IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 283 of 2017
Appeal No. 131 of 2018
Appeal No. 231 of 2018

Dated: 22.03.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

Jaiprakash Power Ventures Limited,
(Erstwhile M/s Bina Power Supply Company Ltd,
since merged with Jaiprakash Power Ventures Limited)
JA House, 63 Basant Lok, Vasant Vihar,
New Delhi- 110057. …Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission
   Through it's Secretary
   5th Floor, Metro Plaza,
   Arera Colony, Bittan Market,
   Bhopal-462 016.

2. Madhya Pradesh Power Management Company Ltd.
   Through it's Managing Director
   (Erstwhile Madhya Pradesh Power Trading Company Ltd.)
   Shakti Bhawan, Vidyut Nagar,
   Rampur, Jabalpur (M.P.) – 482008.

3. Madhya Pradesh Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur
   Through it's Managing Director
   Shakti Bhawan, Vidyut Nagar,
   Rampur, Jabalpur (M.P.) – 482008.

4. Madhya Pradesh Madhya Kshetra Vidyut Vitaran Co. Ltd.,

Through it's Managing Director
Bhopal Bijli Nagar Colony,
Nishtha Parisar, Govindpura,
Bhopal-462023.

5. Madhya Pradesh Paschim Kshetra Vidyut Vitaran Ltd.,
Through it's Managing Director
Indore GPH Campus,
Polo Ground, Indore – 452003. ...Respondents

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Mr. Siddharth Nigotia
Mr. Kartikay Trivedi
Mr. Shivam Kumar
Mr. Jatin Ghuliani
Mr. Anant Singh
Mr. Mohit Mansharamani
Mr. Rishabh Sehgal
Mr. Kunal Veer Chopra
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Ms. Ekssha Kashyap
Mr. Manoj Kumar Shrma
Ms. Sadhvi Kumar
Mr. Ajsra Gupta
Mr. Tushar Jain
Mr. Mahip Singh for R-2

JUDGEMENT

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

1. The Appellant, i.e. M/s. Jaiprakash Power Ventures Ltd (hereinafter referred as "JPVL" or "Appellant") has filed the three captioned Appeals challenging the orders dated 03.06.2016, 21.06.2017 and 24.05.2018 (hereinafter referred as "Impugned Orders") passed by Madhya Pradesh Electricity Regulatory Commission (hereinafter referred as "MPERC" or "State Commission") in Petition No. 70 of 2015, 62 of 2016 and 57 of 2017, respectively, filed by the Appellant seeking True-up of Generation Tariff of 2x250 MW (Phase-1) coal based thermal power station at Bina, District Sagar

for FY 2014-15, 2015-16 and 2016-17, the Appellant is aggrieved by the disallowance of the following claims of the Appellant:

(a) Disallowance of Operation and Maintenance Expenditure for 400 KV Dedicated Transmission Line (in short "DTL") incurred by Appellant in view of the findings rendered in order dated 03.06.2016 passed the MPERC for Petition filed by Appellant for FY 2014-15.

(b) Disallowance of the grossing up the base rate of Return on Equity (in short **"**RoE**"**) with Minimum Alternate Tax (in short "MAT") as Appellant payment towards income tax or MAT is NIL.

(c) Disallowance of recovery of Capacity Charges for 68.42% of the installed capacity.

Parties

2. M/s. Jaiprakash Power Ventures Ltd. (Unit: Jaipee Bina Thermal Power Plant) is a Generating Company within the meaning of Section 2(25) of the Electricity Act, 2003.

3. Madhya Pradesh Electricity Regulatory Commission, 1st Respondent is the Electricity Regulatory Commission in the State of Madhya Pradesh discharging functions under the provisions of the Act.

4. Respondent Nos. 2 to 5 are the Trading and Distribution Companies.

Factual Matrix

5. Considering that the issues raised in Appeal Nos. 131 of 2018 and 231 of 2018 are also raised in Appeal No. 283 of 2017 alongwith other issues, the Appeal No. 283 of 2017 is taken up as lead Appeal for sake of adjudication and avoiding repetition.

6. The issues as challenged in the three captioned appeals are as below:

List of Appeals

S. No.	Financial Year	Order date	Petition No.	Appeal No.	Grounds for Appeal
1.	2014-2015	03.06.2016	70 of 2015	131 of 2018	Issue (a) as above
2.	2015-2016	21.06.2017	62 of 2016	283 of 2017	Issue (a), (b) and (c) as above
3.	2016-2017	24.05.2018	57 of 2017	231 of 2018	Issue (a) and (b) as above

7. The Appellant has also submitted the following chronology of events alongwith its part submissions which has not been disputed by the Respondents

S. No.	DATE	EVENT
1.	15.11.1994	Appellant was incorporated under the Companies Act,

		1956 by the name of Bina Power supply Company Limited ("BPSCL**"**).
2.	21.12.1994	Jaiprakash Hydro-Power Limited was incorporated under the Companies Act, 1956.
3.	23.12.2009	The name of BPSCL was changed to Jaiprakash Power Ventures Limited ("JPVL**"**).
4.	12.08.2008	MoU was executed between Govt. of Madhya Pradesh ("GoMP") and the Appellant for establishing and operating a 5 x 250 MW Thermal Power Station ("Project") in two phases based on the availability of coal.
5.	30.01.2009	An Implementation Agreement was executed between the GoMP and Appellant.
6.	05.01.2011	Power Purchase Agreement (**"**PPA**"**) was executed between the Appellant and Respondent No. 2 to 5 for development, commissioning, operation and maintenance of the Power Station and for generation and sale of energy from the Power Station to Respondent No.1 i.e., Madhya Pradesh Power Management Company Limited (**"**MPPMCL**"**). The relevant terms of the PPA are as under: (a) Delivery Point is defined as the interconnection point of the Power Station switchyard bus and transmission line for evacuation purpose. (b) Interconnection facilities is defined as facilities on

		the Procurer's side of the Delivery Point for receiving and metering Electrical Output and include all other transmission lines and associated equipment's, transformers and switching equipment and protective devices. (c) **Article 3.2(ii)** provides that Procurer shall be responsible for establishing the necessary evacuation infrastructure beyond the interconnection point necessary for evacuation of the contracted capacity. (d) Article 4.1.1 provides the obligations of Appellant under the PPA. (e) Article 4.2 provides that Procurers have to ensure the availability of Interconnection Facilities for evacuation of contracted capacity from the Delivery Point. The Article in question clarifies that MPPMCL had to ensure the availability of interconnection facilities at its own risk and cost. **(f) In terms of Article 4.8, the contracted capacity had to be evacuated through a DTL of 400 KV to be constructed by Appellant and cost to be incurred shall be decided mutually between the Appellant and GoMP.**
7.	20.07.2011	Subsequently, another PPA was executed between the

		Appellant and GoMP for procurement of power on Variable Charges basis. Under the PPA, GoMP has nominated MPPMCL to receive 5% net power at variable charge.
8.	16.05.2012	Appellant filed a Petition bearing No. 40 of 2012 for determination of the provisional tariff of the Project before MPERC.
9.	31.08.2012	Unit I of Project achieved its Commercial Operation Date (**"**COD**"**).
10.	07.09.2012	MPERC approved the PPA which was executed between Appellant and MPPMCL. The relevant observation of MPERC are as under: (a) Provisions in PPA signed with Appellant are at variance with provisions contained in model PPA approved by the State Government. The provisions as highlighted to be at variance are as under: (i) No provision for establishing necessary evacuation infrastructure beyond the delivery point under Article 4.2. (ii) Additional provision regarding interconnection and transmission facilities is provided in Article 4.8. (b) Procurer obligation under Article 3.2 and 4.2 of the PPA is inconsistent with sub-article 4.8 of the

		PPA. (c) In light of the above observation, MPERC accorded approval to PPA subject to additions/ modifications to the articles of the PPA. It was directed that Article 3.2(ii) be amended as under: *"The Procurer shall have ensured the availability of necessary evacuation infrastructure beyond the Interconnection Point, necessary for evacuation of the Contracted Capacity at least 210 days prior to COD."* ***Note: While Article 3.2(ii) was directed to be amended, however, no addition/modification was directed to Article 4.2(i) of the PPA.***
11.	07.04.2013.	Unit II of Project achieved its COD.
12.	12.12.2012	MPERC disposed of the Petition No. 40 of 2012 and determined the provisional tariff for the Project subjecting it to revision on filing of audited account along with other clarifications as required by MPERC and held that DTL would form part of the generation system and the generation tariff is to be decided after taking into account the cost incurred in construction of DTL. **It is relevant to mention that during the adjudication of the provisional tariff of the Plant,**

		the only issue/concern was raised related to transmission cost by the Energy Department, GoMP and MPPMCL. Therefore, the cost to be incurred towards the O&M of DTL was neither raised by any of the parties nor the same was considered by MPERC while considering the provisional tariff of the plant.
13.	2014	In view of the direction passed by MPERC, Appellant filed an application in Tariff Petition No. 40 of 2012 for determination of final generation tariff for the Project for FY 2012-13 and FY 2013-14 and generation tariff for FY 2014-15 and FY 2015-16.
14.	04.07.2014	During the pendency of the Application, MPERC passed an order directing the Energy Department, GoMP to make a note of the issue pertaining to the cost of transmission line associated with the Project and ensure that the resolution is submitted by GoMP, Energy Department with MPERC.
15.	26.11.2014	MPERC vide its Order disposed of the Application filed by the Appellant and determined the Final Tariff of the Project. By way of the same order, MPERC allowed the costs incurred by the Appellant towards transmission line/system associated with Bina Thermal Power Plant by holding that the cost of common facilities, including that of the transmission system

		shall be apportioned between Phase I and II as and when the COD of any unit under Phase II of Appellant's generating station is achieved. **Note: In view of no issue being raised by Energy Department GoMP or MPPMCL qua the consideration of the O&M expenses towards DTL, therefore, MPERC has not taken any or adjudicated upon the right of Appellant to claim O&M expenses for the DTL.**
16.	2015	Subsequent to the above order, the Appellant filed a Petition No. 70 of 2015 for True-up of its generation tariff of the Project for FY 2014-15.
17.	03.06.2016	MPERC disposed of Petition No. 70 of 2015 and disallowed O&M expenses incurred towards construction of the DTL on the ground that the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations 2012 does not provide for any O&M expenses towards DTL separately.
18.	2016	Aggrieved by the Order dated 03.06.2016 passed by MPERC in Petition No. 70 of 2015, the Appellant filed a Review Petition bearing No. 47 of 2016 seeking review of the Order concerning the disallowance of grossing of RoE with MAT and disallowance of O&M expenses for DTL.
19.	15.11.2016	Appellant filed True-up Petition No. 62 of 2016 before

		the MPERC for True-up of its Generation Tariff for FY 2015-16 of the Project.
20.	27.03.2017	On preliminary scrutiny of the Petition, MPERC issued a letter in Petition No. 62 of 2016 calling up Appellant to submit additional information concerning: (a) To file supporting documents in order to ascertain that whether Appellant is eligible for MAT in light of the figures recorded in the balance sheet and provisions under MPERC Regulations, 2012. (b) Submit breakup/ allocation of income/ expenditure and profit/ loss of M/s JPVL among all its power station duly certified by Statutory Auditor. (c) Appellant to submit justification towards claim of O&M expenses of transmission line as the aforesaid cost was rejected in earlier True-up Petition No. 70 of 2015for FY 2014-15.
21.	19.04.2017	MPPMCL filed its Reply to Petition No. 62 of 2016 filed by Appellant.
22.	25.04.2017	Appellant submitted an affidavit in Petition No. 62 of 2016 providing the additional information and document as sought by MPERC. The relevant information's/submissions are as under: (a) In light of a profit of Rs 111.17 Cr recorded by

		the Generating Station of Appellant for FY 2015-16, Petitioner has claimed RoE grossing up with MAT and break up and allocation of income and expenditure and profit/loss of Appellant among all its power station was submitted which recorded an overall loss of Rs 294.50 Crore. (b) Submission of detail justification towards claim of O&M expenses towards DTL and norms basis which the expenditure has been ascertained by the Appellant.
23.	02.05.2017	Appellant filed its rejoinder to the reply filed by Respondent No.2/MPPMCL in Petition No. 62 of 2016 filed before MPERC.
24.	21.06.2017	MPERC passed the Impugned Order.

8. The three issues are dealt separately in the succeeding paragraphs.

Issue 1- O&M expense for the Dedicated Transmission Line

9. The Appellant is assailing the decision of the MPERC whereby the MPERC has disallowed the claim of the Appellant by holding that MPERC's Tariff Regulations, 2012 do not provide for any O&M expenses for the DTL separately and therefore the Claim of the Appellant cannot be allowed, it is his submission that in case the Appellant had been a licensee then expenditure would have been allowed, in fact, the expenditure has not been subjected for it being prudent, further, argued that the finding of MPERC is fallacious for

various reasons:

a. the framing or existence of a Regulation is not a pre-condition for the State Commission to exercise its powers under Section 62 read with Section 86 of the Act, the legal proposition has been affirmed by the Constitutional Bench of the Supreme Court of India vide Judgment in the case of ***PTC India Ltd. Vs. CERC & Ors. (2010) 4 SCC 603 [Para 55 & 57]*** which is now embedded in the Regulatory jurisprudence followed by this Tribunal in *Appeal No. 86 of 2014* titled as ***Chhattisgarh State Power Distribution Co. Ltd. & Ors. vs. CSERC & Ors. [Para 19.5]*;**

b. Section 10 of the Act clearly mandates the Generating Company to establish, operate and maintain the DTL, further, in terms of Article 4.8 of the PPA, it was the obligation of the Appellant to construct the DTL, however, primary obligation under the PPA of operation and maintenance of such a line is vested with MPPMCL, the relevant extracts of Article 4.2 are quoted as under:

"4.2 Procurer's Obligations

Subject to the terms and conditions of this Agreement, the Procurer undertake to be responsible, at its own cost and risk, for:

(i) Ensuring the availability of Interconnection Facilities for evacuation of Contracted Capacity from the Delivery Point;

(ii) Payment of the Tariff in accordance with Article 10;

(iii) Opening and furnishing to the Company a Letter of Credit in favour of the Company and renewing and replenishing the same in accordance with Article 10.55; and

(iv) Fulfilling other obligations undertaken by it under this Agreement.

[Emphasis Added]

c. the DTL in question was commissioned for evacuation of power from the generating station of the Appellant, therefore, any cost incurred with regards to such a facility must be adequately recovered so that the Generator can effectively run its business of power generation, however, in the instant case, the generating company was asked to establish the evacuation facility beyond the 'Delivery Point' through a DTL, which is contrary to the norms followed, the same is evident from the Order dated 07.09.2012 passed in Petition No. 11 of 2012 and Petition Nos. 7,8,9,10 & 12 of 2012, therefore, it is clearly evident that the evacuation system envisaged for the Appellant is distinct from other generating companies operates in the State of Madhya Pradesh.

10. Further, submitted that the O&M expenses as per Regulation 36 of MPERC Tariff Regulations 2012, are computed on the basis of Plant capacity (Per MW) which comprises of employee cost, Repair & Maintenance (R&M) cost and Administrative and General (A&G) cost, the aforesaid admittedly only confined to the Generation Assets of the generating plant only and in no manner can be extended to include DTL.

11. Also, the MPERC vide its Impugned Order has disallowed the claim of the Appellant with regards to O&M expenses for DTL on the basis that the MPERC Tariff Regulations 2012 does not provide for it separately, however, the MPERC in the Impugned Order has nowhere stated that the O&M expenses allowed in under the applicable Regulations covers the O&M expense for DTL also, further, no evidence or data was placed or deliberated confirming any material on record to show that the normative determination of O&M of the generating station, covers the O&M towards the DTL, therefore, it would be relevant to consider Regulation 36 of MPERC Tariff Regulations, 2012 which pertains to O&M expenses for Thermal Power Stations:

> *"36. Operation and Maintenance Expenses of Thermal Power Stations including MPPGCL's*
>
> *36.1* ***The Operation and Maintenance expenses admissible to existing thermal power stations comprise of employee cost, Repair & Maintenance (R&M) cost and Administrative and General (A&G) cost****. These norms exclude Pension, Terminal Benefits and Incentive, arrears to be paid to employees, taxes payable to the Government and fees payable to MPERC. The Generating Company shall claim the rate, rent & taxes payable to the Government, cost of chemicals and consumables, fees to be paid to MPERC and any arrears paid to employees separately as actuals……*
>
> ***[Emphasis Added]***

12. The Appellant claimed that its Power Plant operates under the tariff determined through Section 62 of the Act and it is well settled position of law which has been time and again affirmed by this Tribunal in catena of judgments that in a cost plus Tariff, the State Commission must allow all the reasonable expenditures to the Generator after prudence check, it is pertinent to mention that such Generating Stations are in fact governed by principles enumerated under Section 61 of the Electricity Act, 2003, wherein, clause (c), (d) and (e) clearly mandate that there should be reasonable recovery of the cost of electricity, therefore, the Appellant as enshrined under Section 62 and 61 of the Act is entitled to reimbursement of all legitimate costs incurred by it in generation and supply of power to the Respondent No.2.

13. It cannot be disputed that the Electricity Act, the National Electricity Policy and the Tariff Policy require that consumer interest is protected while ensuring financial viability and growth of the power sector, thus, twin objectives of financial viability/sustainability and consumer interest are the cornerstone of the electricity sector.

14. Additionally, submitted that the scheme of the Act also promotes efficiency, financial viability, recovery of money and growth of the power sector, therefore, if the Appellant is denied recovering the O&M expense for DTL, it would lead to under recovery which is contrary to the mandate of the Act and various policies framed thereunder itself, in the instant case, the DTL was declared as part of the generation system, therefore it was the responsibility of the Appellant to operate and maintain the said Transmission line, consequent to which the Appellant has incurred substantial costs qua Operation and

Maintenance, which otherwise should have been borne by the Respondents, hence, the O&M expenses incurred by the Appellant on the DTL is a cost incurred with regards to generation and supply of power and such cost are a pass through in a cost-plus tariff regime, however, the MPERC failed to appreciate that regardless of the fact whether the MPERC Regulation provides for such cost or not, the MPERC under the statutory scheme is obligated/bound to grant the same.

15. The Appellant, accordingly, pleaded that the finding of the MPERC on O&M expenses is incorrect as even the Central Commission's (CERC) Regulations do not provide specifically for O&M Expenses for DTL, however, the CERC in regards to various projects having such requirement provided the same under its Regulatory Powers, further, argued that the MPERC in many cases followed the CERC Tariff Regulations, 2009 in order to formulate MPERC Regulations 2012, hence, in the instant case, it ought to have consider the O&M expenses as allowed by the CERC, the relevant extract of the CERC Regulations is placed by the Appellant, as under:

> *"(28) '**operation and maintenance expenses' or 'O&M expenses' means the expenditure incurred on operation and maintenance of the project, or part thereof, and includes the expenditure on manpower, repairs, spares, consumables, insurance and overheads**;*
>
> *19. Operation and Maintenance Expenses. Normative operation and maintenance expenses shall be as follows, namely;*

(a) Coal based and lignite fired (including those based on CFBC technology) generating station, other than the generating stations referred to in clauses (b) and (d):

Year	*200/210/250 MW sets*	*300/330/350 MW sets*	*500 MW sets*	*600 MW and above sets*
2009-10	*18.20*	*16.00*	*13.00*	*11.70*
2010-11	*19.24*	*16.92*	*13.74*	*12.37*
2011-12	*20.34*	*17.88*	*14.53*	*13.08*
2012-13	*21.51*	*18.91*	*15.36*	*13.82*
2013-14	*22.74*	*19.99*	*16.24*	*14.62*

”

16. The Appellant further relied upon the Statement of Reasons (**“**SoR**”**) of CERC Tariff Regulations, 2009 which provide that the O&M cost for the purpose of tariff does not cover the cost incurred towards the DTL constructed by the Generating Company, the relevant extract of the SoR of CERC Tariff Regulations, 2009, relied upon, is reproduced below for ease of reference:

“20. O&M expenses for Thermal Generating Station{Regulation 19(a) to (e)}

20.3 ***The Operation & Maintenance cost for the purpose of tariff covers expenditure incurred on the employees including gratuity, CPF medical, education allowances etc, repair and maintenance expenses including stores and consumables, consumption of capital spares not part of capital cost, security expenses, administrative expenses etc. of the generating stations, corporate expenses apportioned to each generating stations etc.*** *but exclude the expenditure on fuel i.e. primary fuel as well as secondary and alternate fuels."*

[Emphasis Added]

17. We note here that the CERC Regulations are not a binding Regulations for the State Commission, it can only be a guiding principle to the State Commission, therefore, reliance on CERC Regulations can be best be considered as guiding norms.

18. The Appellant further submitted that on a plain reading of CERC Tariff Regulations 2009, it is evident that it does not provide specifically for O&M expenses for DTL, however, regarding various projects having such requirement, the CERC has allowed O&M expenses for the DTL on the ground that if the same is not allowed then it will result in under recovery for the generator, the Appellant placed reliance upon the Order dated 11.03.2010 passed in matter titled *NTPC Sail Power Company Limited vs Electricity Department, UT of Dadra & Nagra Haveli and Others* in Petition No. 308 of 2009 wherein it was held as under:

"51. ***The petitioner has submitted that O&M charges for dedicated transmission lines and sub-stations /bays for captive power generating station has not been provided in the O&M expenses for thermal power generating stations under the 2009 regulations specified by the Commission****. Hence, the petitioner has claimed the following O&M expenses for the dedicated transmission line:*

……

52. The petitioner has submitted that out of the 7 no. of bays for associated transmission system, 3 no. of bays fall within the side of the petitioner and the rest 4 no. of bays fall within the Raipur sub-station of Power Grid Corporation of India (PGCIL) for connection to the double bus scheme. ***The petitioner has also submitted that the assets included in the 4 bays at Raipur sub-station belonged to the petitioner and it has awarded the O&M contract to PGCIL for O&M of these 4 bays. The submission of the petitioner is found to be in order and the O&M expenses claimed is allowed.***

[Emphasis Added]

19. The Appellant also argued that the MPERC in passing the Impugned Order has failed to appreciate that the cost of DTL is to be fully serviced through the Tariff, as any under recovery with regards to the cost of installing and maintaining the DTL will result in significant drop in the Return on Equity allowed in the tariff of the Appellant and the project of the Appellant will not be commercially viable.

20. The Respondent No. 2 (in short "R-2"), MPPMCL submitted that, under

the provisions of Section 10 of the Act, the Generating Company is required to construct DTL for evacuation of the Power generated in the Power Station, in the present case the Article 3.2(ii) of the PPA Dated 05.01.2011 was suitably amended by First Amendment Dated 30.07.2013 to align the above provision with Section 10 of the Act, consequently, the Appellant constructed the 400 KV DTL and the Capital Cost incurred is allowed by the MPERC to the Appellant.

21. We are not satisfied with the above contention of the R-2, section 10(1) of the Act provides that *"Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.",* however, every generating station is not bound to establish a DTL, even in the State of Madhya Pradesh, no generating station has built a DTL except in the instant case, in fact the DTL can be built by a generating station or a captive generating plant, if required, for evacuation of power, without obtaining a licence for transmission under the provisions of the Act.

22. It is also important to note here that the extant provisions in the PPA provided that the responsibility of establishing the evacuation system, from the delivery point i.e. the interconnection point at the generating station switchyard, is that of the Respondents, however, the seller i.e. the Appellant, contrary to such a provision, has built the DTL for facilitating evacuation of power.

23. Further, informed that, in compliance to the directions contained in order dated 06.02.2013 passed in Petition No. 81 of 2012 filed before the State

Commission by the Appellant herein, the Appellant and the Respondents executed the "First Amendment" dated 30.07.2013 to the PPA, the amended Sub-Article 3.2 (ii) of PPA dated 05.01.2011 reads as below:

> *"3.2. Satisfaction of Conditions Subsequent*
>
> ***(i)****…..*
>
> ***(ii)*** *The Procurer shall establish at its cost or ensure the availability of necessary evacuation infrastructure through CTU/ STU or any other agency beyond the Interconnection Point, necessary for evacuation of the Contracted Capacity at least 210 days prior to COD."*
>
> *[Emphasis Added]*

24. Also submitted that in order dated 12.12.2012 passed by MPERC in Petition No. 40 of 2012 filed by the Appellant for "Determination of Provisional Tariff for 2x210 MW coal based project at Bina", the MPERC, after examining the provisions of the Article 4.8 of the PPA with respect to the provisions of Electricity (Removal of Difficulty) Fifth Order, 2005, has come to the conclusion that the 400 KV DTL is part of the generation system, the relevant extract is quoted as under:

> *"26. At the outset, it is expedient to dispose of the issue related to transmission cost raised by both, the Energy Department, GoMP and Respondent No.1. The Commission is of the view that the*

contentions of neither has any merit for consideration at this stage since the subject petition for determination of generation tariff is before the Commission pursuant to the same PPA wherein the provision regarding "Interconnection and Transmission Facilities" under Para 4.8 provides for sharing of the cost of dedicated Transmission line of 400 kV laid by the petitioner for evacuation of contracted capacity as decided mutually between the petitioner and GoMP. Such provisions in PPA which have bearing on the cost components in the subject petition may not be left unresolved to create any dispute for the future since the PPA was also filed with the Commission for approval.

27. It would be relevant here to refer to the Electricity (Removal of Difficulty) Fifth Order, 2005. The preamble to this Order states, interalia,:

> *"And whereas a dedicated transmission line in terms of sub-section (16) of section 2 of the Act is an electrical supply line for point-to-point transmission for connecting a captive generating plant or a generating station to any transmission line or sub-stations or generating stations or the load centre, as the case may be;*
>
> *And whereas such a dedicated transmission line is neither a transmission line in terms of sub-section (72) of section 2 of the Act nor it is a distribution system connecting the point of a*

connection to the installation of consumer in terms of sub-section (19) of section 2 of the Act;"

28. Clause 2 of this Order also specifically provides as follows :

"A generating Company or a person setting up a captive generating plant shall not be required to obtain license under the Act for establishing, operating or maintaining a dedicated transmission line, if it complies with the following .....".

29. It follows therefore, that such dedicated transmission line would be a part of the generation system, if it is erected by the Generating Company. ***Obviously, the generation tariff would then have to be decided after taking into account the costs incurred for the construction of such dedicated transmission lines.***

30. A reading of sub-section (16) of section 2 of the Act would lead to no other conclusion. The argument that transmission tariff should be dealt with separately is in this context without basis. Transmission tariff can only be determined in case of a transmission licensee. ***It might be noted that most PPAs that the Respondent has executed with IPPs provide for evacuation of electricity ex-bus bar by the Respondent. In this peculiar case, the Generating Company cannot be deprived of its lawful dues under any garb. In view of the abovementioned facts, the Energy Department, GoMP and the parties in the subject***

***petition are directed to resolve this issue in terms of PPA before the final tariff petition is filed in the matter**.*

25. Also, the MPERC, in Para 4.13 of Order in Petition No. 40 of 2012 following is recorded by the MPERC:

"4.13 Vide additional submission dated 27th June' 2014, the petitioner submitted the following in response to the above:

> *"The Petitioner humbly submits that the Petitioner vide its letter dated, 22nd September, 2012, 3rd August, 2013, 5th November, 2013 and 6th February, 2014, has requested the Government of Madhya Pradesh, to allow the cost of entire transmission line and bay at Powergrid S/s, to be a part of Project Cost. The consent is awaited. Copy of request letters attached as Annexure A-23."*

4.14 Vide order dated 4th July, 2014, the Commission directed Energy Department, GoMP to make a note of the issue pertaining to cost of transmission line associated with Bina Thermal Power Plant and ensure that the resolution of the GoMP, Energy Department on this issue be submitted to the Commission by 18th July, 2014.

…….

……

4.17 In response to the above directives, MPPMCL and GoMP submitted the following :

…..

…..

GoMP's Response

Vide letter dated 13th August, 2014, Deputy Secretary, Energy Department, GoMP submitted the following:

"it is to intimate that Government of Madhya Pradesh has resolved as under, in the matter regarding sharing of cost of transmission line incurred on 2x250 MW coal based Power Project at Bina, District Sagar in terms of provisions under Power Purchase Agreement (PPA) entered with M/s. Jaiprakash Power Ventures Co. Ltd.:

(i) At present total cost of the 400 kV dedicated double circuit transmission line/ system constructed from Bina Power Station to 400 kV Sub Stations of MPPTCL at Bina and of PGCIL be included in the project cost for the purpose of determination of tariff by Appropriate Commission for the power to be generated from the above project.

(ii) At the time of COD of units of Phase-II, the cost of common facilities, including the transmission system, be appropriated between Phase-I and Phase-II. As directed, it is requested to kindly consider the

aforesaid submission for taking further decision in the subject cited matter."

26. Therefore, argued that the Appellant itself vide its letter dated 22.09.2012, 03.08.2013, 05.11.2013 and 06.022014, had requested the Government of Madhya Pradesh (GoMP), to allow the cost of entire transmission line and bay at Powergrid S/s, to be a part of Project Cost, which in turn was agreed by GoMP, consequently, the Appellant constructed the 400 KV DTL and the entire Capital Cost of the same has been paid by the Answering Respondent to the Appellant and the said DTL has become the integral part of the Generation System.

27. Apart from above, this Tribunal in its judgment titled ***The Chairman TNEB, Tamil Nadu Electricity Board & Ors. Vs. Ind Barath Thermal Power Ltd. & Ors.,*** Appeal No. 145 of 2011 has held that it is the duty of the generating company to establish a DTL and it is neither a transmission line in terms of the definition under Section 2(72) of the Electricity Act 2003 nor a distribution system in terms of the definition of Section 2(19) of the Act, the relevant portion of the above said judgment is quoted below:

"14. The perusal of the above provision in the repealed 1948 Act would make it clear that under that Act, the generating company was merely required to establish main transmission lines as may be required to be established by the competent Government. In other words, the Government may require or may not require the generating company to establish main transmission line. On the

contrary, Section 10 of the 2003 Act mandates that generating company shall establish, operate and maintain the dedicated transmission lines connected therewith in accordance with the provisions of this Act. Thus, the Section 10 of the 2003 Act becomes mandatory by which the generating company is mandated to construct its own dedicated transmission lines which connect the substation of the Appellant.

…..

…..

18. Reading of the above order would indicate the following features:-

1) It is the duty of the generating company to establish a dedicated transmission line.

2) Dedicated transmission line is not a transmission line in terms of the definition under Section 2(72) of the Act. Similarly, the dedicated transmission line is not a distribution system in terms of the definition of Section 2(19) of the Act.

3) ……

19. …..

….

…..

50. Summary of Our Findings

i) Section 10 of the Act read with the Electricity (Removal of difficulty) fifth order, 2005 makes it clear that it is the duty of the generating company to establish the dedicated transmission lines

ii) …….

51. In view of our above findings, the impugned order dated 20th April, 2011 is set aside. It is declared that the generating company is governed by Section 10 of the Electricity 2003 Act and as such Generating Company alone is liable to construct transmission line at its own cost. It would, therefore, be appropriate to direct the Respondent Generating Company to get the dedicated transmission lines constructed at its own cost as per Section 10 of the 2003 Act. Accordingly directed.

52. In order to overcome the apprehended difficulty of laying down dedicated transmission line as per the mandate of Section 10 of the Act and avoid further delay, the generator may take the help of the Appellant transmission licensee to get the dedicated transmission lines erected by the Appellant on deposit work basis paying the full cost."

28. Further, argued that Section 10 of Electricity Act 2003 mandates that Generating Company shall establish, operate and maintain DTLs connected

therewith in accordance with the provisions of the Act, also, once the DTL is constructed by the Generator, the same becomes part of the Generation Project, the determination of the Generation Tariff is governed by the extant Tariff Regulations framed and notified, which also contain operation and maintenance expenses for the entire Generation Project/ Plant on the normative basis (Rs. per MW), in the 2012 Generation Tariff Regulations *(also in the subsequent Generation Regulations)*, there is no separate provision for O&M expenses for individual components of the Power Project (including DTL).

29. Also submitted that the Appellant accepted the responsibility of constructing DTL for evacuation of Power from the interconnection point in Bina Thermal Power Station to the Switchyard of the State Transmission Utility, knowing fully well the existing provisions of the Generation Tariff Regulations, which were never challenged, further, the Capital Cost for establishing 400 KV DTL was agreed to be shared in accordance with Sub-Article 4.8 of the PPA dated 05.01.2011 *(subject to First Amendment Dated 30.07.2013)*.

30. Also argued that the MPERC's 2012 Generation Tariff Regulations, were framed under Section 181 of Electricity Act 2003 for determination of Generation Tariff, DTL is admittedly a part of Generating Station, and, the O&M expenses are allowed on normative basis under Regulation 36 of the said Regulations, the Appellant has failed to demonstrate that expenses incurred in O&M of 400 KV DTL are over and above the normative O & M Expenses allowed by the MPERC for the entire Power Plant.

31. Further, submitted that contrary to the claim of the Appellant, the O&M

Expenses being allowed on the normative basis during FY 2014-15 and 2015-16 are far above the actual O & M expenses incurred by the Appellant, therefore, separate claim of minor O&M Expenses purportedly on 400 KV DTL is totally unjustified, hence rightly disallowed by the MPERC.

32. Additionally, submitted that as per the technical scrutiny 400 KV transmission line having Twin Moose Conductors would have been adequate for handling entire planned capacity of the Bina Thermal Power Station (5 x 250 MW i.e. 1,250 MW (Installed) and 1,170 MW Net). however, the DTL was constructed using Quad Moose Conductors, which is double the capacity *(Appx. 2,000 MW)*, at a substantially higher Capital Cost, also, Phase-II of the Project has not come up, therefore, currently the maximum share of utilization of the DTL for supply of power to the Respondent is only 15.75 % (Appx. 320 MW), the MPERC has allowed O & M Expenses for Bina Thermal power Station (2 x 250 MW) in accordance with provisions of Regulation 36.1 of 2012 Generation tariff Regulations.

33. It is important to take a note of Article 4.2 (Procurer's Obligations), which provides that the Procurer i.e. the Respondents herein are responsible, at their own cost and risk, for ensuring the availability of Interconnection Facilities for evacuation of Contracted Capacity from the Delivery Point i.e. the interconnection point of the Power Station switchyard bus and transmission line for evacuation purpose, it is also to note that the Interconnection facilities is defined as facilities on the Procurer's side of the Delivery Point for receiving and metering Electrical Output and include all other transmission lines and associated equipment's, transformers and switching equipment and protective

devices, as such the evacuation beyond the defined delivery point is through the transmission system including the DTL.

34. Therefore, establishing, operating and maintaining the evacuation system was the responsibility of the Respondents herein, and in case such a system would have been setup by the Respondents, the capital cost alongwith the O&M expenses would have been allowed, however, in the instant case such an expense is limited to capital cost only.

35. Further, at the time of signing the original PPA, such a responsibility was of the Respondents, and, as such the O&M charges for the generating station were exclusively determined for the generating station excluding the DTL, as also the case for all other generating station in the State of MP, thus , it cannot be disputed that the Normative O&M expenses are determined on the basis of per MW capacity of the generating station, and in the State of MP, none of the generating stations have built the DTL as such the Normative O&M expenses are determined without considering the DTL as one of the components of the generating station, prior to the instant case,

36. Thus, it can evidently be said that the O&M expenses by the State Commission are determined considering all the generating stations in the State, which, certainly, do not have the responsibility of operating and maintaining the DTL.

37. Also, the Normative parameters are determined on the basis of past expenditure incurred, however, in the State of Madhya Pradesh, as there was

no precedent where the DTL is built by a generating station, even the State Commission could not record any evidence or data confirming any material to show that the normative determination of O&M of the generating station, covers the O&M towards the DTL.

38. Undisputedly, the normative parameters are determined with reference to a specific tariff element and based on the position prevalent at the time of the normative determination, any succeeding changes may affect the basis on which the norms had been fixed with reference to a particular tariff element, and in case, such subsequent developments are not on account of any default by the utility, the normative parameters need to be revised to adjust for the impact.

39. Further, the State Commission vide order dated 12.12.2012 passed in Petition No. 40 of 2012 has held that:

> *"-----Para 4.8 provides for sharing of the cost of dedicated Transmission line of 400 kV laid by the petitioner for evacuation of contracted capacity as decided mutually between the petitioner and GoMP. Such provisions in PPA which have bearing on the cost components in the subject petition may not be left unresolved to create any dispute for the future since the PPA was also filed with the Commission for approval."*
>
> ------
>
> *--- Obviously, the generation tariff would then have to be decided after taking into account the costs incurred for the construction of such dedicated transmission lines.*

----- It might be noted that most PPAs that the Respondent has executed with IPPs provide for evacuation of electricity ex-bus bar by the Respondent. In this peculiar case, the Generating Company cannot be deprived of its lawful dues under any garb. In view of the abovementioned facts, the Energy Department, GoMP and the parties in the subject petition are directed to resolve this issue in terms of PPA before the final tariff petition is filed in the matter."

40. The State Commission realising the above has rightly observed that ***"Obviously, the generation tariff would then have to be decided after taking into account the costs incurred for the construction of such dedicated transmission lines."*** and also*, "It might be noted that most PPAs that the Respondent has executed with IPPs provide for evacuation of electricity ex-bus bar by the Respondent. In this peculiar case,* ***the Generating Company cannot be deprived of its lawful dues under any garb****."*

41. We find merit in the aforesaid observation, however, the decision of the State Commission rejecting the O&M charges on the pretext of absence of any extant provision in the Tariff Regulations, 2012 cannot be agreed to and has to be rejected, as in case of absence of certain provisions, the State Commission ought to have used its Regulatory Powers to provide justice to the case.

42. It is well settled law that the State Commission, in absence of framing or existence of a Regulation, can always exercise its powers under Section 62 read with Section 86 of the Act, the legal proposition has been affirmed by the

Constitutional Bench of the Supreme Court of India vide Judgment in the case of PTC India Ltd. Vs. CERC & Ors. (2010) 4 SCC 603 [Para 55 & 57] which was considered by this Tribunal in Appeal No. 86 of 2014 titled as Chhattisgarh State Power Distribution Co. Ltd. & Ors. vs. CSERC & Ors. [Para 19.5];

43. It is also well settled that the legitimate cost/ all the reasonable expenditures should be allowed to a Generator after prudence check, it is pertinent to mention that such Generating Stations are in fact governed by principles enumerated under Section 61 of the Electricity Act, 2003.

44. We are inclined to accept the submission of the Appellant that the Central Commission's Regulations *pari materia* to the Tariff Regulations, 2012 of the State Commission, which certainly are not binding principle but are guiding principle, and also do not provide specifically for O&M Expenses for DTL, however, the Central Commission in regards to various projects having such requirement provided the same under its Regulatory Powers, further, many of the State Commissions including MPERC in many cases followed the CERC Tariff Regulations, 2009 in order to formulate MPERC Regulations 2012, hence, in the instant case, it should have considered the O&M expenses on similar lines as allowed by the CERC, the relevant extracts of the CERC Regulations and the State Commission Regulations are placed as under:

CERC Regulation

*"(28) '**operation and maintenance expenses' or 'O&M expenses' means the expenditure incurred on operation and maintenance of the project, or part thereof, and includes the***

expenditure on manpower, repairs, spares, consumables, insurance and overheads*;*

State Regulation

"36. Operation and Maintenance Expenses of Thermal Power Stations including MPPGCL's

36.1 ***The Operation and Maintenance expenses admissible to existing thermal power stations comprise of employee cost, Repair & Maintenance (R&M) cost and Administrative and General (A&G) cost****. These norms exclude Pension, Terminal Benefits and Incentive, arrears to be paid to employees, taxes payable to the Government and fees payable to MPERC. The Generating Company shall claim the rate, rent & taxes payable to the Government, cost of chemicals and consumables, fees to be paid to MPERC and any arrears paid to employees separately as actuals……*

45. From the above, it can be seen that under similar provisions, the Central Commission has rightly invoked its Regulatory Powers to provide justice by prudently making up for the gap arisen due to absence of certain provision in the relevant regulations *inter-alia* granting O&M expenses over and above the normative expenses for a DTL.

46. We also decline to accept the contention of the R-2 that the Appellant has already been granted higher O&M charges as against the actual and therefore, need not be granted additional O&M charges, on the contrary, we are inclined to accept the Contention of the Appellant that the R-2 has misconstrued the

concept of norms provided in the Tariff Regulations, the contention appears to be that the Appellant ought to have used the gains due to higher efficiency in O&M, it is completely contrary to the principles of tariff determination and negates the whole purpose of normative approach, this Tribunal vide its judgment titled *U.P. Power Corporation Ltd. V. Central Electricity Regulatory Commission & Ors. 2011 ELR (APTEL) 0858* has held as under:

> *"10……..Thus, each element of the Tariff has to be determined on the norms following commercial principles, encouraging competition and safeguarding the consumer interest and at the same time ensure recovery of the cost of electricity in a reasonable manner. Accordingly, the Central Commission by a reasoned order has decided to allow O & M expenses to the four gas stations of NTPC as applicable to Gas Power Stations without warranty spares. It is expected that if NTPC performs better than the operational norms, it will be rewarded for efficiency and if it performs at lower than normal parameters, it will have to bear the consequential loss. Thus, there is no force in the argument of the appellant that before allowing the enhanced O & M expenses, the Central Commission shall check whether the actual ROE is less than the normative ROE and then only allow the enhanced O & M expenses. This is not as per the scheme of the Regulations."*

47. Further, this Tribunal vide judgment dated 31.07.2009 in Appeal No. 42 and 43 of 2008 (*Haryana Power generation Corporation Ltd. vs. Haryana Electricity Regulatory Commission & Anr*.) has held as under:

"34. In our opinion, once the State Commission adopts normative approach, it is neither in the interest of the long term development of the electricity industry in the State nor is a fair play to the appellant to deny the benefits of the normative approach to the appellant. The very purpose of normative approach is that the parties are informed of the benchmarks beforehand and that if they are in a position to better the benchmarks, they are entitled to the benefits unless there is some unhealthy practice adopted by them. In the case before us, if the appellant is able to raise resources below the benchmark rates, it indicates efficiency on the part of the appellant for which it should be allowed benefit in terms of the norms. Otherwise, the purpose of normative approach would get defeated and the appellant may not remain adequately motivated to work with the desired efficiency. It is true that the consumers should not be burdened with unnecessary costs, but the same is equally applicable to the appellant when it is denied recovery of costs incurred by it if the same is not in line with the norms."

48. In the light of above, we are satisfied the Appellant is entitled for additional O&M expenses for the DTL established by it in addition to the O&M expenses granted as per the relevant Regulations, accordingly, the issue is decided in favour of the Appellant.

Issue 2- Grossing up the base rate of RoE with MAT

49. The Appellant has argued that the MPERC in the Impugned Order has refused to gross up Return on Equity (RoE) with MAT as per Regulation 22 of MPERC Tariff Regulations, 2012 *inter-alia* has failed to appreciate that non-payment of tax by the Appellant is a result of loss suffered by the other Generating Companies of Appellant i.e., J.P. Nigrie Project, added that Regulation 22 of MPERC Tariff Regulations 2012 deals with RoE, wherein Regulation 22.1 states that RoE shall be computed on paid up equity capital determined in accordance with Regulation 21, Regulation 22.3 states that the rate of RoE shall be computed by grossing up the base rate with the normal tax rate for the year 2012-13 applicable to the generating company and the First Proviso to Regulation 22.3 states that effective tax rate is calculated as per actual tax paid as per relevant finance acts by the concerned generating company.

50. It is his submission that the MPERC has passed the Impugned Order in complete disregard to the settled principle, reliance is placed upon Judgment passed by this Tribunal titled ***Tata Power Company Limited vs MERC*****, Appeal No. 104, 105 and 105 of 2012** wherein it was held that each regulatory business is to be treated as if in a water tight compartment and the consumer of the regulated business must not be exposed to the risks of other regulated business and any other non-regulated business and that income tax assessment has to be made on stand-alone basis for each of the regulated business of the entity so that the consumers are fully insulated and protected from the income tax payable from other regulated or unregulated businesses of the entity, the relevant extract of the Judgment is reproduced below:

"53. For example, when on standalone basis the regulated business has taxable income to be taxed at normal rates, there may be losses/tax exemptions in other businesses which may result in overall taxable income being less than the regulated taxable income and, hence, actual tax liability for all businesses being less than that of regulated business on standalone basis. ***In case, actual tax liability is allowed by the regulator whether in full or in proportion of profit of regulated business, it obviously amounts to less than due tax allowance for regulated business due to exemptions/losses of other business being utilised for subsiding the regulated business, which is not permissible as per the above Judgment. The impact is more pronounced when the overall taxable income becomes so small or even negative that the tax rate applicable is MAT, which not only artificially reduces the tax liability for regulated business due to lower rate, but also creates an incorrect impression that this tax allowed at MAT rate is to be reversed in future as MAT credit allocating MAT credit. This is obviously not permissible and for giving effect to the said Judgment in Appeal No. 251 of 2006 tax computation for regulated business has to be done on standalone basis at normal rates even though it may result into tax allowance higher than actual tax payment for overall business.***

…….

57. ***In the present case, the State Commission has worked out the book profit of each segment separately. It observed that the Appellant has paid MAT. It did not worked why and how the tax***

liability of the company, under normal income tax rates, got reduced to such a level that it came under MAT*. Was it due to regulated business or unregulated business? Was the regulated business enjoying any tax holiday or accelerated depreciation or other tax deductions? Book Profit calculations in the Impugned order do not reflect any such deductions in the regulated businesses of G, T & D. Obviously, it was due to other business (unregulated by MERC) of the Appellant which caused massive permissible deductions. The benefit of such deduction must be shared by the beneficiaries of such business only and not by the consumers of regulated business. Presently, those businesses may be getting tax rebates due to tax holidays or accelerated depreciation.* ***But in the future at the end of tax holidays and reduced depreciation, these deductions would not be available to those companies and their tax liability would increase. Under those circumstances, the tax burden of the unregulated business would not be allowed to be shared by regulated business of MERC."***

[Emphasis Added]

51. The contention of the Appellant is that the following points emerge for consideration for treatment of tax which clearly show that the impugned findings of the MPERC are not correct:

(a) Each regulatory business is to be treated as if in a watertight compartment and the consumers of the regulated business must not be exposed to the risks of other regulated business and any other non-regulated business.

(b) Income Tax assessment has to be made on stand-alone basis for each of the regulated business of the entity so that consumers are fully insulated and protected from the Income Tax payable from other regulated or unregulated businesses of the entity.

(c) Regulated businesses within the jurisdiction of the SERC should neither subsidize nor get subsidy from other businesses of such entity whether unregulated or regulated by the same or different regulator.

52. The Appellant added that the generating station has recorded a profit of Rs 111.17 Crores during FY 2015-16, therefore, the Appellant has rightly claimed RoE by grossing up with MAT, however, on account of break up and allocation of income, expenditure, and profit/loss of Appellant Company among all its power stations has resulted in the overall loss of Rs 294.50 Crore for the FY 2015-16, whereas, this generating station has recorded a profit of Rs 99.23 Cr during FY 2016-17, whereas, on account of break up and allocation of income, expenditure and profit/loss of Appellant Company among all its power stations has resulted in the overall loss of Rs 760.18 Crore for the FY 2016-17.

53. Also informed and pleaded that Bina Thermal Power Plant is not a corporate legal entity/company, as it is only a division/Generating station of the Appellant and hence it is not liable or eligible to pay MAT due to overall suffered by the company, and for this reason, the payment towards MAT for FY 2015-16 has been shown as 'NIL' in the annual audited accounts of Jaypee Bina, therefore, the MPERC ought to have allowed RoE by grossing up with MAT as envisaged under Regulation 22 of MPERC Tariff Regulations, 2012.

54. On the contrary, the Respondent No.1, the State Commission has submitted that the Appellant has filed an application dated 02.02.2021, seeking amendment of the captioned appeal, being IA No. 186 of 2021, which *inter-alia* was allowed by this Tribunal on 08.04.2022 after which the Appellant has filed the amended appeal, accordingly, the State Commission is filing the present Written Submission only to the new grounds, raised by the Appellant in the amended appeal, in addition to the detailed Written Submissions dated 06.03.2018 filed by the State Commission and the same may be treated as the part and parcel of the present Written Submission.

55. However, during the arguments, the oral arguments were limited to the issue of grossing up of RoE, on being asked, the State Commission submitted that the State Commission is adopting the submissions of Respondent No. 2 on the other two issues.

56. Further, submitted that the State Commission has determined RoE in accordance with the relevant provisions of the MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2012 ("MPERC Tariff Regulations, 2012"), the relevant regulations are quoted as under:

> ***"22 Return on Equity:***
>
> *22.1 Return on equity shall be computed in rupee terms, on the equity base determined in accordance with Regulation 21.*

22.2 Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per Regulation 22.3 of this Regulation:

Provided that in case of Projects commissioned on or after 1st April, 2013, an additional return of 0.5% shall be allowed if such Projects are completed within the timeline specified in Appendix-I :

Provided further that the additional return of 0.5% shall not be admissible if the Project is not completed within the timeline specified above for reasons whatsoever.

22.3 The rate of return on equity shall be computed by grossing up the base rate with the normal tax rate for the Year 2012-13 applicable to the Generating Company:

Provided that return on equity with respect to the actual tax rate applicable to the Generating Company, in line with the provisions of the relevant Finance Acts of the respective Year during the Tariff period shall be trued up separately.

22.4 Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where t is the applicable tax rate in accordance with Regulation 22.3 of this Regulation.

Illustration.-

(i) In case of Generating Company paying Minimum Alternate Tax (MAT) say @ 20.01% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.2001) = 19.377%

(ii) In case of Generating Company paying normal corporate tax say @ 33.99% including surcharge and cess: Rate of return on equity = 15.50/ (1-0.3399) = 23.481%."

57. Accordingly, the State Commission must gross-up the base rate of RoE with the effective tax rate of the respective financial year, i.e., the actual tax paid by the generating company in the said year, however, in the concerned financial year, i.e., 2015-16; the Appellant's Annual Audited Accounts indicated that it had paid 'nil' amount towards tax, despite that the Appellant had claimed Return on Equity by grossing up MAT, accordingly, the State Commission directed the Appellant to submit detailed break up of plant wise income and expenditure and tax on profit, alongwith, the supporting documents in case the Appellant was eligible for MAT during 2015-16 in terms of the Tariff Regulations, 2012.

58. Further, added that the Appellant vide affidavit dated 25.04.2017 had submitted that it had suffered an overall loss of INR 294.50 crores (including all the power stations operated by the Appellant), the relevant extract of the affidavit is placed as under:

"The Petitioner would humbly like to submit that since the Generating Station has recorded a profit of 111.17 Crores during the Year 2015-16, the Petitioner has accordingly claimed ROE grossing up with MAT. The break up and allocation of income, expenditure and profit/ loss of M/s. JPVL among all its power stations duly certified by Statutory Auditor to arrive at overall loss of ' 294.50 Crores in M/s. JPVL is attached as Annexure-8."

59. Consequentially, it was observed that the payment towards income tax or MAT was 'nil', for generating company as a whole as well as for Bina Thermal Power Plant, i.e., the project for which the tariff petition was filed, also the consolidated Annual Audited Accounts for generating company recorded overall loss of Rs 294.50 Crore even though Bina Thermal Power Plant was earning profit, no income tax had been paid by the Appellant, thus, the Appellant had not paid any tax for FY 2015-16.

60. Accordingly, the State Commission passed the Impugned Order disallowing grossing up of RoE as claimed by the Appellant, the relevant extract of the Impugned Order is as below:

> "60. On *perusal of the aforesaid response filed by the petitioner on MAT, the Commission observed the following:*
>
> *i. The petitioner filed the Annual Audited Accounts including balance sheet, profit and loss accounts and annexure thereto, of Jaypee Bina Thermal Power Plant (JBTPP) along with Consolidated Financial Statement of Jaypee Power Ventures Limited (JPVL) as on 31st March, 2016.*
>
> *ii. The Consolidated Financial statement of Jaypee Power Ventures Limited (JPVL) comprises of the financials of following power plants also including 500 MW Bina TPS in the subject petition:*
>
> *a) 300 MW Jaypee Baspa-ll Hydro Electric Project (HEP),*
>
> *b) 400 MW Jaypee Vishnuprayag HEP,*

c) 1091 MW Jaypee Karcham Wangtoo HEP,

d) 500 MW Bina TPS

e) 1320 MW Jaypee Nigrie Super Thermal Power Station.

iii. In FY 2015-16, Generating Company i.e. M/s. Jaypee Power Ventures Ltd. (JPVL) has shown a loss of ' 294.50 Crore in its Books of Account and has not paid any tax, therefore, the grossing up of ROE with MAT is not considerable as the company (JPVL) has not paid income tax.

iv. Moreover, in the Annual Audited Accounts of Bina Thermal Power Plant, the payment towards Income Tax or MAT during FY 2015-16 is shown as NIL. While carrying out the true up exercise, the base rate of ROE is required to be grossed up with the actual tax rate. In the subject matter of Jaypee Bina Thermal Power Plant, the payment towards income tax or MAT is NIL. Thus, the Commission does not find any basis for grossing up the base rate of ROE grossing up with MAT.

61. In view of the observations, the Commission has not considered grossing up the base rate of ROE with MAT. Accordingly, the Return on equity for FY 2015-16 is worked out as given below:

Table 10: Return on Equity for FY 2015-16

Sr. No.	***Particular***	***Unit***	***FY 2016-17***
1.	*Opening Equity Normative*	*Rs. Crore*	*1045.23*
2.	*Normative Equity Addition During the Year*	*Rs. Crore*	*6.44*
3.	*Closing Normative Equity*	*Rs. Crore*	*1051.68*

4.	*Average Normative Equity*	*%*	*1048.46*
5.	*Base rate of Return on Equity*	*Rs. Crore*	*15.50*
	Return on Equity	*Rs. Crore*	*162.51*

61. Accordingly, the State Commission was bound to disallow grossing up of Return **on Equity with MAT, in compliance to the provisions of the MPERC Tariff Regulations, 2012 which clearly state that return on equity will be grossed up with effective tax rate and that effective tax rate shall be considered based on actual tax paid in the respective financial year, therefore, as t**he Appellant having not paid any tax, despite the profit earned by Bina Thermal Power Plant, cannot claim grossing up of Return on Equity, in accordance with the provisions of the applicable regulations.

62. Further, submitted that in Annual Audited Accounts for FY 2015-16 for Bina thermal power station and the corporate balance sheet of the Appellant generating company, the Appellant had neither paid any Tax nor booked/recorded any profits in the balance sheet of generating company.

63. The Respondent No. 2, MPPMCL submitted that the MPERC has determined Return on Equity in accordance with the relevant provisions of the 2012 Generation Tariff Regulations, the Appellant argued that Return on Equity (RoE) for JP Bina Project must be grossed up with Minimum Alternate Tax (MAT) at the rate of 21.34 % even when the “NIL” tax has been paid during FY 2015-16, also contended that non-payment of tax by the Appellant is a result of loss suffered by the other Generating Station of the Appellant i.e. JP Nigrie Project, accordingly, the MPERC is right in not grossing up the MAT rate with

RoE to the Appellant because Regulations do not provide for grossing up of MAT in cases where there is no liability of tax to the Generating Company, reliance was placed on Regulation 22 of 2012 Tariff Regulations providing method of computing Return on Equity (RoE) based on applicable tax rate.

64. Further, informed that along with Petition No. 62 of 2016, the Appellant had filed Annual Audited Accounts including Balance Sheet, Profit and Loss Account of Jaypee Bina Thermal Power Plant (JBTPP) along with Consolidated Financial Statement of Jaypee Power Ventures Limited (JPVL) as on 31.03.2016, from where it is observed that for the FY 2015-16, the Appellant i.e. M/s Jaypee Power Ventures Ltd. (JPVL) has shown a loss of Rs. 294.50 Crore in its Books of Account and has not paid any tax, besides, in Books of Accounts submitted, the amount of Income Tax or MAT paid was shown as "NIL", consequently, as per Regulation 22 of 2012 Tariff Regulation, the base rate of RoE is to be grossed up with **actual tax rate**, which in the present case is admittedly **"NIL"**, thus, the MPERC held that grossing up of Base Rate of RoE with MAT is not considered as the Company (JPVL) has not paid income tax.

65. The MPPMCL, in view of above, argued that the contention of the Appellant in respect of the issue of Grossing of RoE with MAT, has no merit and liable to be rejected and the Order Dated 21.06.2017 passed by the State Commission in Petition No. 62 of 2016, does not deserve to be interfered by this Tribunal.

66. From the above, it is clear that the submissions of the contending parties are wholly based on the interpretation of Regulation 22 of the 2012 Tariff

Regulations, inter-alia, whether grossing up of RoE with MAT has to be carried out on the basis of the actual tax paid by the Appellant or as per the applicable tax.

67. Further, the other issue is whether the accounts of the generating station in dispute have to be considered independently or integrated with main parent company for the purpose of RoE under the provisions of the Electricity Act, 2003.

68. The Respondents have contended that Regulation 22.3 provides that the RoE has to be grossed up with actual tax paid whereas the Appellant has contended that RoE is to be grossed up with the applicable tax payable.

69. Undisputedly, the accounts of the Appellant's generating station have to be considered independent of the accounts of the parent company, this Tribunal in ***Tata Power Company Limited vs MERC*****, Appeal No. 104, 105 and 105 of 2012 h**as held that each regulatory business is to be treated independently, exclusive of other businesses of the company, *further, in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis*, the relevant extract of the judgment is reproduced below:

> *"53. For example, when on standalone basis the regulated business has taxable income to be taxed at normal rates, there may be losses/tax exemptions in other businesses which may result in overall taxable income being less than the regulated taxable income and,*

hence, actual tax liability for all businesses being less than that of regulated business on standalone basis. ***In case, actual tax liability is allowed by the regulator whether in full or in proportion of profit of regulated business, it obviously amounts to less than due tax allowance for regulated business due to exemptions/losses of other business being utilised for subsiding the regulated business, which is not permissible as per the above Judgment. The impact is more pronounced when the overall taxable income becomes so small or even negative that the tax rate applicable is MAT, which not only artificially reduces the tax liability for regulated business due to lower rate, but also creates an incorrect impression that this tax allowed at MAT rate is to be reversed in future as MAT credit allocating MAT credit. This is obviously not permissible and for giving effect to the said Judgment in Appeal No. 251 of 2006 tax computation for regulated business has to be done on standalone basis at normal rates even though it may result into tax allowance higher than actual tax payment for overall business.***

…….

57. ***In the present case, the State Commission has worked out the book profit of each segment separately. It observed that the Appellant has paid MAT. It did not worked why and how the tax liability of the company, under normal income tax rates, got reduced to such a level that it came under MAT****. Was it due to regulated business or unregulated business? Was the regulated business enjoying any tax holiday or accelerated depreciation or other*

tax deductions? Book Profit calculations in the Impugned order do not reflect any such deductions in the regulated businesses of G, T & D. Obviously, it was due to other business (unregulated by MERC) of the Appellant which caused massive permissible deductions. The benefit of such deduction must be shared by the beneficiaries of such business only and not by the consumers of regulated business. Presently, those businesses may be getting tax rebates due to tax holidays or accelerated depreciation. ***But in the future at the end of tax holidays and reduced depreciation, these deductions would not be available to those companies and their tax liability would increase. Under those circumstances, the tax burden of the unregulated business would not be allowed to be shared by regulated business of MERC."***

58. ***The Tribunal in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis.*** *In Appeal No. 173 of 2011 the Tribunal has provided the methodology for assessing the income tax liability of the licensee.* ***The State Commission did not follow these directions and got carried away with the observations that the utility must not gain or loose on account of income tax made in the context of grossing up of income tax. It simply allocated the actual tax paid by the Appellant, for the company as a whole, in proportion to their respective book profit.***

59. The issue is decided accordingly. The Commission is directed to reassess the Income tax liability of the Appellant as per our findings above and issue consequential orders.

[Emphasis Added]

70. From the afore-quoted judgment, it is clear that the tax assessment of the regulated business must be done on standalone basis and if, tax as per the regulations is to be considered on applicable basis, it cannot be considered on actual basis.

71. In the instant case Regulation 22.3 provides that the rate of return on equity shall be computed by grossing up the base rate with the normal tax rate applicable to the Generating Company, as such the MAT as applicable based on the profit/loss statement of the generating company, and the not the actual tax paid, has to be considered for grossing up RoE, as also held by this Tribunal vide the aforesaid judgment.

72. Accordingly, the Appellant's contention has merit and is allowed, the arguments of the Respondents are declined, the issue is decided in favour of the Appellant.

Issue 3- Inadequate recovery of Capacity Charges

73. The Appellant had claimed Annual Capacity Charge for 68.42% of the installed capacity instead of 65%, further added that the Appellant had entered into multiple PPAs for sale of power from its power plant, as under:

S.No.	PARTICULARS	CAPACITY

1.	Under two parts tariff to MPPMCL	65%
2.	Merchant capacity	30%
3.	GoMP on variable charge	5%
	TOTAL	100%

74. The Appellant claimed that the procurer of 95% of power from Appellant Project will be paying for 100% of the annual capacity charge as the Appellant is supplying 5% power under the PPA dated 20.07.2011 to GoMP on variable charge only, further, mentioned that in various tariff orders passed in case of hydro projects such as 300 MW Baspa II and 400 MW Vishnuprayag HEO, the balance power after reducing the quantum of free energy to the home state is used to recover 100% of the capacity charges, similarly, in the instant case, the capacity charge for the purpose of recovery against the supply of 65% of the installed capacity through PPA dated 05.01.2011 works out to be 68.42% (i.e. 65*100/(100-5)=68.42%) whereas, MPERC has only allowed 65% of the annual capacity charges.

75. The MPPMCL submitted that the Appellant had claimed Annual Capacity Charge of 68.42 % of the installed capacity instead of 65% of contracted capacity *inter-alia* the Appellant had tried to recover capacity charge in respect of its commitment to supply 5% of net capacity at variable charge only to the Government of Madhya Pradesh.

76. Further, submitted that the issue of recovery of Capacity Charges pertaining to supply of 5% concessional energy to Govt. of Madhya Pradesh is no longer res-integra, this Tribunal has already decided the said issue against

the Appellant in its judgement dated 13.02.2017 in the case of ***M/s Jaiprakash Power Ventures Ltd. Vs. Madhya Pradesh Electricity Regulatory Commission and Ors. (Appeal No. 25 of 2016 and IA No. 71 of 2016),*** the relevant part of the judgement is quoted as under:

"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. …….
b. …….

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."

ii. .....

iii. 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.

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.

iii. 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.

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

77. In the light of the aforesaid judgment, the issue stands covered, we, accordingly, decide against the Appellant.

Conclusion

78. As observed and concluded in the preceding paragraphs, the following issues are decided in favour of the Appellant:

(a) Disallowance of Operation and Maintenance Expenditure for 400 KV Dedicated Transmission Line (in short "DTL") incurred by Appellant in view of the findings rendered in order dated 03.06.2016 passed the MPERC for Petition filed by Appellant for FY 2014-15.

(b) Disallowance of the grossing up the base rate of Return on Equity (in short **"**RoE**"**) with Minimum Alternate Tax (in short "MAT") as Appellant payment towards income tax or MAT is NIL.

79. However, the following issue is decided against the Appellant:

(c) Disallowance of recovery of Capacity Charges for 68.42% of the installed capacity.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 283 of 2017, Appeal No. 131 of 2018 and Appeal No. 231 of 2018 have merit and are allowed to the extent as concluded in the foregoing paragraphs, the Impugned Orders dated 03.06.2016, 21.06.2017 and 24.05.2018 passed by Madhya Pradesh Electricity Regulatory Commission in Petition No. 70 of 2015, 62 of 2016 and 57 of 2017, respectively, are set aside to the extent as concluded hereinabove.

The State Commission is directed to pass consequential orders expeditiously, but not later than four months from the date of this judgment.

The Captioned Appeals and IAs, if any are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 22nd DAY OF MARCH, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj