M.P. is given benefit of generation from the project being set up in its jurisdiction. The burden of unrecovered capacity charges are then to be passed onto other beneficiaries of the project. The same principle is also enshrined in CERC Tariff Regulations, 2014.

c) As per Section 62 of the Electricity Act and various regulations of the State Commission and CERC, the Appellant is entitled to for complete pass through of the expenses incurred on generation. This is also in line with objectives of the National Tariff Policy.

iv) Deduction of Non-Tariff Income in Review Proceedings:

a) The State Commission, vide Review Order dated 26.11.2014 in Review Petition filed by the Appellant has arbitrarily deducted the non-tariff income from the capital cost. The State Commission has held that the Appellant has not dealt with the non-tariff income in its tariff petition. The deduction of Rs. 2.71 Cr (excluding miscellaneous receipt on account of excess provision written back and foreign currency difference) is made as per the Regulation 31 of the MPERC Tariff Regulations, 2012 for the period 2013-14.

b) The State Commission has gone beyond the scope of Review proceedings while deducting the non-tariff income which was not sought by either party and without giving opportunity to the Appellant. This is against the principle of Natural Justice. It has also violated the Act which provides that tariff determination to be done once a year.

v) Other issues raised by the Respondents in their reply:

a) Respondent No.2 has raised certain objections in its reply regarding the Impugned Order. The objections are related to determination of blended Generation Tariff for Unit-1 & Unit-2, high capital cost of the plant, high pre-commissioning expenses, High Station Heat Rate and Depreciation. The Respondent No. 2 has not filed any appeal against the Impugned Order and is agitating the issues in its reply to the instant appeal filed the Appellant. Consideration of such submissions is not allowed under law and such submissions are to be out rightly rejected.

10. The learned counsel for the Respondent Nos.1 &2 have made the following arguments / submissions on the issues raised in the present Appeal for our consideration:

i) Disallowance of Pre-Commissioning Expenses:

a) The State Commission has allowed full quantity of coal (including imported coal) for generation of infirm power by the Appellant. The total cost of the coal in the Impugned Order was allowed based on weighted average rate of domestic coal for FY 2012-13 and FY 2013-14 data provided by the Appellant vide its affidavit dated 27.06.2014.

b) As per Regulation 19 of the MPERC Tariff Regulations, 2012 the revenue earned from sale infirm power generation after accounting for the fuel expenses shall be applied in reduction of capital cost. CERC, UI Regulations, 2009 and CERC, Deviation Settlement

Mechanism Regulations, 2014 provide for capping of UI/DSM rates for injection of infirm power based on type of coal used (domestic or imported). Thus, despite the fact that blended coal used for generating infirm power, the expenses on main fuel corresponding to which revenue is earned are to be considered in capital cost as pre commissioning fuel expenses.

c) The MPERC Tariff Regulations 2009 & 2012 provide for weighted average landed price of coal for determination of cost of coal/ energy charges of thermal power station. These Regulations do not provide to consider weighted average price of coal consumption on FIFO basis as contented by the Appellant.

d) The State Commission on analysis of the details furnished by the Respondent No. 2, equipment suppliers' guaranteed performance parameters and the Appellant, found that as per design of the boiler, the GCV and quantity of domestic FSA coal were adequate for generation of infirm power. The Appellant has been following the principle of weighted average landed price of coal for claiming energy charges from the Respondent No. 2. The claim that the Appellant is following weighted average price of consumption on FIFO basis for claiming energy charges is not in line with spirit of the MPERC Tariff Regulations, 2012. Based on these facts, the State Commission allowed rate of domestic coal on the total quantity of coal consumed (including imported), for infirm power generation to arrive at pre- commissioning expenses.

ii) Double deduction of revenue earned from sale of infirm power:

a) The deduction of Rs 9.23 Cr., revenue earned from sale of infirm power before the COD of Unit-1 & Unit-2 was done based on the facts & figures and supporting documents made available by the Appellant during the course of hearing on which Impugned Order was passed. This was done as per the Regulation 19 of the MPERC Tariff Regulations, 2012. It is the responsibility of the Appellant to establish that the revenue earned from the sale of infirm power is reduced from the capital cost after accounting for the fuel expenses.

b) In the original tariff petition No. 40 of 2012 filed before the State Commission, the Appellant could not demonstrate or establish that revenue earned from sale of infirm power has been reduced from the capital cost. The same also could not be justified by the Appellant through its supplementary submissions made in the tariff petition. The Appellant vide affidavit dated 13.8.2014 submitted that *"the said income on account of infirm power has been reduced from the capital expenditure"* without any supporting document.

c) In response to the State Commission's letters dated 05.05.2014 & 26.07.2014, the Appellant made additional submissions. From these submissions, the State Commission observed that the Chartered Accountant (C.A.) certificate dated 04.06.2014 does not contain break up of Capital Works in Progress (CWIP) as on 31.03.2014. In another affidavit, the Appellant emphasized to consider the Capital Cost break up in additional submission as final estimated cost, wherein the pre-commissioning fuel expenses of Rs. 96 Cr. were merged with overhead expenses of Rs. 253 Cr. In response to the

query of the State Commission, the Appellant submitted the details of fuel consumed (Rs 96 Cr) and revenue earned from sale of infirm power (Rs. 9.23 Cr.) and mentioned that net revenue earned from sale of infirm power is Rs 86.59 Cr. These submissions were not in consonance of other submissions made to the State Commission.

d) During pleadings of Review Petition, the Appellant now came up with C.A. certificate dated 14.1.2015 on this issue. From the C.A. certificate, the State Commission observed that the revenue from sale of infirm power (Rs. 9.23 Cr.) has been credited to CWIP. This certificate was produced by the Appellant after the Impugned Order dated 26.11.2014. In response to the State Commission's queries, the Appellant filed details vide affidavit dated 18.03.2015. Vide this affidavit, the Appellant filed Annual Audited Accounts of FY 2012-13 and FY 2013-14 and C.A. Certificate dated 11.03.2015. This C.A. Certificate certifies that Capital Cost as on COD of Unit-1 & Capital Cost as on COD of Unit-2 are net of revenue received from the sale of infirm power. Schedule 10 B of the Annual Audited Accounts (regarding CWIP & IEDC pending allocation) indicated expenses on trial run (net of infirm energy) at end of each financial year, under CWIP account.

e) The Appellant also failed to provide the relevant date-wise complete details and documents w.r.t CWIP as sought by the State Commission. Based on the facts/ documents available on record, the State Commission found that the said revenue is accounted for under CWIP account instead of capitalised assets of the project. Accordingly the State Commission deducted revenue earned from sale of infirm power from the Capital Cost of the Appellant. The

State Commission has also quoted this Tribunal's judgement dated 25.10.2013 in Appeal No. 17 of 2013 filed by MPPGCL for ATPS station in favour of its decision.

iii) Inadequate Recovery of Capacity Charges:

a) The Appellant and Govt. of M.P. entered into MoU on 12.8.2008 for setting up of 1250 MW thermal power station in two phases. As per clause 24 of the MoU, the parties in MoU entered into Implementation Agreement (IA) on 30.1.2009 for the said project. As per the IA, the Govt. of M.P. is entitled to get 5% of net power generated by the project at variable charges, as determined by the Appropriate Commission. IA also provides obligations of Govt. of M.P. in respect of concessional power.

b) The PPA dated 5.1.2011, entered between the Appellant and the Respondent No. 2 provides for supply of contracted capacity from the project for the period of 25 years. As per the PPA, the contracted capacity shall mean the capacity equivalent to 65% of phase-I (2x250 MW) and tariff shall be paid for making available the contracted capacity and supplying electrical output corresponding to the contracted capacity at Normative Availability. Accordingly the State Commission has determined the annual fixed charges for the contracted capacity i.e. 65%. The beneficiaries in both the agreements (PPAs) i.e. for concessional energy as well as contracted capacity are same i.e. Respondent No.2 to 5.

c) Further the MPERC Tariff Regulations. 2012 also do not provide for recovery of such unrecoverable capacity charges from any other

party on account of concessional power agreed to by the generating company.

iv) Deduction of Non-Tariff Income in Review Proceedings:

a) MPERC Tariff Regulations, 2009,applicable for the period 2009-10 to 2012-13 has no provisions related to non-tariff income. Accordingly the State Commission has not made any adjustment of non tariff income in the Annual Capacity charges determined for FY 2012-13. Regulation 31 of the MPERC Tariff Regulations, 2012 applicable for the period FY 2013-14 to FY 2015-16 provides for deduction of non-tariff income from the capital cost corresponding to that year.

b) While reviewing the Impugned order, the State Commission found that non-tariff income is recorded in schedule 19 of the Annual Audited balance sheet of the Appellant for the year FY 2013-14. The Appellant had not dealt with the same in its petition under Regulation 31 of the MPERC Tariff Regulations 2012. The State Commission under Regulation 10.1 of MPERC Tariff Regulations, 2012 can revise the tariff after satisfying itself for reasons to be recorded in writing. Accordingly, the State Commission deducted the non-tariff income of Rs. 2.71 Cr. (excluding miscellaneous receipt on account of excess provision written back and foreign currency difference) pro-rata for the year FY 2013-14 from the capital cost of the Petitioner.

v) Other issues:

a) Respondent No.2 has also raised certain objections in its reply regarding the Impugned Order. The objections are related to determination of blended Generation Tariff for Unit-1 & Unit-2, high capital cost of the plant, high pre-commissioning expenses, High Station Heat Rate and Depreciation.

11. **After having a careful examination of all the aspects brought before us on the issues raised in Appeal and the submissions made by the Respondents as well as the Appellant for our consideration, our observations are as follows:-**

a. The present case pertains to decision of the State Commission vide its Impugned order dated 26.11.2014 and Review Order dated 8.5.2015 regarding partial deduction of pre commissioning fuel expenses, double deduction of infirm power revenue from capital cost, inadequate recovery of capacity charges and deduction of non-tariff income during proceedings of Review Order.

b. We now take the Question Nos. (a) & (b) at Serial No. 7 above together. For Question No. 7(a), i.e. Whether the State Commission correctly applied the methodology to arrive at cost of coal to determine pre-commissioning expenses? and Question No. 7(b) i.e. Whether the State Commission has correctly disallowed the blending usage of imported coal for the purpose of determination of pre- commissioning fuel expenses?, we observe as follows:

i. The PPA signed between the Appellant and the Respondent No. 2 provides provisions related to primary fuel. The relevant extract of the PPA is as below:

"Fuel means primary fuel (coal) used to generate electricity namely, domestic coal/ imported coal (as applicable)"

…….

…….

"3.1.1 (ii) The Company shall have executed the Fuel Supply Agreement for the entire Contracted Capacity with the Fuel supplier for due procurement of Fuel for a period not less than 10 years and have provided the copy of the same to the Procurer. Such Fuel Supply Agreement shall be for domestic coal, to the extant available according to the extant policy of the Government of India"

The provisions of the PPA provide that the Appellant can source domestic/imported coal to fulfil its obligations to generate electricity for the contracted capacity to the Respondent no. 2.

ii. The State Commission while disallowing the pre commissioning expenses relied on MPERC Tariff Regulations 2009 & 2012 which have provisions that for determining the cost of coal/ energy charges for the thermal power station, the weighted average landed price of coal shall be considered. Regulations 41.2 & 41.4 of MPERC Tariff Regulations, 2012 provide the following:

"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 x CVSF) x LPPF x 100 / {CVPF x (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:*
……..

……

41.4 The landed cost of coal shall include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means, and, for the purpose of computation of Energy Charges, shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal despatched by the Coal Supply Company during the month….”

iii. The State Commission while disallowing the pre commissioning expenses in its Impugned Order at para 4.23 observed as below:

"4.23 The Commission has considered the average rate of domestic coal for FY 2012- 13 for determining pre-commissioning fuel expenses for Unit I and for FY 2013- 14 for determining pre-commissioning fuel expenses for Unit II as given below:

Table 10: Pre-commissioning coal costs approved by the Commission

Period	***Unit I***	***Unit II***
Coal consumption (MT)	*53,052*	*25,326*
Average rate of domestic coal (₹/tonne)	*3,776.92*	*3,137.36*
Total coal costs allowed by the Commission *(*₹ Crores)	*20.04*	*7.95*
Coal cost submitted by the petitioner *(*₹ Crores)	*20.79*	*11.21*

iv. MPERC Tariff Regulations as reproduced above considers determination of the cost of coal/energy charges for the thermal power station based on the weighted average landed price of coal. From the above regulations, we do not see any difference in methodology to be adopted for arriving at the cost of coal before and after the COD of the Unit. The terms landed cost of coal and weighted average cost of coal are synonymous in the regulations and the cost of the coal is to be arrived based on weighted average landed price.

The State Commission in the Impugned Order as brought out above has considered average rate of domestic coal instead of weighted average landed price of coal. The same is not in line with the MPERC Tariff Regulations, 2012.

Thus, the Impugned Order of the State Commission considering average rate of domestic coal for the purpose of arriving at pre-commissioning expenses is devoid of any merits to that extent.

v. The State Commission has linked the issue of blending of imported coal with domestic coal with the rate of sale of infirm power as per CERC Unscheduled Interchange/Deviation Settlement Mechanism and related matters Regulations, 2014. The Regulation 5 (5) of these regulations is reproduced below:

"The infirm power injected into the grid by a generating unit of a generating station during the testing, prior to COD of the unit shall be paid at Charges for Deviation for infirm power injected into the grid, consequent to testing, for a period not exceeding 6 months or the extended time allowed by the Commission in the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access and related matters) Regulations, 2009, as amended from time to time, ***subject to ceiling of Cap rates corresponding to the main fuel used for such injection*** *as specified below:*

Domestic coal/ Lignite/Hydro Rs. 1.78 / kWh sent out
APM gas as fuel Rs. 2.82/ kWh sent out up to 31.3.2014and thereafter, Rs. 5.64/ kWh sent out
Imported Coal Rs. 3.03 / kWh sent out
RLNG Rs. 8.24 / kWh sent out"

vi. MPERC Tariff Regulations 2009 & 2012 regarding sale of infirm power provide as below:

"19 Sale of Infirm Power

19.1 Infirm Power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional / State UI pool account at the applicable frequency-linked UI rate:

Provided that any revenue earned by the Generating Company from sale of Infirm Power after accounting for the fuel expenses shall be applied for reduction in capital cost."

vii. CERC Regulations as reproduced above do not bar domestic coal based generating stations for using imported coal/blended coal for generating infirm power. These Regulations prescribe ceiling of rates corresponding to the main fuel used for infirm injection. The PPA entered between the Appellant and the Respondent No. 2 also provides for domestic/imported coal as primary fuel as brought out above at Para no.11. b. i. Further, Regulation 41.2 of MPERC Tariff Regulations, 2012 as reproduced above seeks details from the generating company regarding GCV and price of domestic/e-auction/imported coal and their blending ratio.

viii. In view of the above, the Impugned Order of the State Commission disallowing the cost of imported coal in pre-commissioning expenses is not justified and the Impugned Order of the State Commission to that extent is set aside.

c. On Question No. 7(c) i.e. Whether the State Commission is correct in doubly reducing the earning from generation of infirm power contrary to the Regulations?, we decide as follows:

i. We once again look at the State Commission's Tariff Regulations 2009 & 2012 which provide following regarding infirm power injection to the grid prior to the COD of the Unit.

"19 Sale of Infirm Power
19.1 Infirm Power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional / State UI pool account at the applicable frequency-linked UI rate:

Provided that ***any revenue earned by the Generating Company from sale of Infirm Power after accounting for the fuel expenses shall be applied for reduction in capital cost****."*

It is the responsibility of the Appellant/ Generating Company to clearly establish that the revenue earned from the injection of infirm power after accounting for fuel expenses has been reduced from the capital cost as on COD of the Unit(s).

ii. During the proceedings in Petition No. 40 of 2012, the Appellant could not clearly establish that the Capital Cost as on COD of the Units is net of revenue earned from the sale of infirm power from the respective units.

iii. During the proceedings of the Review Petition 5 of 2015, the Appellant produced Chartered Accountant Certificate dated 14.1.2015 certifying that the revenue earned from the sale of infirm power has been credited to CWIP. The State Commission asked for further detailed documents like audited annual accounts for 2012-13

& 2013-14, reconciliation of CWIP as on COD of the Units and at the end of the financial years 2012-13 and 2013-14 etc. from the Appellant to confirm that the revenue from sale of infirm power has been reduced from capital cost as on COD of the Units. But the Appellant was not able to establish that the revenue earned from sale of infirm has been reduced from the capital cost as on COD of the respective units. The State Commission has held that based on available documents and submissions before the State Commission, it is seen that the revenue earned from sale of infirm power lies in CWIP as on 31.3.2013 and 31.3.2014. Accordingly, the State Commission dismissed Review Petition on this account.

iv. While going through the details, the arguments and the counter arguments made by the parties, we feel that the whole issue needs to be resolved with full clarity. The Appellant has submitted the C.A. certificates mentioning that the revenue earned from sale of infirm power has been reduced from capital cost as on COD of the units. The State Commission tried to reconcile the figures with the annual accounts of the Appellant. The gap exists in reconciling the figures of CWIP as on COD of the Units and as on end of the financial years in which COD of the units occurred.

v. We feel that as a matter of Natural Justice one last chance may be given to the Appellant to prove its contention that revenue earned from sale of infirm power has been actually reduced as on COD of the Units to avoid the penalty of double deduction of the same from the capital cost. We hereby grant liberty to the Appellant to approach the State Commission on this issue and direct the State Commission to hear the issue on merits again. However, we are not

expressing any opinion. The Impugned Order is set aside to that extent.

d. On question no. 7(d), i.e. Whether the State Commission has failed to allow proportionate recovery of Capacity Charges left unrecovered due to concessional energy supplied?, we decide as follows:

i. The Memorandum of Understanding dated 12.08.2008, signed between the Appellant and Govt. of M.P. provides that "the Government is desirous of facilitating private investment in power generation projects in the State of Madhya Pradesh and providing assistance for the development of the power generation projects and in consideration being entitled to a certain share of power generated from such projects."

ii. Clause 3.1 under Article –III of the Implementation Agreement dated 30.01.2009 signed between Appellant and Govt. of M.P. is reproduced below:

"3.1 Concessional Energy

i. The Company will provide, on annualised basis, to the Government or its nominated agency, 5 (Five) percent of the net power generated by the Project at the Variable Charges, as determined by the Appropriate Commission. Provided that if the Company is allocated captive coal block also in the state of Madhya Pradesh for supply of coal to the Project, then the Company will provide, on an annualised basis, to the Government or its nominated agency, 7.5 (seven point five) percent of net power generated by the Project at Variable Charges, as determined by Appropriate Commission."

.....

.....

Further Clause 4.2 of this Implementation Agreement provides Obligations of the Government in the form of assistance in obtaining clearance/ approvals etc, incentives to the project, land acquisition, change in law etc.

This provision of the Implementation Agreement clearly spells out that the 5% energy to be supplied by the Appellant at variable charges is the concessional energy.

iii. The PPA dated 05.01.2011 signed between Appellant and the Respondent No. 2 provides as below:

*"**Contracted Capacity**: shall mean the capacity equivalent to 65% of the phase-I (2x250 MW) and 37% of the phase-II (3x250 MW) (subject to availability of coal for phase-II) of power Station's Installed Capacity contracted with the Procurer as per terms of this agreement*

.....

.....

***Tariff**: shall mean the tariff payable by the Procurer to the Company for making available the Contracted Capacity and supplying Electrical Output corresponding to the Contracted Capacity at Normative Availability."*

The above provisions clearly bring out that the contracted capacity is 65% from phase-I (2x250 MW) of the Project and tariff is payable for the same.

iv. The PPA dated 20.07.2011 signed between Appellant and the Respondent No. 2 for concessional energy provides as below:

*"**Contracted Energy**: shall mean the energy equivalent to five percent (5%) of the Electrical Output of the Unit or the Power*

Station at all times contracted to be sold by the Company to the GoMP in accordance with the terms of this Agreement;

.....

.....

***Tariff**: shall mean the Variable Charge/Cost;"*

From the above provisions, it is clear that the PPA is for the 5% "Contracted Energy" and not for the 5% "Contracted Capacity". Definition of Tariff also provides as payment of Variable Charge/Cost for this 5% contracted energy.

v. In view of the above discussions and provisions of the MoU, IA and PPAs, it is very clear that no capacity charges are required to be payable by the Respondent No.2 for this 5% contracted energy.

vi. Hence this issue is decided against the Appellant and the Impugned Order of the State Commission to this extent is upheld.

e. On question no. 7(e), i.e. Whether the State Commission in Review Proceedings can substantially alter the Tariff, which was determined through the Final Tariff Order on a ground, which was neither agitated nor urged by either of the parties? Was the State Commission justified in not giving an opportunity to the Appellant before delivering such Order which was prejudicial to the interests of the Appellant?, we decide as follows:

i. The Regulation 31 of the MPERC Tariff Regulations, 2012 applicable for control period 2013-14 to 2015-16 provides as below:

"31 Non Tariff Income

(a) Any income being incidental to the business of the Generating Company derived from sources, including but not limited to the disposal of assets, income from investments, rents, income from sale of scrap other than the de-capitalized/written off assets, income from advertisements, interest on advances to suppliers/contractors, income from sale of ash/rejected coal, and any other miscellaneous receipts other than income from sale of energy shall constitute the non tariff income.

(b) The amount of Non-Tariff Income relating to the Generation Business as approved by the Commission shall be deducted from the Annual Fixed Cost in determining the Annual Fixed Charge of the Generation Company:

Provided that the Generation Company shall submit full details of its forecast of Non-Tariff Income to the Commission in such form as may be stipulated by the Commission from time to time. Non tariff income shall also be Trued-up based on audited accounts."

The above regulation of the State Commission is clear regarding deduction of non-tariff income from the annual fixed cost in determining the Annual Fixed Charges of the generating company. The onus of providing the details of non-tariff income is with the Appellant.

ii. Further, the Regulation 10.1 of the MPERC Tariff Regulations, 2012 applicable for control period 2013-14 to 2015-16 provides as below:

"10.1 No Tariff or part of any Tariff may ordinarily be amended, more frequently than once in any financial Year, except in respect of any changes expressly permitted under the terms of these Regulations. The Commission may, after satisfying itself for reasons to be recorded in writing, allow for other revision of Tariff."

This regulation enables the State Commission to revise the tariff more than once in a financial year, after satisfying itself for reasons to be recorded in writing.

iii. The State Commission in exercise of its power as stated above adjusted the non-tariff income for 2013-14 based on the amount recorded in the Annual Audited Accounts of the Appellant (duly certified by the Statutory Auditor).

iv. In view of the above, the Review Order of the State Commission to this extent is upheld and the contention of the Appellant is rejected. The action of the State Commission is justified as it is based on the facts placed before it.

f. The other issues agitated by the Respondent No. 2 through its Reply, as brought out at para 10. v. a. above do not call for any discussion as the Respondent No. 2 has not preferred to file any Appeal against the Impugned Order of the State Commission.

ORDER

We are of the considered opinion that some of the issues raised in the present appeal and I.A. have merit as discussed above. The Appeal is partially allowed.

The Impugned Order dated 26.11.2014 passed by the State Commission is hereby set aside to the extent as brought out above and the order is remanded back to the State Commission on the issues regarding pre-commissioning expenses and double deduction of revenue earned from sale of infirm power. In view of above, I.A. No. 71 of 2016 is disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **13th day of February, 2017.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/NON-REPORTABLE

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