

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA No. 1657 of 2022 in
Appeal No. 357 of 2023**

Dated: 15th September, 2023

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

Madhya Pradesh Power Management Company Limited,
Block No. 11, Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh – 482008. ... Appellant

Vs.

1. Madhya Pradesh Electricity Regulatory Commission,
Through the Secretary,
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal,
Madhya Pradesh – 462016.
2. M/s. Jaiprakash Power Ventures Limited,
JA House, 63, Basant Lok,
Vasant Vihar, New Delhi – 110057.
3. Madhya Pradesh Poorv Kshetra
Vidyut Vitran Company Limited, Jabalpur,
Shakti Bhawan, Vidyut Nagar,
Through the CMD,
Rampur, Jabalpur – 482008.
4. Madhya Pradesh Madhya Kshetra
Vidyut Vitran Company Limited, Bhopal,
Through the CMD,
Bijli Nagar Colony, Nishtha Parisar,
Govindpur, Bhopal,
Madhya Pradesh– 462023

5. Madhya Pradesh Paschim Kshetra
Vidyut Vitran Company Limited, Indore,
Through the CMD,
Indore GPH Campus,
Polo Ground, Indore,
Madhya Pradesh – 452003.
6. State Load Despatch Centre,
Through the Chief Engineer,
Nayagaon, Rampur,
Jabalpur, Madhya Pradesh – 182008.
7. Energy Department,
Government of Madhya Pradesh,
Through the Principal Secretary,
VB-2, Vallabh Bhawan Annex,
Mantralay, Bhopal,
Madhya Pradesh – 462004.

Counsel for the Appellant(s) : Mr. Alok Shankar
Mr. Kumarjeet Ray

Counsel for the Respondent(s) : Ms. Mandakini Ghosh
Ms. Kirti Dhoke
Mr. Rahul Ranjan
Ms. Akanksha Bhola ZDSfor R-1

Mr. Sakya Singh Chaudhuari
Mr. Avijeet Lala
Ms. Astha Sharma
Ms. Shreya Dubey
Ms. Nameeta Singh
Ms. Nithya Balaji
Ms. Soumya Kumar
Mr. Karan Jaiswal
Mr. Aryaman Singh
Mr. Ravish Kumar
Ms. Aparna Tiwari
Ms. Bhumija Phore
Ms. Shriya Gambhir
Mr. Priyanshu Singh for R-2

Mr. Ravin Dubey for R-6

ORDER

(IA No. 1657 of 2022)
(Application for Stay of Impugned Order)

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The IA No. 1657 of 2022 in Appeal No. 357 of 2023 has been filed by M/s. Madhya Pradesh Power Management Company Limited (in short "MPPMCL" or "Appellant") seeking stay of the Order dated 07.12.2021 and the Order dated 14.07.2022 (collectively referred as "Impugned Orders") passed by the Madhya Pradesh Electricity Regulatory Commission (in short "State Commission" or "MPERC") in Petition No. 64 of 2015, and in Review Petition (in short "RP") No. 25 of 2022 respectively.

2. The captioned Appeal has challenged the decision of the State Commission directing the Appellant to make the necessary payment qua late payment surcharge @ 1.25% per month as per the terms of the PPA.

3. The Impugned Order dated 07.12.2021 read with Order dated 14.07.2022 in Review Petition No. 25 of 2022 was passed consequent to remand order dated 24.08.2021 (in short "Remand Order") by this Tribunal in Appeal 232 of 2016, the State Commission while disposing of the Petition No. 64 of 2015, directed that the Appellant is liable to pay LPS @ 1.25% per month as per the terms of the Power Purchase Agreement (in short "PPA"), prior to it the Appellant has also challenged the Remand Order of this Hon'ble Tribunal dated 24.08.2021 before the Supreme Court in Civil Appeal 249 of 2021, which is currently pending adjudication.

4. Being aggrieved by the aforesaid direction of the State Commission, the Appellant filed the captioned Appeal alongwith the IA for seeking stay of the Impugned Orders.

5. The Appellant is the erstwhile Madhya Pradesh Power Trading Co. Ltd., the nominee of the Government of the State of Madhya Pradesh, since renamed as MP Power Management Company Ltd. for purchase of bulk power on behalf of the distribution companies of the State of Madhya Pradesh (in short "MP").

6. The Respondent No. 1, the State Commission is the statutory authority established under the Electricity Act, 2003 (in short "Act") and vested with the powers to adjudicate the matter under section 86 of the Act.

7. The Respondent No. 2 i.e. Jaiprakash Power Ventures Ltd. (in short "JPVL") is a generating company within the meaning of Section 2(28) of the Act, having a power plant with installed capacity of 2x660 MW Jaypee Nigrie Super Thermal Power Plant ("Jaypee Nigrie") at Nigrie District Singrauli, Madhya Pradesh.

8. The Respondent Nos. 3 to 5 are the distribution licensee having area of supply in the State of MP, and the Respondent No. 6 is the State Load Despatch Centre (in short "SLDC") established under the Act.

9. The brief facts of the case are noted in brief.

10. On 05.01.2011, the Appellant signed a PPA with the JPVL, Respondent No. 2, whereby, the Appellant will be supplied 30% of the installed capacity of the Power Project at a tariff determined by the State Commission, subsequently, Government of Madhya Pradesh (in short "GoMP") signed another PPA on 06.09.2011 with JPVL for supply of 7.5% of the net power to GoMP or its nominated agency (MPPMCL) at variable charges.

11. The Respondent No. 2, JPVL scheduled the Contracted Capacity from one of the units to avoid operations under the technical minimum level while backing down the other unit which was otherwise capable of operation after commissioning of second unit i.e. Unit II of Jaypee Nigrie, however, MPSLDC disagreed with the decision of JPVL on the ground that the PPA provides for supply of 30% of Installed Capacity from each of the units, resulting into the dispute.

12. JPVL submitted that it had achieved Plant Availability Factor for the Month (in short "PAFM") for both units which was not accepted by the Appellant countering that PAFM had to be worked out based on the operating unit and not for the backed down unit.

13. JPVL, further, argued that it had declared its availability as per the Indian Electricity Grid Code, 2010 (in short "IEGC") at all relevant times for both its units, however, the same were not certified by the WRLDC as per the requirements of law and as per the PPA, and therefore, in the absence of such clarification of availability, the Appellant did not accept the claim of JPVL for Capacity Charges for the unit under Reserve Shut Down (in short "RSD").

14. Being aggrieved, JPVL filed Petition No. 64 of 2015 under Section 86(1)(b)&(f) of the Act before the State Commission with reference to the operational issues related to "Declared Capacity" and "Contracted Capacity" of its 2x660 MW coal based Super Critical Thermal Power Project as per PPA entered into by the parties on 05.01.2011.

15. The aforesaid Petition No. 64 of 2015 was disposed of by the Respondent Commission vide order dated 08.07.2016 with the directions to the Appellant and Respondent No. 2 to resolve the issue regarding certification of Declared Capacity by the competent authority as per the provisions of applicable Laws/Regulations and to ensure billing and payment in accordance with the provisions of PPA and the applicable Code/ Regulations notified by the appropriate Commission, the relevant extract of the directions are follows:

“31. In view of the observations and findings of the Commission in the preceding paragraphs, the subject petition being devoid of merits is dismissed and disposed of. The petitioner and Respondent No. 1 are directed to resolve the issue regarding certification of Declared Capacity by the competent authority as per the provisions of applicable Laws/Regulations and to ensure billing and payment in accordance with the provisions of PPA and the applicable Code / Regulations notified by the appropriate Commission.”

16. The aforesaid order dated 08.07.2016 was challenged by JPVL through Appeal no. 232 of 2016 and this Tribunal, on 24.08.2021, allowed the appeal *inter-alia* remanding the subject matter to the State Commission with the following observations and directions:

“42. For the foregoing reasons, the impugned order cannot be sustained. The State Commission has fallen in grave error by misconstruing the terms of the PPA and denying to the appellant Capacity Charges on basis of availability of the two Units of the Power Station as certified by the WRLDC. The insistence of generation from both units of the Power Station as a pre-condition for such entitlement amounts to modifying the contract which is impermissible. The appellant is held entitled under the PPA to supply the Contracted Capacity from any single unit, both units or combination thereof of its Power Station to the procurers (first to fourth respondents) who, in turn, are under a contractual obligation to procure the Contracted Capacity from the appellant's Power Station whether from any single unit, both units or combination thereof. The direction of SLDC by Letter No. 07-05/CR dated 29.05.2015 informing WRLDC that power from the power station should be scheduled on a unit-wise basis is, thus, held bad and inoperative and consequently quashed. The appellant is held entitled to accordingly recover from the procurers the capacity charges for the relevant period, subject to confirmation of certification of availability statedly issued by WRLDC, along with the delayed payment surcharge, the determination whereof would need to be done by the State Commission.

43. The impugned order is, thus, set aside. The matter is remanded back to the MPERC for passing a fresh order on the petition (no. 64 of 2015) of the appellant, bearing in mind the above decision in this appeal and taking on record the certification by WRLDC as to

availability of the Power Station during the relevant period. Having regard to the time lapse since the filing of the said petition, we direct that the Commission shall take up the matter on 06.09.2021 for further hearing of the parties and pass the consequential order expeditiously within a period of three months of the said date and also follow up by adopting such measures as are necessary for securing timely compliance.”

17. In compliance to the Remand Order, the State Commission, after rehearing the matter, disposed of the Petition vide order dated 07.12.2021 (the Impugned Order), the relevant extract is quoted as under:

“19. Based on the above submissions made by both the parties during the fresh proceedings in this matter, the Commission has noted that the difference in amount of capacity charges on account of interpretation of contracted capacity to the extent of confirmation of certification of availability of power plant issued by WRLDC has been received by the petitioner. However, the delayed payment surcharge for the period under dispute has not been paid by the Respondents to the petitioner. In view of the aforesaid and as per the direction of the Hon'ble Tribunal in Appeal No. 232 of 2016, the Commission directs the Respondent No. 1 to make necessary payments towards the late payment surcharge @ 1.25% per month on the amount of delay on outstanding payments in terms of Article 10.4.2 of the Power Purchase Agreement executed between the petitioner and the Respondent No. 1. The Late Payment Surcharge should be paid by the Respondent No. 1 within 30 days from the date of issue of this order.”

18. Thereafter, the Appellant filed a Review Petition, however, the State Commission dismissed the review petition while holding that the review petition is not maintainable as per Regulation 40.2 of the MPERC (Conduct of Business) (Revision-I) Regulations, 2016 as well as the Code of Civil Procedure, the relevant extract of the Review Order dated 14.07.2022 is as under:

“21. On going through the reasons/grounds mentioned by petitioner seeking review in this matter, the Commission has noted that any of such grounds do not fall under the circumstances provided for review under Regulation 40.2 of the MPERC (Conduct of Business) (Revision-I) Regulations, 2016 and also articulated under Rule 1 Order 47 of the Code of Civil Procedure (CPC) for review in the instant case. Therefore, the subject review petition is not maintainable and hence dismissed and disposed of accordingly.”

19. The Appellant has submitted that the Impugned Orders passed by State Commission is in violation to MPERC Tariff Regulations, 2015 with reference to the provisions that bind the generating station in issues related to determination of tariff including the Late Payment Surcharge (in short “LPS”) that may be payable, thus it has a prima facie case in its favour, further, stating that the State Commission has failed to consider that the Appellant was not provided with complete bills for making the requisite payment.

20. The Appellant also pleaded that the Appellant will suffer irreparable loss and injury, if such stay is not granted, as any additional amount to be paid on account of LPS is an additional burden on the Appellant, also submitted that

the revenues of the Appellant are regulated and they do not have infinite funds to delve into for the period in which the present matter is sub judice, additionally, this will be in the nature of unplanned expenditure for the Appellant and the Appellant's revenue for other business and expenditures will be reduced for this reason causing them permanent loss/injury even if later the money is returned to them after adjudication.

21. The Appellant also argued that the balance of convenience is in favour of the Applicant since it has already paid the principal amount, it is only the interest amount which is under challenge and if the Appellant fails in this appeal, the requisite amount as would be decided will be paid, further claiming that the Appellant being a responsible regulated entity having its operation over the past several years in the state of Madhya Pradesh will not run away from its liabilities.

22. After hearing the contesting parties, the main grievance of the Appellant is that the revenues of the Appellant are regulated and is constraint to park the requisite funds as directed to be paid for a long time since the present matter is sub judice, additionally, such funds are in the nature of unplanned expenditure, required for other business and expenditures will be reduced for this reason causing them permanent loss/injury, such reasons, prima facie, cannot be justified for granting interim injunction, as the generating company has made huge investments in setting up the power plant and also for day to day operation and maintenance of the same, failure in getting the return against supply of electricity may badly impact the operation of the generating station and the finances of the company.

23. The Impugned Orders passed by the State Commission are in compliance to the Remand Order rendered by this Tribunal and are in accordance with the observations and directions issued vide the Remand Order.

24. The Applicant has failed to bring out any ground in support of its case, the only argument in support to the prayer for seeking stay is that the Impugned Orders passed by State Commission are in violation to MPERC Tariff Regulations, 2015 with reference to the provisions that bind the generating station in issues related to determination of tariff including the Late Payment Surcharge (in short "LPS") that may be payable, however, could not bring out any details suggesting violation of the said Tariff Regulations, thus failed the test of a prima facie case in its favour.

25. We also decline to accept the submission of the Appellant that it will suffer irreparable loss and injury, if such stay is not granted, as any additional amount to be paid on account of LPS is an additional burden on the Appellant, the Respondent No. 2 has a long term contract with the Appellant and in case the Appellant succeeds, the amount can be recovered against the future bills, therefore, there is no merit in its submission that it will suffer irreparable loss and injury.

26. Further, the submission of the Appellant that the balance of convenience is in favour of the Appellant since it has already paid the principal amount, it is only the interest amount which is under challenge and if the Appellant fails in this appeal, the requisite amount as would be decided will be paid, further claiming that the Appellant being a responsible regulated entity having its operation over the past several years in the state of Madhya Pradesh will not run away from its liabilities, the same is true for Respondent No. 2 which is

engaged in the business of generation in various parts of the country for several years and is a public limited company.

27. On being asked, the Appellant except claiming the three tests required for interim injunction failed in proving the same based on facts/ submissions, we could not find any reason for granting interim injunction in the matter.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the present IA No. 1657 of 2022 in Appeal No. 357 of 2023 is devoid of merit and therefore, stands dismissed.

The captioned Appeal is included in the List of Finals to be taken up from there in its turn.

PRONOUNCED IN THE OPEN COURT ON THIS 15th DAY OF SEPTEMBER, 2023.

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice Ramesh Ranganathan)
Chairperson**

pr/mkj