

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 253/MP/2022

Coram:

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 9th May, 2023

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with Articles 11 & 22 of the Pilot Agreement for Procurement of Power dated 25.02.2019 and Pilot Power Supply Agreement dated 26.02.2019 seeking directions to PTC/Haryana Power Purchase Centre to make payment of Rs. 12,64,54,644/- claimed under Tariff Invoice dated 02.05.2020 raised by MB Power for the month of April 2020 in terms of the PPA.

And

In the matter of:

MB Power (Madhya Pradesh) Limited,

Laharpur, Jaithari,

Anuppur-484 330, Madhya Pradesh

.....Petitioner

Vs.

1. Haryana Power Purchase Centre,

2nd Floor, Shakti Bhawan,

Sector-6, Panchkula-134 109, Haryana

2. PTC India Limited,

2nd Floor, NBCC Tower,

15, Bhikaji Cama Place,

New Delhi-110 066

The following were present:

Shri Akshat Jain, Advocate, MBPMPL

Shri Sagnik Maitra, Advocate, MBPMPL

Shri Abhishek Gupta, Advocate, MBPMPL

Shri Ravi Kishore, Advocate, PTC

Shri Keshav Singh, Advocate, PTC

Shri Shubham Arya, Advocate, HPPC

Ms. Poorva Saigal, Advocate, HPPC

Ms. Reeha Singh, Advocate, HPPC

Shri Ravi Nair, Advocate, HPPC

ORDER

The Petitioner, MB Power (Madhya Pradesh) Limited (“MB Power”), has filed the present Petition, *inter-alia*, seeking payment of Rs.12,64,54,644/- unilaterally withheld by the Respondents, PTC/HPPC against the monthly tariff invoice dated 2.5.2020 raised by the Petitioner for the month of April, 2020 along with the applicable interest/Late Payment Surcharge (“LPS”) under the Pilot Power Purchase Agreement (“PPA”) dated 25.2.2019 and Pilot Power Supply Agreement (“PSA”) dated 26.2.2019.

The Petitioner has made the following prayers:

“(a) Direct PTC/HPPC to make payment of amount totaling to Rs.12,64,54,644/- (Rupees Twelve Crores, Sixty-Four Lacs, Fifty-Four Thousand and Six hundred Forty-Four Only) to MB Power, unilaterally withheld by PTC/HPPC against the Monthly Tariff Invoice dated 02.05.2020 raised by MB Power for the month of April 2020 under the PPA dated 25.02.2019 forthwith along with interest/late payment surcharge;

(b) Direct PTC/HPPC to pay interest/late payment surcharge corresponding to such withheld/unpaid monthly charges under Invoice dated 02.05.2020 accrued till the date of making final payments to MB Power in terms of the applicable provisions of the PPA;

(c) Declare that nationwide lockdown on account of Covid-19 Pandemic and the consequent reduction of demand of power does not qualify as Force Majeure for PTC/HPPC under the PPA/PPSA;

(d) Quash and set-aside Force Majeure Notice dated 29.03.2020 issued by PTC/HPPC; and

(e) Pass any such further order as this Commission may deem necessary in the interest of justice.”

Background of the case

2. The Petitioner has developed and operates a 1200 MW coal based thermal power project (“Project”) in District Anuppur in the State of Madhya Pradesh. The Project comprises of two units of 600 MW each. These units i.e. Unit-I and Unit-II of the Project achieved COD on 20.5.2015 and 7.4.2016 respectively.

3. On 10.4.2018, Ministry of Power, Government of India issued Guidelines for procurement of power under Pilot Scheme for medium-term through PFC Consulting Limited (“PFCCL”) as nodal agency and PTC India Limited (“PTC”) as an Aggregator. On 1.5.2018, PFCCL issued Request for Qualification and Request for Proposal for procurement of power under Pilot Scheme for medium term. On 12.10.2018, pursuant to competitive bidding process, PFCCL issued Letter of Award (“LoA”) to MB Power/PTC for procurement of 175 MW power.

4. Consequent to the above, the Petitioner has executed a Pilot Agreement for Procurement of Power (“PPA”) dated 25.2.2019 with PTC for supply of 175 MW power from its Project to Haryana Power Purchase Centre (“HPPC”) through PTC on back-to-back basis for a period of three years. Accordingly, PTC has entered into a Pilot Power Supply Agreement (“PSA”) dated 26.2.2019 with HPPC for onward supply of 175 MW power procured from the Petitioner’s Project. Pursuant to execution of these PPA and PSA, HPPC and PTC entered into a Memorandum of Understanding (“MoU”) dated 26.2.2019 with a back-to-back MoU between PTC and the Petitioner dated 27.2.2019 for supply of power under the PPA and PSA for 8 months in a financial year, namely April to November each year for a period of three years.

Submissions of the Petitioner

5. The Petitioner has mainly submitted as under:

(a) On 24.3.2020, Ministry of Home Affairs, Government of India (“MHA”), in exercise of powers under Section 10(2)(l) of the National Disaster Management Act, 2005, issued guidelines (“MHA Guidelines”) on measures to be taken by the Central Government and the State Governments for containing the spread of Corona Virus/ Covid-19 in the country. In terms of the MHA Guidelines, a



lockdown was imposed in the country and all government, commercial and private establishments were directed to be closed except for those providing essential services. In terms of clause 4(g) of the MHA Guidelines, power generation, transmission and distribution were recognized as essential services and exempted from the lockdown, which were to continue like normal.

(b) On 25.3.2020, Ministry of Power, Government of India (“MoP”), issued a letter to the Secretaries of Power Departments of State Governments stating that power generation and supply is an essential service and, therefore, exempted from the restrictions imposed by lockdown. MoP further stated that since power generation utilities including Ultra Mega Power Projects (“UMPPs”) and Independent Power Plants (“IPPs”) supply inter-State electricity to the grid, their operations were critical for maintaining power supply across the country. Accordingly, MoP requested to ensure that the restrictions of lockdown did not hamper the movement of staff and raw materials for these power plants.

(c) On 27.3.2020, MoP issued an order to the Load Despatch Centres, Electricity Regulatory Commissions, Central Electricity Authority, and all the generating and distribution companies, providing that in light of the negative impact of the lockdown on the liquidity of Discoms, scheduling of power will not be impacted, even if there is payment security mechanism only for 50% of the amount for which payment security mechanism is to be otherwise established contractually.

(d) On 28.3.2020, MoP, issued a Press Release stating that despite the lockdown imposed to contain the spread of the Covid-19 pandemic, the whole workforce of the power sector, viz: generation, transmission, distribution and system operations is working round the clock to keep all homes and establishments lighted, as MoP is committed to provide 24x7 supply of electricity to all consumers. Further, on 28.3.2020, MoP also issued directions to this Commission under Section 107 of the Electricity Act regarding reduction in the rate of LPS payable by the distribution Licensees till 30.6.2020.

(e) Since MB Power and HPPC/PTC are engaged in providing essential services viz, generation and distribution of electricity to the consumers of Haryana, during the period of lockdown both the entities were exempted from the restrictions imposed due to lockdown and continued to be operational for generating & supplying power with no change/waiver in their respective contractual obligations under the PSA/PPA.

(f) However, in contravention to the above stipulations of MHA and MoP, HPPC, on 29.3.2020, issued a Force Majeure Notice under Article 15 of the PSA to PTC (subsequently e-mailed by PTC to the Petitioner on 29.3.2020), claiming the nationwide lockdown imposed by MHA Order dated 24.3.2020 due to outbreak of Covid-19 Pandemic as an event of Force Majeure. HPPC, in this Force Majeure Notice stated that (i) MHA Order dated 24.3.2020 read with Addendum dated 25.3.2020 prevents HPPC from performing its obligations of scheduling power from MB Power for the month of April 2020, (ii) The average peak demand of HPPC's consumers in April, 2019 was 6627 MW and during the lock down, the same is approx. 4000 MW. This is a Force Majeure Event beyond the control of HPPC, (iii) Ministry of Finance, Government of India ("MoF") vide its Office Memorandum dated 19.2.2020 has clarified that Covid-19 should be considered as a case of natural calamity and Force Majeure clause may be invoked, (iv) Since Covid-19 is epidemic in nature, hence it qualifies as Force Majeure under Article 15 of the PSA.

(g) The above Force Majeure claim was denied by the Petitioner vide its letter dated 1.4.2020 to PTC with a copy to HPPC, on the various grounds, namely, (i) HPPC's Force Majeure Notice is neither addressed to the Petitioner, nor does it have any relevance to PPA between MB Power and PTC. In any event, refusal of HPPC to schedule power under its PSA with PTC does not and cannot constitute a Force Majeure under the PPA between MB Power and PTC (ii) Under the PPA between MB Power and PTC, PTC is obliged to mitigate any losses to MB Power and offtake power from MB Power's Project and pay tariff thereof, (iii) Procedure prescribed in the PPA for issuing a notice for a Force Majeure Event has not been followed nor has any evidence been adduced establishing how HPPC is

prevented from scheduling power from MB Power, (iv) Imposition of lockdown by MHA does not qualify as a Force Majeure event under Article 15 of the PPA as the same does not in any manner hamper/affect the performance of HPPC's obligations to schedule power from MB Power's Project, as both the entities i.e., MB Power and HPPC continue to be operational, (v) Power generation and distribution are essential services in terms of in terms of Clause 4(g) of the MHA Guidelines of the MHA Order dated 24.3.2020 and accordingly specifically exempted from the nationwide lockdown imposed by MHA, (vi) HPPC reliance on MoF Office Memorandum dated 19.2.2020 is completely misplaced. By way of the said Office Memorandum, MoF has clarified that disruption of supply chains due spread of Covid-19 will be considered as a case of natural calamity and the Force Majeure Clause may be invoked in such scenarios. The present case does not deal with disruption of supply chain and hence HPPC is bound by the terms of the Agreements and cannot be allowed to renege on the performance of its obligations citing the provisions of Force Majeure. (vii) in terms of Article 6.1 and 10.1 of the PSA, the primary obligation of HPPC is to schedule/procure at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower, on RTC basis. Pertinently, imposition of lockdown due to outbreak of Covid-19 does not qualify as an event of Force Majeure under Article 15 of the PSA as the same does not affect the performance of obligations of HPPC inasmuch there is no impairment on HPPC from scheduling/procuring the minimum 55% of the Contracted Capacity, especially when MB Power is ready and willing to supply the Contracted Capacity, (viii) HPPC conduct in seeking declaration of a Force Majeure Event in terms of MHA Order dated 24.3.2020 is contrary to the spirit of Pilot Scheme for Procurement of Power under which the PPA and PSA was signed, (ix) HPPC has failed to provide details of material the alleged Force Majeure Event would have on the performance of obligations under the PSA (x) MB Power shall continue to declare its availability in line with the provisions of PPA. Accordingly, HPPC is called upon to adhere to its contractual obligations and continue scheduling power from MB Power and pay tariff as per the PSA.

(h) HPPC vide its e-mail dated 2.4.2020 informed PTC that the Force Majeure Notice has been issued under the PSA between HPPC with PTC and hence,

PPA between PTC and MB Power is not relevant for HPPC. Further, the issue of essential commodity and its implications raised by MB Power can have no application where there is no demand for the power proposed to be generated by MB Power. Covid-19 epidemic has resulted in lockdown due to which the Government, commercial and private establishments are closed resulting in drastic reduction of load/demand in Haryana, due to which, HPPC is unable to schedule power under the PSA dated 26.2.2019 and the same is on account of Force Majeure event. Accordingly, in case there is any injection of power, the same will be at the cost and risk of the generator and/or PTC.

(i) On 3.4.2020, PTC while forwarding the above e-mail of HPPC to the Petitioner stated that in terms of Article 16.2(a) of the PPA read with the PSA 'epidemic' is an event of Force Majeure. HPPC and PTC have invoked Force Majeure under the PPA & PSA and available reliefs thereof on account of 'Force Majeure' in terms of PPA and PSA will be applicable. PTC further stated that the current extra-ordinary situation impedes the ability of PTC to meet its performance obligations, in spite of the special dispensation(s) given by Government of India and RBI. PTC will be constrained to schedule power based on the demand requisition of the DISCOMs. PTC will endeavour to make payment as and when its cash flow improves. PTC will not be liable for any LPS on such delayed payments.

(j) On 3.4.2020, this Commission also passed a Suo-Moto Order in Petition No. 6/SM/2020 implementing the directions of MoP Notification dated 28.3.2020 qua Late Payment Surcharge ("LPS").

(k) On 5.4.2020, the Petitioner replied to PTC's letter dated 3.4.2020 and HPPC's e-mail dated 2.4.2020, denying PTC/HPPC's claim on Force Majeure, on the grounds as already pointed out vide its letter dated 1.4.2020. The Petitioner, *inter alia*, also stated that (i) invocation of any Force Majeure is contrary to the Force Majeure exemptions granted by MHA in terms of MHA Order and Guidelines dated 24.3.2020 wherein all activities pertaining to generation and distribution of power are to continue like normal and in terms of Clause 17 of the Guidelines, anyone violating such directions shall be liable to be proceeded

against as per the provisions of Section 51 to Section 60 of the Disaster Management Act, 2005 and that the only relief provided in the Commission's Suo-Motu order in Petition No.6/SM/2020 is reduction in rate of LPS to 12% per annum in case of delayed payment by Distribution companies for the period between 24.3.2020 to 30.6.2020.

(l) On 6.4.2020, MoP, issued a further clarification to its earlier letters/Notifications dated 27.3.2020 and dated 28.3.2020, stating that no exemption has been given to distribution licensees from making payment of bills within 45 days of its presentation and the obligation to pay for capacity charges under the PPA shall continue.

(m) On 7.4.2020, the Petitioner again wrote to PTC stating that MoP vide its letter dated 6.4.2020 has clarified that the distribution companies are required to deposit/ open LC for 50% of the cost of power and the remaining 50% will have to be paid within the period given in the PPA, failing which the delayed payment surcharge will apply. Further, in terms of Article 6.1 and Article 10.1 of the PSA dated 26.2.2019 read with MoP's letter dated 6.4.2020, HPPC is obligated to schedule/procure at least 55% of the Contracted Capacity or Declared Capacity on RTC basis and make payment for such power procured from MB Power and PTC is obligated to pay tariff in terms of Clause 1.2.11 of the Standard Bidding Documents for Procurement of Power under the Pilot Scheme. Accordingly, PTC is obligated to provide a LC Credit for 50% of the cost of power. It was again reiterated that the outbreak of Covid-19 and imposition of lockdown cannot be regarded as a Force Majeure event as claimed by PTC and HPPC and any actions of PTC to the contrary would be in breach of the PPA as well as MoP's directions dated 27.3.2020, 28.3.2020 and 6.4.2020.

(n) On 10.4.2020, the Petitioner further wrote to HPPC reiterating its earlier contentions and *inter-alia* stating that as per the contractual agreement, HPPC shall schedule at least the Declared Capacity or 55% of the Contracted Capacity whichever is lower on Daily Basis (RTC basis) and 55% of Contracted Capacity on monthly basis for eight months during April to November (each year), with no penalty for not scheduling power during off-peak months i.e., from December to

March. Accordingly, the Petitioner requested HPPC to off take 55% of the Contracted Capacity and pay tariff for the same or pay penalties in terms of the PPA (about 50 lakh/day).

(o) On 10.4.2020, HPPC e-mailed to PTC (subsequently forwarded by PTC to the Petitioner on 13.4.2020) replying to the Petitioner's letters dated 5.4.2020 and dated 7.4.2020, reiterating its earlier position and *inter-alia* stating that PTC/MB Power cannot proceed on the basis that so long as MB Power is available to generate, HPPC is bound to schedule and that there cannot be any Force Majeure event affecting HPPC. MB Power's reliance on MoP clarification dated 6.4.2020 is erroneous as this has no applicability to the present PSA nor does it provide any obligation on any distribution licensee to schedule power. The obligation to pay under the PSA is for power scheduled and since the power cannot be scheduled due to Force Majeure events, there can be no payment.

(p) On 15.4.2020, MHA issued guidelines extending the nationwide lockdown till 3.5.2020. In terms of Clause 11(iii) of said MHA Guidelines, Power Generating Company and Distribution Licensees continued to be exempted from the restrictions imposed due to lockdown on account of providing essential services. Similar guidelines were issued by MHA on 1.5.2020 further extending the lockdown till 17.5.2020.

(q) HPPC vide its e-mail dated 16.4.2020 informed PTC that on account of Force Majeure, it would not be able to schedule power in the month of April, 2020 and there cannot be any penalty on HPPC for the same.

(r) On 21.4.2020, the Petitioner wrote to PTC replying to HPPC e-mails dated 10.4.2020 and 16.4.2020 reiterating its earlier position and *inter-alia* stating that any suspension of power for commercial reasons or due to reduction of demand cannot be a Force Majeure and as such, any failure of PTC/HPPC to schedule power in accordance with the PPA/PSA and pay tariff will be regarded as material breach of PTC/HPPC's obligations. Subsequently, there were various communications exchanged between the Petitioner, HPPC and PTC on

23.4.2020, 27.4.2020, 2.5.2020, wherein the parties reiterated their above mentioned contentions.

(s) MB Power declared 100% availability during April 2020. However, there was no offtake/ scheduling by PTC/HPPC during this period of April 2020. On 2.5.2020, MB Power issued the invoice for the period from 1.4.2020 to 30.4.2020 for Rs. 12,64,54,644/- on PTC/HPPC in terms of the PPA. However, on 3.5.2020, PTC returned the invoice to the Petitioner on the ground that HPPC and PTC have already invoked Force Majeure and HPPC did not schedule any power from MB Power during April 2020, hence no amount is payable to MB Power against the said invoice. In response, the Petitioner on 9.5.2020, wrote to PTC stating that it has already disputed the Force Majeure claim of HPPC and PTC by way of its letters dated 1.4.2020, 5.4.2020, 7.4.2020, 19.4.2020 and 1.5.2020 and further requested PTC to make the payment against the said invoice in terms of PPA.

(t) On 11.11.2021, the Petitioner once again wrote to PTC reiterating its earlier position. Further, the Petitioner stated that even if PTC/HPPC consider outbreak of Covid-19 as a Force Majeure, then in terms of the Clause 16.2 of PPA, the Contract Period shall be extended by a period equal in length to the period during which there was no off-take of power by PTC/HPPC. Accordingly, the Petitioner requested PTC PTC/HPPC to extend Contract Period and schedule power for one month in lieu of Force Majeure (April 2020) in terms of PPA.

(u) On 11.1.2022, the Petitioner wrote to PTC, inter-alia, stating that the power supply under the Pilot Scheme has stopped after 30.11.2021 and the Contract Period as per PPA will end on 31.3.2022. The Petitioner requested PTC/HPPC to extend Contract Period and/or schedule power for one more month in lieu of Force Majeure (April, 2020) in accordance with the PPA. Thereafter, on 7.2.2022, the Petitioner once again wrote to PTC stating that in view of the Contract Period for power supply as per PPA ending on 31.3.2022, PTC/ HPPC to confirm extension of Contract Period and/or schedule power in April 2022 in order to mitigate the losses as an alternate option.

(v) Thereafter, on 4.3.2022, the Petitioner wrote to PTC stating that in terms of the contractual arrangement, PTC/HPPC were required to offtake minimum 55% of power for a period of eight months from April to November every year commencing from April, 2019. However, PTC/HPPPL did not schedule power in the month of April 2020 citing Force Majeure due to the outbreak of Covid-19 pandemic, which has been refuted by the Petitioner through a series of communications between April - May 2020. Further, PTC has neither made the payment against invoice for an amount of Rs. 12,64,54,644/- for the month of April 2020 nor has it responded to MB Power's offer to extend the Contract Period under the PPA and to schedule power for one more month beyond the expiry of the Contract Period i.e., for the month of April 2022 despite repeated reminders. However, in absence of any response to the same, the Petitioner withdrew its offer to supply power after the expiry of the Contract Period on 31.3.2022 and requested PTC to clear the outstanding dues of Rs. 12,64,54,644/- i.e. compensation payable on account of no offtake of power in the month of April 2020 along with applicable interest within 15 (fifteen) days. However, in any absence of any response from PTC/ HPPC, the Petitioner has filed the present Petition.

(w) During the onset of Covid-19 pandemic, MB Power and PTC/HPPC were obligated to perform their contractual obligations as electricity generation, transmission and distribution was exempted from the nationwide lockdown restrictions and were directed to remain operational in terms of the Order and directions issued by MHA, MoP and other government agencies, Hence, the same does not constitute an event of Force Majeure for PTC/HPPC under the PPA/PSA and hence HPPC/PTC are under contractual obligation to schedule/procure at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower, on RTC basis and pay compensation in the event off-take of power is less than 55%.

(x) This Commission in Order dated 20.1.2022 passed in Petition No. 594/MP/2020 titled *GMR Warora Energy Limited v. DNH Power Distribution Company Limited* and Order dated 27.6.2022 passed in Petition No. 187/MP/2021 titled *MSEDCL v. GMR Warora Energy Limited* has already held

that nationwide lockdown on account of Covid-19 pandemic and consequent reduction in demand of power cannot be considered as Force Majeure. Further such lockdown has not affected the Discoms from performing its functions and obligations under the agreement and as such Discoms are obligated to make payment of tariff as per the PPA during the nationwide lockdown imposed due to Covid-19 Pandemic. Similar Orders have been issued by Hon'ble High Court of Punjab and Haryana (Judgment dated 4.7.2022 passed in CWP No.7519 of 2020 *titled Talwandi Sabo Power Limited vs. Union of India & Ors*), MPERC (Order dated 18.11.2021 passed in Petition No. 10 of 2021 *titled Jhabua Power Ltd. v. MPPMCL* and Order dated 26.7.2022 passed in Petition No. 72 of 2021 titled *MB Power Madhya Pradesh Limited v. MPPMCL*). Hence this issue is no longer res integra in view of the findings of this Commission, MPERC and Hon'ble High Court of Punjab and Haryana.

(y) During April 2020, despite the Petitioner having declared 100% availability of the Contracted Capacity under the PPA, PTC/HPPCL under the guise of Force Majeure did not schedule any power. Accordingly, the Petitioner in terms Article 10.2.2 of the PPA/PSA raised invoice upon PTC/HPPC on 2.5.2020 for Rs. 12,64,54,644/- as compensation/tariff for the shortfall in energy scheduled by PTC/HPPCL at the rate of the difference between the Tariff payable by PTC/HPPC and the daily Average (RTC) MCP Prices at the Power Exchange (IEX). However, PTC/HPPCL has illegally, and arbitrarily withheld payment of entire amount claimed under Invoice dated 2.5.2020. Such non-payment besides being unlawful and unwarranted, is contrary to and in violation of (i) Articles 10.2.2 of the PPA/PPSA in terms of which PTC/HPPC is obligated to pay tariff/compensation to MB Power for the quantum of energy schedule less than 55% of the Contracted Capacity at the rate i.e., the difference between the tariff payable under the PPA and the daily Average (RTC) MCP Prices at the Power Exchange for such date and (ii) MoP clarification dated 6.4.2020, in terms of which no exemption has been given to the Distribution Licensees (i.e., HPPC in the present case) from making payment of the bills within 45 days of its presentation.

(z) Accordingly, PTC/ HPPC is liable to make the payment towards the said Invoice of Rs. 12,64,54,644/- along with the interest/ Late Payment Surcharge (at the rate of 5% above bank rate) on the payment outstanding beyond the Due Date (i.e., 30 days of Invoice date) in terms of Article 11.6.1 of the PPA/PSA and Article 24.4 of the PPA and 23.4 of the PSA.

Hearing dated 13.10.2022

6. The Petition was admitted on 13.10.2022 and notice was issued to the Respondents to file their replies. Reply to the Petition has been filed by the Respondents HPPC and PTC and the Petitioner has filed rejoinder thereof.

Reply of the Respondent No.1- HPPC

7. Respondent No.1, HPPC has filed its reply vide affidavit dated 8.12.2022. Besides reiterating the various factual developments in terms of contractual arrangements amongst the parties, communications exchanged amongst the parties and various orders and directions on Covid-19 issued by MHA, MoP and other government agencies etc., as already recorded under Petitioner's submissions in preceding paragraphs herein, the Respondent HPPC has mainly submitted as under:

(a) Ministry of Finance vide Notification dated 19.2.2020 and MNRE vide Notification dated 20.3.2020 have stated that disruption due to Covid-19 will be covered in Force Majeure Clause. MHA in its notification dated 24.3.2020 has acknowledged Covid-19 as 'an epidemic'.

(b) Due to lockdown restrictions on account of Covid-19 pandemic leading to shut down of various establishments, the energy requirement of the Haryana has reduced drastically, due to which HPPC's ability to off-take power from MB Power was severely hampered. Such a drastic reduction in demand is not the usual course but on account of an epidemic.

(c) Article 15 of the PSA defines “Force Majeure” and provides a list of events which are to be considered as Force Majeure. “Epidemic” qualifies as a Non-Political Force Majeure Event under Article 15.2 of the PSA. Further Article 15.6 of the PSA absolves the affected party under to PSA to perform its contractual obligations during the subsisting period of Force Majeure event.

(d) During April, 2020, HPPC was affected by the Force Majeure Event in terms of Article 15 of the PSA and hence it is relieved of its obligation to pay the differential amount in accordance with Article 10.2.2 of the PSA.

(e) Ability of HPPC to perform its obligations was not affected on account of any commercial reason or the agreement being onerous to perform or otherwise any event in the usual course. HPPC was affected by a Force Majeure event and the consequences of the same would be to release HPPC of its obligations, including the obligation to schedule 55% of contracted capacity in April, 2020 under the PSA.

(f) MB Power is deliberately confusing the issue of essential services. The issue of essential service of electricity and necessity to maintain power supply would arise only if there is demand for power and power can be availed from the generating station. It is not possible for HPPC to avail power when there is no corresponding demand in the State.

(g) Electricity being an essential commodity was exempted from the various restrictions imposed by the Government of India and the respective State Governments. Even though HPPC, being a distribution licensee, was exempted from the said restriction, its consumers (including commercial and industrial consumers) were shut down due to which the State witnessed a sharp decline in power consumption. During the first week of April, 2020, power demand in Haryana drastically reduced to 3471 MW vis-à-vis 5239 MW in April, 2019 (i.e., ~ 33.75% decline). Such a scenario was beyond the reasonable control of HPPC, and it could not have prevented or overcome by exercise of due diligence and following Good Industry Practice. Therefore, Covid-19 and its impact (including drastic fall in demand of power) is a Force Majeure Event within the PSA entitling HPPC for appropriate relief. However, MB Power has failed to appreciate the

ground realities and the scope of Article 15 under the PSA vis-à-vis impact of Covid-19 pandemic, and the consequent lockdown due to which HPPC was prevented from off-taking power from its sources.

(h) MB Power has relied upon MHA Guidelines and MoP circulars to state that power distribution was an exempted activity from the lockdown. The exemption granted to distribution activities was with respect to its operational mobility so that there is no interruption of power supply to end consumers. Such an exemption did not or could not arrest the drastic fall in demand of electricity as various small/medium and even large industries were forced to shut down their operations due to the lockdown. Further, MB Power's contention that the lockdown has not impacted the performance of obligations under the PSA/PPA is erroneous. The MHA Guidelines dated 24.3.2020, notified restrictions on account of the Covid-19 pandemic, whereby while the electricity generation, transmission, distribution and services activities were kept as essential services, the restriction was however applicable to power consuming units. Due to the impact of the lockdown on the power consuming units of the State, severely hampered HPPC's ability to off-take power from MB Power. In such situation, even if HPPC's activities were exempted from the lockdown, the drastic fall in demand in the State of Haryana was beyond its control.

(i) Process of power generation till its consumption is an instantaneous process as electricity cannot be stored. Therefore, any fluctuation in demand of power has a direct correlation with the procurement of power. Hon'ble Supreme Court in the case of State of A.P. -v- National Thermal Power Corpn. Ltd., [(2002) 5 SCC 203], has held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Therefore, there can certainly not be any procurement, if the consumption is drastically impacted due to Force Majeure Event.

(j) Exemptions by the Central Government were only provided for the generation, transmission and distribution services. However, the restriction on various activities related to consumption of electricity has not been exempted. The

Electricity could not be drawn by HPPC unless there is an instantaneous consumption since electricity cannot be stored.

(k) HPPC is under an obligation to forecast and schedule power in a manner that the grid stability is maintained. In case the demand of power within the State drastically reduces, HPPC has no other choice but to make proportionate reductions in procurement of power keeping in mind the safety and security of the grid.

(l) MB Power has failed to address the fundamental question as to how the reduction in demand in the present case is a normal day to day fluctuation and is not on account of Force Majeure Event i.e., the outbreak of Covid-19 and consequent nation-wide lockdown which had unprecedented effect on the demand of power. Accordingly, HPPC was well within its rights to invoke Force Majeure in terms of Article 15 of the PSA. Accordingly, during the subsistence of the Force Majeure Event, MB Power cannot seek payment of fixed charges from HPPC.

(m) The Force Majeure clause in the PSA applies to the benefit of both parties. If the contentions of MB Power are accepted, then the question would arise as to whether there can be any situation at all where the Force Majeure applies to HPPC. The clauses in the PSA cannot be left redundant. This is contrary to the well settled principles of law. In other words, the clauses in the PSA providing for Force Majeure Events affecting HPPC will be nugatory and redundant as it will have no application at all if HPPC is required to pay the fixed charges even where HPPC cannot avail the electricity declared available and utilize it for distribution and retail supply of electricity due to Covid-19 pandemic.

(n) PTC has accepted the Force Majeure Notice issued to it by HPPC in terms of Article 15 of the PSA. Under the said PSA, there is no requirement for payment of any amount in terms of Article 10.2.2 by HPPC to PTC. In any event, PTC on 29.3.2020 and on 3.4.2020 individually invoked Force Majeure under Article 16 of the PPA, entered into between PTC and MB Power.

(o) Reliance placed by MB Power on the judgment of Hon'ble High Court of Punjab and Haryana dated 4.7.2022 passed in CWP No.7519 of 2020 titled

Talwandi Sabo Power Limited vs. Union of India & Ors is misplaced as the issue therein was the conduct of the SLDC in not considering the availability declared by the Generator. Furthermore, there was no express provision which specifically recognized an epidemic as a Force Majeure event in the PPA, entered into between Talwandi Sabo Power Limited and Punjab State Power Corporation Limited. Also, a Letter Patents Appeal (“LPA”) being No. 767 of 2022, has been filed against the said Order and there is a stay operative on the said Order.

(p) Further, with respect to this Commission’s Order dated 20.1.2022 passed in Petition No. 594/MP/2020 titled GMR Warora Energy Limited v. DNH Power Distribution Company Limited, there was no express provision which specifically recognized an epidemic as a Force Majeure event in the PPA, entered into between GMR Warora Energy Limited and DNH Power Distribution Company Limited. Whereas, in the present case, there is a specific provision namely Article 15.2(a), which specifically recognizes ‘epidemic’ as a ‘Force Majeure event’. Also, DNH Power Distribution Company Limited has filed an appeal before the APTEL against the said Order.

(q) Similarly, with respect to MPERC Order dated 18.11.2021 passed in Petition No. 10 of 2021 titled Jhabua Power Ltd. v. MPPMCL and Order dated 26.7.2022 passed in Petition No. 72 of 2021 titled MB Power Madhya Pradesh Limited v. MPPMCL, the PPA provisions did not expressly provide for ‘epidemic’ as a ‘Force Majeure’ event, unlike the present case.

(r) MB Power vide its letters dated 11.11.2021, 11.1.2022 and 7.2.2022 has itself accepted and acknowledged that April, 2020 was affected by a Force Majeure Event, in lieu of which MB Power sought dispensation/accommodation by way of an extension of the PPA by one month in terms of Article 16.6.2 of the PSA

(s) Tariff/compensation claimed by MB Power is on account of non-scheduling of power by HPPC during April 2020 in terms of Article 10.2 of the PPA/PSA. Since, such a tariff is payable if the Contract Period or billing period is not affected by the Force Majeure Event, the same is not applicable in present

case. Thus, MB Power's contention with respect to HPPC's obligation to pay tariff/compensation in view of Article 10.2 is erroneous.

(t) With respect to the liability of interest/late payment surcharge, the said components are only leviable when a payment is delayed. However, in this case, HPPC was affected by a Force Majeure Event and there was no obligation to make payments to PTC for the month of April, 2020.

Reply of the Respondent No.2, PTC

8. Respondent No.2, PTC has filed its reply vide affidavit dated 29.12.2022. Besides reiterating the various factual developments in terms of contractual arrangements amongst the parties, communications exchanged amongst the parties and various orders and directions on Covid-19 issued by MHA, MoP and other government agencies etc., as already recorded under Petitioner's submissions in preceding paragraphs herein, Respondent, PTC mainly has submitted as under:

(a) As per Article 16.2 (a) of the PPA between MB Power and PTC, "Epidemic" is a Force Majeure event and upon occurrence of a Force Majeure event, the affected party shall by a notice, report such occurrence to the other party. Accordingly, on 29.3.2020, PTC, acting on a notice of Force Majeure dated 29.3.2020 received from HPPC, informed MB Power about occurrence of a Force Majeure due to Covid -19 pandemic and wherein HPPC had stated that in view of the epidemic, HPPC was unable to schedule power from the Petitioner during the month of April, 2020.

(b) Section 32 of the Indian Contract Act, 1872 provides that if a contract is based on the happening of a future event and such event becomes impossible, the contract becomes void. Similarly, Section 56 of the Indian Contract Act, 1872 provides that if a contract becomes impossible, by reason of an event which a promisor could not prevent, after the contract is made, then the contract becomes void. In the present dispute, the Agreements specifically provided that epidemic is a Force Majeure event and the Government of India vide notification dated 24.3.2020 had declared Covid-19 as an epidemic and PTC/HPPC had issued a



notice of occurrence of Force Majeure to the Petitioner. Accordingly, non-scheduling of power by HPCC during April, 2020 is well covered by the specific clause in the Agreement and the settled law.

(c) MB Power vide its letters dated 11.11.2021, 11.1.2022 and 7.2.2022 to PTC informed that in terms of Clause 16.6.2 of the PPA, the contract stands extended for the period during which there was no offtake of power (i.e. April 2020). Accordingly, MB Power requested for extension of the contract period by one more month and/or schedule power in April 2022 (in lieu of power not scheduled during April 2020). Therefore, MB Power has accepted that there was an event of Force Majeure during April 2020 and accordingly, had sought extension of contract period and MB Power cannot plead to the contrary and same is barred by law under the principle of Estoppel.

(d) The above request letter of MB Power dated 11.11.2021 was forwarded by PTC to HPPC vide letter dated 16.11.2021 requesting HPPC to consider the request MB Power to extend the contract period. However, despite the clear provisions of PPA/PSA, contract was not extended by HPCC for one more month. Eventually MB Power vide letter dated 4.3.2022 withdrew its offer to supply power after the expiry of the Contract Period on 31.3.2022. As no response was received from HPPC, consequently PTC vide letter dated 16.3.2022 to HPPC withdrew its letter dated 16.11.2021 for extension of contract period.

(e) The case laws cited by the Petitioner in the Petition do not cover the present dispute as in all the cases the contract did not specify epidemic as a Force Majeure event.

Rejoinders of the Petitioner on the submissions HPPC and PTC

9. The Petitioner filed its rejoinders vide affidavits dated 16.1.2023 against the replies of HPPC and PTC. The Petitioner mainly has submitted as under:

(a) HPPC's reliance on MoF notification dated 19.2.2020 is misplaced as MoF has clarified that only disruption of supply chains due to Covid-19 will be considered as a case of natural calamity and the Force Majeure Clause may be



invoked in such scenarios. However, in the present case, there is no disruption of supply chains, as MB Power fulfilled its contractual obligation to supply power. Accordingly, HPPC is also bound by the terms of the agreement and cannot be allowed to renege on the performance of its obligations citing the provisions on Force Majeure.

(b) The Respondents, HPPC and PTC have contended that the claimed Force Majeure Event is on account of the Covid-19 epidemic which has led to a situation where HPPC/PTC is unable to perform its obligations under the PSA/PPA and Article 15 of PSA and Article 16 of PPA recognised “epidemic” as Force Majeure event. This contention is erroneous as in terms of these Articles of PSA and PPA to qualify as an event of Force Majeure it is essential that the performance of HPPC’s/PTC’s obligations under the PPSA/PPA becomes impossible. None of the obligations of HPPC/PTC as mentioned under Article 6.1 of the PPA/PPSA has been affected by way of Covid-19 and imposition of lockdown thereto. Therefore, imposition of lockdown due to outbreak of Covid-19 and/ or reduction in load/demand in the Haryana due to imposition of lockdown does not qualify as an event of Force Majeure under Article 15 of the PSA and Article 16 of the PPA as the same does not affect the performance of obligations of HPPC/PTC inasmuch there is no impairment on HPPC/PTC from scheduling/procuring the minimum 55% of the Contracted Capacity, especially when MB Power is ready and willing to supply the Contracted Capacity. Therefore, the requirements of Article 15 (of PSA) and Article 16 (of PPA) have not been satisfied and the lockdown cannot be considered as a Force Majeure event for HPPC/PTC. HPPC’s/PTC’s contractual obligation to pay tariff/Minimum Offtake Compensation cannot be done away with particularly in view of Article 10.2 of the PPA/PSA.

(c) In any case basis of Respondents’ claim of Force Majeure stems from the term ‘epidemic’ included as a qualifying event of Force Majeure under Article 15.2(a) of the PSA and Article 16.2(a) of the PPA. A literal interpretation and application of these Articles of PSA and PPA no longer remains tenable with the coming into force of the MHA Order dated 24.3.2020 issued under the Disaster Management Act 2005 – which overrides any other law for the time being in force.

This Order declares that the activities of generation, transmission and distribution of electricity to be essential services and thereby exempt from Covid-19/lockdown restrictions. In such a scenario Respondents' claim of Force Majeure on account of an epidemic, i.e., Covid-19 cannot stand in terms of Article 15.2(a) of the PSA and Article 16.2(a) of the PPA. It is because the MHA Order dated 24.3.2020 by exempting the entities engaged in the essential activities of generation, transmission and distribution of power from any restrictions arising out of Covid 19/lockdown even during the subsistence of the epidemic has extinguished the need for such epidemic to be qualified as a Force Majeure event during the alleged Force Majeure period. With the removal of restrictions, the MHA Order dated 24.3.2020 has in fact enabled entities like PTC/HPPC to fulfil its respective contractual obligations. Moreover, the MHA Order dated 24.3.2020 being in the nature of delegated legislation will stand to override PSA and PPA provisions, including Article 15.2(a) of the PSA and Article 16.2(a) of the PPA. In this regard, reliance has been placed on judgement of the Hon'ble Supreme Court in the case of *PTC v. CERC [(2010)4 SCC 60]*.

(d) HPPC's reliance on the various judicial decisions to contend that outbreak of Covid-19 pandemic and consequent national lockdowns will qualify as an event of Force Majeure is misplaced as the same are not applicable to the issues in the present case because the said decisions are in regard to Force Majeure situations involving entities which were not engaged in essential services thereby being exempted from restrictions arising out of Covid-19 and its ensuing lockdown. However, in the present case both MB Power and HPPC are entities which were exempted from Covid-19 restrictions in terms of MHA Order dated 24.3.2020.

(e) HPPC's contention that MB Power accepted Force Majeure due to Covid-19 during April 2020 and accordingly, in terms of Article 16.6.2 of the PSA, sought an extension of the PSA/ PPA for a period of 1 month (i.e. corresponding to April 2020, when no scheduling was done by HPPC on account of alleged Force Majeure event) is erroneous as MB Power had never accepted Covid-19 or a lockdown thereof as a Force Majeure event under PPA/ PSA. In its letter dated 4.3.2022, MB Power has clearly stated that its offer for supply of power after the

expiry of the Contract Period on 31.3.2022 was without prejudice to MB Power's claims and were pursuant to the good business relations between the parties and power requirements in Haryana. Since, HPPC did not exercise this one-time option made available to them, the same was withdrawn by MB Power by way of the letter dated 4.3.2022.

(f) Force Majeure Notice(s) issued by PTC/ HPPC suffer from procedural infirmities. Article 16.5 of the PPA and 15.5 of the PPA casts an obligation on the Affected Party to provide necessary particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under the Agreement before alleging a particular event to be a Force Majeure Event. Evidently, PTC/HPPC has failed to provide these details in the Force Majeure Notice. HPPC's Force Majeure Notice dated 29.3.2020 which was forwarded by PTC on 29.3.2020 merely states that HPPC would not be in a position to perform its obligations on account of national lockdown due to Covid-19 pandemic and reduction in power requirement of consumers of HPPC. Hence Force Majeure Notice is invalid for being *ultra vires* the provisions of the PPA/PSA.

Hearing dated 14.2.2023

10. The matter was heard on 14.2.2023. During the course of hearing, learned counsels for the parties made their respective submissions in the matter. The parties were permitted to file their respective written submissions. Accordingly, written submissions have been filed by the Petitioner and the Respondent, HPPC

Written Submissions of the Petitioner and Respondents

11. The Petitioner MB Power and the Respondent HPPC filed their respective Written Submissions on 28.2.2022 and reiterated their earlier submissions as mentioned in the preceding paragraphs.



Analysis and Decision

12. After considering the submissions of the parties and perusal of documents placed on record, the following issues arise for our consideration:

Issue No. 1: Whether the provisions of the PSA/ PPA regarding notification of Force Majeure Event has been complied with?

Issue No. 2: Whether Covid-19 led lockdown and consequent reduction in the power demand of HPPC constitutes a Force Majeure Event for the Respondents?

Issue No. 3: Whether the Respondents are liable to make payments against the Invoice dated 2.5.2020 raised by the Petitioner along with Late Payment Surcharge/ Interest?

The above issues have been dealt with in the subsequent paragraphs.

Issue No. 1: Whether the provisions of the PSA/ PPA regarding notification of Force Majeure Event have been complied with?

13. The Respondents have primarily argued that the Covid-19 pandemic led to lockdown which resulted into a significant reduction in the demand of Haryana and affected their ability to schedule power from the Petitioner during April 2020, which constitutes a Force Majeure event in terms of PSA/PPA.

14. We note that Article 15.5 of the PSA (which is identical to Article 16.5 of the PPA) provides for duty to report Force Majeure Event, which reads as under:

“15.5 Duty to report Force Majeure Event

15.5.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

(a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 16 with evidence in support thereof;

(b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;

(c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and

(d) any other information relevant to the Affected Party's claim.

15.5.2 *The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.*

15.5.3 *For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 15.5.1 and such other information as the other Party may reasonably request the Affected Party to provide."*

15. In the present case, HPPC vide its letter dated 29.3.2020 issued a Force Majeure Notice to PTC and PTC forwarded the same to MB Power through e-mail on 29.3.2020. In this Force Majeure Notice, HPPC referred to MoF Order dated 19.3.2020 and MHA Notification dated 24.3.2020 and intimated that Covid-19 has resulted in lockdown due to which power requirement of Haryana has been reduced drastically and HPPC would be unable to schedule power during the month of April, 2020 from MB Power. HPPC claimed lockdown on account of Covid-19 as a Force Majeure event under PSA.

16. In terms of Article 15.5 of the PSA, HPPC was required to intimate Force Majeure Event within 7 days its occurrence. We observe that the Force Majeure Notice was issued by HPPC on 29.3.2020 i.e. within 5 days of MHA Order dated 24.3.2020, which was forwarded by PTC to MB Power on the same day. In view of the same we hold that the Respondents have complied with the provisions of PSA and PPA regarding notification of Force Majeure Event.

17. This issue is answered accordingly.



Issue No. 2: Whether Covid-19 led lockdown and consequent reduction in the power demand of HPPC constitutes a Force Majeure Event for the Respondents?

18. The Petitioner has submitted that MHA vide Order dated 24.3.2020 issued in exercise of powers under Section 10(2)(l) of the Disaster Management Act 2005 imposed a national lockdown due to Covid-19 pandemic. However, power generation, transmission and distribution were recognized as essential services and were accordingly, exempted from the lockdown. Therefore, all activities pertaining to generation and distribution of power continued like normal and anyone violating such directions shall be liable to be proceeded against as per the provisions of Section 51 to Section 60 of the Disaster Management Act, 2005. Further, MoP Notification dated 25.3.2020 also exempted generation and supply of electricity, being essential commodity/services, from the restrictions imposed by lockdown. MoP further stated that power generation utilities, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), etc. shall continue to supply inter-State electricity to the grid. On 27.3.2020, the MoP issued an order to the Load Despatch Centres, Electricity Regulatory Commissions, Central Electricity Authority, and all the generating and distribution companies, to continue scheduling of power even if payment security mechanism was established for 50% of the contractual amount. Subsequently, on 28.3.2020 MoP issued a Press Release stating that despite the lockdown, the whole workforce of the power sector, viz: generation, transmission, distribution and system operations shall work round the clock.

19. The Petitioner has submitted that since MB Power and HPPC/PTC are engaged in providing essential services viz, generation and distribution of electricity to the consumers of Haryana, during the period of lockdown both the entities were exempted



from the restrictions imposed due to lockdown and continued to be operational for generating and supplying power with no change/waiver in their respective contractual obligations under the PSA/PPA.

20. The Petitioner has accordingly contended that the imposition of lockdown by MHA does not qualify as a Force Majeure Event with respect to scheduling of power by HPPC/PTC from MB Power under the PSA/PPA as the same does not in any manner hamper/affect the performance of HPPC's obligations to schedule power from MB Power's Project, as both the entities i.e., MB Power and HPPC continue to be operational. Thus, MB Power and PTC/HPPC were obligated to perform their contractual obligations during such period. The Petitioner has further contended that MoP vide letter dated 15.4.2020 had requested State Governments to ensure uninterrupted operations of inter-State power generating stations as was done pursuant to MoP's letters dated 25.3.2020 and dated 28.3.2020. As such, failure of PTC/HPPC to schedule power in accordance with the PPA/PSA and pay tariff is a material breach of PTC/HPPC's obligations. The Petitioner has submitted that it declared 100% availability during April, 2020 under PPA/PSA, however there was no offtake/ scheduling by PTC/HPPC during this period on account of alleged Force Majeure.

21. The Petitioner has further contended that this issue is no longer *res integra* in view of the findings of this Commission, MPERC and Hon'ble High Court of Punjab and Haryana. Accordingly, the Petitioner relied on this Commission's Orders dated 20.1.2022 and 27.6.2022 passed in Petition No. 594/MP/2020 and Petition No. 187/MP/2021 respectively wherein the Commission has held that nationwide lockdown on account of Covid-19 pandemic and consequent reduction in demand of power

cannot be considered as Force Majeure. Further, such lockdown has not affected the distribution companies from performing its functions and obligations under the agreement and as such distribution companies are obligated to make payment of tariff as per the PPA during the nationwide lockdown imposed due to Covid-19 Pandemic. The Petitioner also relied on the similar Orders issued by Hon'ble High Court of Punjab and Haryana (Judgment dated 4.7.2022 passed in CWP No.7519 of 2020) and MPERC (Orders dated 18.11.2021 and 26.7.2022 passed in Petition No. 10 of 2021 *and* 72 of 2021 respectively).

22. Per Contra, the Respondents HPPC and PTC have submitted that MoF vide Notification dated 19.2.2020 and MNRE vide Notification dated 20.3.2020 have stated that disruption due to Covid-19 will be covered in Force Majeure Clause. Further, the MHA in its notification dated 24.3.2020 has acknowledged Covid-19 as an 'epidemic' and 'epidemic' is stated to be a Non-Political Force Majeure Event under Article 16.2 of PPA and Article 15.2 of the PSA. Further, Article 16.6 of PPA and Article 15.6 of the PSA absolve the affected party under PPA/PSA to perform its contractual obligations during the subsisting period of Force Majeure event. PTC has relied on Section 32 and 56 of the Indian Contract Act, 1872 to buttress its contentions. The Respondents have also contended that the Petitioner's reliance on this Commission's Orders dated 20.1.2022 and 27.6.2022 passed in Petition Nos. 594/MP/2020 and 187/MP/2021 respectively, judgment of Hon'ble High Court of Punjab and Haryana dated 4.7.2022 passed in CWP No.7519 of 2020 and MPERC's Orders dated 18.11.2021 and 26.7.2022 passed in Petition No. 10 of 2021 and 72 of 2021 respectively are misplaced as there was no express provision which specifically recognized an epidemic as a Force Majeure Event in the respective PPAs in these cases, whereas, in the present case



there is a specific provision namely Article 15.2(a) of the PSA and Article 16.2(a) of the PPA which specifically recognizes 'epidemic' as a Force Majeure Event. HPPC has contended that even though HPPC, being a Distribution Licensee, was exempted from the said restriction in terms of various Government Orders/ Notifications, however its consumers (including commercial and industrial consumers) were shut down due to which the State witnessed a sharp decline in power consumption. During the first week of April, 2020, power demand in Haryana drastically reduced to 3471 MW vis-à-vis 5239 MW in April, 2019 (i.e., ~ 33.75% decline). Such a scenario was beyond the reasonable control of HPPC, and it could not have prevented or overcome by exercise of due diligence and following Good Industry Practice. Due to this, HPPC's ability to off-take power from MB Power was severely hampered. Such a drastic reduction in demand is not the usual course but on account of an epidemic. The issue of essential service of electricity and necessity to maintain power supply would arise only if there is demand for power and power can be availed from the generating station. It is not possible for HPPC to avail power when there is no corresponding demand in the State. HPPC has further contended that process of power generation till its consumption is an instantaneous process as electricity cannot be stored. Therefore, any fluctuation in demand of power has a direct correlation with the procurement of power. HPPC has relied on judgment of Hon`ble Supreme Court in the case of *State of A.P. -v- National Thermal Power Corpn. Ltd.*, [(2002) 5 SCC 203], wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Therefore, there can certainly not be any procurement, if the consumption is drastically impacted due to Force Majeure Event.

23. In rebuttal, the Petitioner has contended that MoF Notification dated 19.2.2020 has clarified that only disruption of supply chains due to Covid-19 will be considered as a case of natural calamity, however, in the present case, there is no disruption of supply chains, as MB Power fulfilled its contractual obligation to supply power. Accordingly, HPPC is also bound by the terms of the agreement and cannot be allowed to renege on the performance of its obligations citing the provisions on Force Majeure. The Petitioner has further contended that in terms of Article 16.1 of PPA and Article 15.1 of the PSA, to qualify as an event of Force Majeure, it is essential that the performance of HPPC's/PTC's obligations under the PPSA/PPA becomes impossible. None of the obligations of HPPC/PTC as mentioned under Article 6.1 of the PPA/PPSA has been affected by way of Covid-19 and imposition of lockdown thereto since power generation, transmission and distribution were exempted from lockdown and these activities continued like normal without affecting the performance of respective obligations of either MB Power or HPPC/PTC under PPA and PSA. It was for this reason that MB Power discharged its obligations under PPA/ PSA and declared 100% availability during the alleged Force Majeure period of April 2020, which was not scheduled by PTC/ HPPC. Therefore, imposition of lockdown due to outbreak of Covid-19 and/ or reduction in demand in the Haryana cannot be considered as a Force Majeure Event for HPPC/PTC under Article 15 of the PSA and Article 16 of the PPA. As such, HPPC's/PTC's contractual obligation to pay tariff/minimum Off-take compensation cannot be done away with particularly in view of Article 10.2 of the PPA/PSA. The Petitioner has also contended that notwithstanding Article 15.2(a) of the PSA and Article 16.2(a) of the PPA including "epidemic as a qualifying event of Force Majeure, application of the same no longer remains tenable in the present matter with the coming

into force of the MHA Order dated 24.3.2020 issued under the Disaster Management Act 2005 – which overrides any other law for the time being in force. This MHA Order, by exempting the entities engaged in the essential activities of power generation, transmission and distribution of from any restrictions arising out of Covid-19 pandemic /lockdown even during the subsistence of the epidemic, has extinguished the need for such epidemic to be qualified as a Force Majeure Event with respect to power generation, transmission and distribution, thereby necessitating entities like MB Power, PTC/HPPC to fulfil their respective contractual obligations. Moreover, the MHA Order dated 24.3.2020 being in the nature of delegated legislation will stand to override the said PSA and PPA provisions.

24. The Respondents have further contended that MB Power vide its letters dated 11.11.2021, 11.1.2022 and 7.2.2022 had accepted Force Majeure Event during April 2020 and had accordingly, sought extension of contract period for one month (i.e. corresponding to April 2020 during which there was no offtake of power) in terms of Clause 16.6.2 of the PPA. In rebuttal, the Petitioner has contended that MB Power had never accepted Covid-19 or a lockdown thereof as a Force Majeure Event under PPA/ PSA. In its letter dated 4.3.2022, MB Power has clearly stated that its offer for supply of power after the expiry of the Contract Period on 31.3.2022 was without prejudice to MB Power's claims and were pursuant to the good business relations between the parties and power requirements in Haryana. Since, HPPC did not exercise this one-time option made available to them hence, the same was withdrawn by MB Power by way of the letter dated 4.3.2022.

25. We have considered the submissions of the parties and the issue involved needs to be examined in light of relevant PPA/PSA provisions regarding Force Majeure, various orders/ notifications issued by MHA, MoP and other government agencies and also relevant regulatory orders already passed on this issue.

26. Articles 15.1 and 15.2 of the PSA (which are identical to Article 16.1 and 16.2 of the PPA) deals with Force Majeure Event provides as under:

“15.1 Force Majeure

As used in this Agreement, the expression “Force Majeure” or “Force Majeure Event” shall, mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 15.2, 15.3 and 15.4 respectively, if it affects the performance by the Utility (s) or the Aggregator claiming the benefit of Force Majeure (the “Affected Party”) of its obligations under this Agreement and which act or event (a) is beyond the reasonable control of the Affected Party, and (b) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (c) has Material Adverse Effect on the Affected Party.

15.2 Non-Political Event

A Non-Political Event shall mean one or more of the following acts or events:

(a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Station Premises);

.....”

As per Article 15.1 of the PSA, any event defined under Article 15.2, Article 15.3 or Article 15.4 of the PSA can be termed as Force Majeure/Force Majeure Event with respect to an affected party (i.e. Utility-HPPC or the Aggregator-PTC), if: (i) such an event affects the performance by the affected party (i.e. HPPC or PTC) of its obligations under PSA/PPA, and (ii) such an event is beyond the reasonable control of the affected Party (i.e. HPPC or PTC) and (iii) the affected party (i.e. HPPC or PTC) could not have



prevented or overcome this event by exercise of due diligence and following Good Industry Practices and (iv) such an event has a material adverse effect on affected party (i.e. HPPC or PTC). All the above four are pre-requisites for qualifying any event as Force Majeure and absence of any of them would render such an event beyond the scope of Force Majeure. Further, as per Article 15.2 (a) of the PSA, “epidemic” is included in the list of Non-Political Event which is to be considered as a Force Majeure Event if it satisfies all the aforesaid prerequisites mentioned in Article 15.1 of the PSA.

27. We now proceed to review the MHA Order dated 24.3.2020 and MoP letter dated 25.3.2020 which were issued on Covid-19 and associated lockdown and its exemptions thereof. MHA Order dated 24.3.2020, whereby the guidelines providing for the measures to be taken for containment of Covid-19 were issued, clearly exempted the units and services relating to power generation, transmission and distribution from the lockdown. The relevant extract of above guidelines reads as under:

“.....

1. Office of the Government of India, its Autonomous/ Subordinate Offices and Public Corporations shall remain close.

Exceptions:

Defence, central armed police forces, treasury, public utilities (including petroleum, CNG, LPG, PNG), disaster management, power generation and transmission units, post offices, National Informatics Centre, Early Warning Agencies

.....

4. Commercial and private establishment shall be closed down. Exceptions:

.....

g. Power generation, transmission and distribution units and services

.....”

28. Further, the MoP vide its letter dated 25.3.2020 had also recognized that power generation is an essential service for securing smooth and uninterrupted power flow

across and within the States and operations of inter-State generating stations are critical for maintaining the power supply. Accordingly, in order to provide the uninterrupted operation of such generator, the Ministry of Power had also asked the concerned authorities to provide various permissions to such generating stations. The relevant extract of the said letter reads as under:

“

Subject: Essential operation of power generation utilities and permission for material movement needed by them during the nation-wide lockdown for Covid-19 outbreak

.....

2. *Power Generation is an essential service for securing smooth and uninterrupted power flow across and within the states. In the current scenario of Covid-19 outbreak and nationwide lockdown announced by Hon'ble Prime Minister, there will be need to ensure uninterrupted power generation.*

3. *The power generation utilities under Ministry of Power, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), hereafter referred to as "interstate power generating stations", supply inter-state electricity to the grid. Hence, their operation are critical for maintaining power supply across the country.*

4. *In order to provide uninterrupted operation of "interstate power generating stations", the following support is requested from your office.*

.....

c. Waiver from section 144, Nationwide Lockdown, Curfew or any other limitation on number of people to gather in locations like ash pond, raw water intake, Power Generating Stations and other related locations where it may be required for operation and maintenance activities of generation and associated equipment.

.....”

Thus, in terms of the above, activities relating to generation, transmission and distribution being essential services were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19. The Respondents have vehemently argued that even though HPPC, being a distribution licensee, was exempted from the said lockdown, however its consumers (including commercial and industrial consumers) were shut down due to which the State witnessed a sharp decline in power

consumption, as such, even if HPPC's activities were exempted from the lockdown, the drastic fall in demand in the State of Haryana was beyond its control. The Respondents further argued that the reduction in power demand due to nationwide lockdown cannot be compared to usual variations in power demand and hence such a reduction in power demand due to nationwide lockdown on account of Covid-19 is required to be treated as Force Majeure absolving HPPC of its obligations under the PSA including its obligation to schedule minimum 55% of the Contracted Capacity from the Petitioner's Project during the month of April, 2020. We have considered the arguments of HPPC/PTC in the above regard and we find them misconceived. On one hand, the Respondents have sought to rely upon the Notifications issued by MoF and MNRE contending that Covid-19 and nationwide lockdown have been considered as Force Majeure therein, whereas on the other hand, it has sought to contest the applicability of the Ministry of Home Affairs Order dated 24.3.2020 clearly exempting services relating to generation, transmission and distribution from the lockdown. Such approbation and reprobation on the part of the Respondent cannot be permitted. In view of the categorical exemption from the Covid-19 led nationwide lockdown to all the activities and services relating to generation, transmission and distribution in terms of MoH Order dated 24.3.2021, it cannot be argued that such Covid-19 led lockdown per se has in any way affected the Respondents HPPC (Distribution Licensee of Haryana) and PTC, (Aggregator), in performing their functions and obligations under the PSA/ PPA. On the contrary with the removal of restrictions, the MHA Order dated 24.3.2020 has in fact enabled entities like HPPC and PTC to fulfil their respective contractual obligations. We are of the view this cannot qualify to be a Force Majeure event especially when its obligation to schedule the power under the PSA/PPA was not predicated upon any particular level of demand.

For this very reason, the reliance of PTC on the Sections 32 and 56 of the Indian Contract Act also cannot sustain as their obligations under the PSA/PPA including the obligation of the scheduling were not contingent upon the particular level of power demand. Therefore, the Covid-19 led lockdown and the consequent reduction in power demand cannot be termed as Force Majeure event absolving the HPPC/PTC from their obligations under the PSA/PPA.

29. The Respondents have also sought to argue that Covid-19 pandemic led lockdown is a Force Majeure event as Covid-19 has been held as an “epidemic” by the Government of India and “epidemic” is included in the list of Non-Political Events constituting Force Majeure Event under PSA/PPA. We have considered the submission of the Respondents. As per Article 15.2 of the PSA and Article 16.2 of the PPA, “epidemic” can be considered a Force Majeure Event only if meets all the pre-requisites with respect to an Affected Party (i.e. Utility-HPPC or the Aggregator-PTC), as mentioned under Article 15.1 of the PSA and Article 16.1 of the PPA i.e. (i) such an event affects the performance by the affected party (i.e. HPPC or PTC) of its obligations under PSA/PPA, (ii) such an event is beyond the reasonable control of the affected party (i.e. HPPC or PTC), (iii) the affected party (i.e. HPPC or PTC) could not have prevented or overcome this event by exercise of due diligence and following Good Industry Practices, and (iv) such an event has a material adverse effect on affected party (i.e. HPPC or PTC). All the above four are pre-requisites for qualifying any event as Force Majeure and absence of any of them would render such an event beyond the scope of Force Majeure. It is noticed that MHA Order dated 24.3.2020 issued in exercise of the powers conferred under Section 10(2)(l) of the Disaster Management Act 2005, categorically exempted activities relating to generation, transmission and



distribution of power being essential services from the Covid-19 led lockdown and directed Ministries/Departments of Government of India, State/Union Territory Governments and State/Union Territory Authorities for strict implementation of the said Order. We note that as per Section 72 of the Disaster Management Act 2005, the provisions of this Act will have an overriding effect notwithstanding anything inconsistent therewith contained in any other law or in any instrument having effect by virtue of any law other than the Disaster Management Act 2005 as under:

*“72. **Act to have overriding effect.**- The provisions of this Act, shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”*

Accordingly, although “epidemic” is included in the list of Non-Political Events constituting Force Majeure Event under PSA/PPA, however, by virtue of MHA Order 24.3.2020 categorically exempting activities relating to generation, transmission and distribution of power, being essential services, from the Covid-19 led lockdown, the performance of the respective functions and obligations of the Petitioner and also Respondents, namely, HPPC (distribution licensee of Haryana) and PTC, (Aggregator) under the PSA/ PPA remained unaffected. Therefore, keeping in view the facts and circumstances of the instant matter and the above discussion, we are not inclined to accept that Covid-19 and its resulting lockdown qualifies as a Force Majeure Event under Article 15.1 of the PSA and Article 16.1 of the PPA.

30. The Respondents have further argued that MB Power vide its letters dated 11.11.2021, 11.1.2022 and 7.2.2022 had accepted Force Majeure Event during April 2020 and had accordingly, sought extension of contract period for one month (i.e.

corresponding to April 2020 during which there was no off-take of power) in terms of Clause 16.6.2 of the PPA, which is reproduced hereunder:

“16.6.2 If any force Majeure Event occurs at any time after the Appointed Date, whereupon the Supplier is unable to transmit electricity to the Delivery Point despite making best efforts or it is directed by the Aggregator, RLDC or SLDC or any Government Instrumentality to suspend generation or transmission during the subsistence of such Force Majeure Event, the Contract Period shall be extended by a period equal in length to the period during which the Supplier was prevented from generating or transmitting electricity on account thereof; provided that in the event of reduction in generation on account of partial inability or suspension, as the case may be, which cause the Availability on any day is to decline below 80% (eighty per cent) of the Normative Availability, the Aggregator shall extend the Contract Period in proportion to the loss of Availability due to Force Majeure. For the avoidance of doubt, loss of 25% (twenty five per cent) of Availability for 4 (four) days shall entitle the Supplier to extension of 1 (one) day in the Contract Period.”

31. It is noticed that the Petitioner in its letters dated 11.11.2021, 11.1.2022 and 7.2.2022 to PTC had stated that PTC/HPPC did not schedule power from MB Power under PPA/PSA during April 2020 citing Force Majeure on account of Covid-19 which has been contested by MB Power. However, even if the same is to be considered as Force Majeure, the Contract Period under the PPA/PSA be extended by one month after the scheduled expiry of PPA/PSA on 31.3.2021 in terms of Clause 16.6.2 of the PPA. However, in absence of any response on the same by HPPC and PTC, the Petitioner withdrew this offer through its letter dated 4.3.2021. We are of the view that if the Respondents HPPC and PTC were to claim Force Majeure for the period of March 2020, wherein HPPC/PTC did not schedule any power from MB Power, then it was contractual obligation on the Respondents to extend the Contract Period by another month beyond 31.3.2021 (i.e. the scheduled expiry date of PPA/ PSA). However, the Respondents having failed to discharge their contractual obligation cannot now claim

any relief on account of Force Majeure for the period during March especially when the PPA and PSA expired on 31.3.2022 without any extension.

32. The Respondent has also relied upon the decisions of the various courts in cases, namely (a) *Halliburton Offshore Services Inc. v. Vedanta Limited* [2020 SCC OnLine Del 542], (b) *MEP Sanjose Mahuva Road Pvt. Ltd. v. National Highway Authority of India Limited*, [2021 SCC OnLine Del 3288] and (c) *Hon'ble Madras High Court's judgment dated 1.2.2021 in R. Naryanan v. Govt. of Tamil Nadu & Ors.* to contend that the outbreak of Covid-19 and nationwide lockdown have been held to be a Force Majeure Event. We have reviewed these decisions and we are of the view of that none of these decisions are applicable in the said matter as they are distinguishable on the facts since in none of cases the parties were clearly exempted from the nationwide lockdown in terms of MHA Order dated 24.3.2020.

33. We have already dealt with the same issue on the similar matter in the Petition No. 594/MP/2020, wherein the Respondent therein DNH Power Distribution Company Limited had Covid-19 and nationwide lockdown thereof as a Force Majeure under the PPA with GMR Warora Energy Limited, wherein DNH Power Distribution Company Limited had also relied upon the above mentioned decisions to substantiate their Force Majeure claim. In our Order dated 20.1.2022 in the Petition 594/MP/2020, we have held the following:

"35. Thus, in terms of the above, the activities relating to generation, transmission and distribution were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19. Therefore, it cannot be argued that such lockdown per se has in any way affected the Respondent, being the distribution licensee in the Union Territory of Dadra and Nagar Haveli, in performing its functions and obligations under the agreement.

36. The Respondent has sought to argue that the reliance on above notification providing for exemption from lockdown is misconceived as the exemption was for

the purpose that power supply should not be disconnected. However, the said argument, in our view, is misconceived. On one hand, the Respondent has sought to rely upon the Notifications issued by Ministry of Finance, MNRE and MoP in contending that Covid-19 and nationwide lockdown have been considered as force majeure therein, whereas on the other hand, it has sought to contest the applicability of the Ministry of Home Affairs Order dated 24.3.2020 clearly exempting services relating to generation, transmission and distribution from the lockdown. Such approbation and reprobation on the part of the Respondent cannot be permitted. In view of the categorical exemption from the Covid-19 led nationwide lockdown to all the activities and services relating to generation, transmission and distribution in terms of MoHA Order dated 24.3.2021, in our view, such lockdown cannot be considered as force majeure event that prevents, hinders or delays the Respondent/ distribution licensee in performing its obligations as specified in the DNH PPA.

“37. The Respondent has also relied upon the decisions in (a) Halliburton Offshore Services Inc. v. Vedanta Limited 2020 SCC OnLine Del 542, (b) MEP Sanjose Mahuva Road Pvt. Ltd. v. National Highway Authority of India Limited, 2021 SCC OnLine Del 3288 and (c) decision of Hon'ble Madras High Court dated 1.2.2021 in R. Naryanan v. Govt. of Tamil Nadu & Ors. to contend that the outbreak of Covid-19 and nationwide lockdown have been held to be force majeure events. We have gone through the judgments as relied upon by the Respondent and find that none of them will come to the aid to the Respondent as they are distinguishable on the facts since in none of cases the parties were clearly exempted from the nationwide lockdown in terms of MHA Order dated 24.3.2020. Although in the case listed under (a) the issue of the Contractor therein, namely, Haliburton Offshore Services Inc. being exempted from the lockdown in terms of letter of Director General Hydro Carbons dated 26.3.2020 was raised and present, it remained contentious. However, in the present case, we have already observed that the activities relating to the generation transmission and distribution were clearly exempted from lockdown in terms of MHA's Order dated 24.3.2020. In fact, the Hon'ble Bombay High Court in the matter of Standard Retail Pvt. Ltd. v. G. S Global Corp. Ltd. has refused to grant relief under force majeure clause on account of imposition to lockdown to a set of steel importers on one of the grounds that distribution of steel had been declared as an essential service and no restrictions were imposed on its movements”

The above findings of the Commission are squarely applicable in the present case.

34. In view of the above, this issue is decided against the Respondents, HPPC and PTC and we hold that Covid-19 led lockdown and consequent reduction in the demand of HPPC does not constitute a Force Majeure Event for the Respondents HPPC and

PTC and the same does not affect or absolve, in anyway, the Respondents HPPC (Utility/ Distribution Licensee) and PTC (Aggregator) in performing their respective obligations under PSA and PPA.

Issue No. 3: Whether the Respondents are liable to make payments against the invoice dated 2.5.2020 raised by the Petitioner along with Late Payment Surcharge/ Interest?

35. The Petitioner has submitted that it declared 100% availability during April 2020 under PPA/PSA, against which there was no offtake/ scheduling by PTC/HPPC claiming Force Majeure. Accordingly, in terms Article 10.2.2 of the PPA/PPSA, the Petitioner raised an invoice on 2.5.2020 for the period from 1.4.2020 to 30.4.2020 upon PTC for Rs. 12,64,54,644/- as compensation/tariff for shortfall in energy scheduled by PTC/HPPCL at the rate of the difference between the tariff payable by PTC/HPPC under PPA/PSA and the daily average (RTC) MCP Prices at the Power Exchange (IEX) for such date. However, on 3.5.2020 PTC returned the invoice to the Petitioner on the ground that HPPC and PTC have already invoked Force Majeure and HPPC did not schedule any power from MB Power during April 2020, hence no amount is payable to MB Power against the said Invoice. In response, the Petitioner on 9.5.2020, wrote to PTC stating that it has already disputed the Force Majeure claim of HPPC and PTC by way of its letters dated 1.4.2020, 5.4.2020, 7.4.2020, 19.4.2020 and 1.5.2020 and further requested PTC to make the payment against the said invoice in terms of PPA. The Petitioner has submitted that PTC/HPPCL has illegally, and arbitrarily withheld payment of entire amount claimed under Invoice dated 2.5.2020.

36. Having already decided that Covid-19 led lockdown and consequent reduction in the demand of HPPC does not constitute a Force Majeure Event for HPPC and PTC

and the same does not affect or absolve, in anyway, the Respondents HPPC and PTC in performing their respective obligations as specified in the PSA and PPA, we now proceed to examine the relevant provisions of the PPA and PSA with respect to the said invoice dated 2.5.2020 raised by the Petitioner as under:

PPA between MB Power (Supplier) and PTC (Aggregator)

**“ARTICLE 10
ALLOCATION OF CAPACITY**

10.1 Contracted Capacity

10.1.1 Pursuant to the provisions of this Agreement, the Supplier shall dedicate a generating capacity of 175 MW to the Aggregator as the capacity contracted hereunder (the "Contracted Capacity") and the Contracted Capacity shall at all times be operated and utilised in accordance with the provisions of this Agreement.

10.1.2. The scheduling and dispatch of power shall be in accordance with the provisions of Indian Electricity Grid Code or any other Rules and Regulations as amended from time to time.

10.1.3 Supplier shall make available full Contracted Capacity to the Aggregator. The Aggregator shall schedule at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower on RTC basis only. However, Aggregator may schedule any quantum beyond 55% and up to the Contracted Capacity in any time block subject to the Declared Capacity by the Supplier.

.....

10.2 Dispatch of unutilised Contracted Capacity

10.2.1 In case Aggregator does not schedule the power, then the Supplier shall have the option to sell the power not scheduled by Aggregator to the Power Exchange/ any third party. However, such power scheduled to any third party/Power Exchange within limit of 55% of the Contracted Capacity on monthly basis shall be considered to be scheduled under this Agreement.

10.2.2 In case the Aggregator schedules power less than 55% of the Contracted Capacity on monthly basis, then the Aggregator shall pay compensation to the Supplier for such shortfall in energy at the rate of difference between the tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date. However, in case daily Average (RTC) MCP Prices at the Power Exchange are more than the Tariff payable, then the Supplier shall pay half the difference between daily Average (RTC) MCP Price at the Power Exchange (IEX) for such date and Tariff. Further, the Aggregator shall



*bear the applicable transmission charges for the entire approved MTOA quantum for such period.
....”*

PSA between PTC (Aggregator) and HPPC (Utility)

“ARTICLE 10 ALLOCATION OF CAPACITY

10.1 Contracted Capacity

*10.1.1 Pursuant to the provisions of this Agreement, the Aggregator shall dedicate a generating capacity of 175 MW to the Utility as the capacity contracted hereunder (**the "Contracted Capacity"**) and the Contracted Capacity shall at all times be operated and utilised in accordance with the provisions of this Agreement.*

10.1.2. The scheduling and dispatch of power shall be in accordance with the provisions of Indian Electricity Grid Code or any other Rules and Regulations as amended from time to time.

10.1.3 Aggregator shall make available full Contracted Capacity to the Utility. The Aggregator shall schedule at least 55% of the Contracted Capacity or Declared Capacity, whichever is lower on RTC basis only. However, Utility may schedule any quantum beyond 55% and up to the Contracted Capacity in any time block subject to the Declared Capacity by the Aggregator.

.....

10.2 Dispatch of unutilised Contracted Capacity

10.2.1 In case Utility does not schedule the power, then the Aggregator shall have the option to sell the power not scheduled by Utility to the Power Exchange/ any third party. However, such power scheduled to any third party/Power Exchange within limit of 55% of the Contracted Capacity on monthly basis shall be considered to be scheduled under this Agreement.

10.2.2 In case Utility schedules power less than 55% of the Contracted Capacity on monthly basis, then the Utility shall pay compensation to the Aggregator for such shortfall in energy at the rate of difference between the tariff payable by the Utility and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date. However, in case daily Average (RTC) MCP Prices at the Power Exchange are more than the Tariff payable, then the Aggregator shall pay half the difference between daily Average (RTC) MCP Price at the Power Exchange (IEX) for such date and Tariff. Further, the Utility shall bear the applicable transmission charges for the entire approved MTOA quantum for such period.

.....”

37. We note that during the month of April 2020, MB Power declared 100% availability of the Contracted Capacity of 175 MW. In terms of Article 10.1.1 and 10.1.3 of the PS and PPA, HPPC (and consequently PTC) was obliged to schedule at least 55% of 175 MW on RTC basis. Further in terms of Article 10.2.2 of the PSA and PPA, in case, scheduling by HPPC (and consequently PTC) is less than 55% of 175 MW during April 2020, then PTC/HPPC is obligated to pay compensation to MB Power for such shortfall in energy at the rate of the difference between the tariff payable by PTC/HPPC (Rs 4.24/kWh) and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date.

38. The day-wise details of the Invoice dated 2.5.2020 for Rs. 12,64,54,644/- raised by MB Power for the period from 1.4.2020 to 30.4.2020 in terms of the above provisions of PPA towards shortfall in energy scheduled by PTC/HPPCL at the rate of the difference between the tariff payable under PPA/PSA (Rs 4.24/kWh) and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) is as under:

Date	% DC by MB Power	% Offtake by PTC	IEX Price (Rs. /kWh)	Shortfall in Availability	Compensation (Rs.)	Shortfall in offtake (MU's)	Compensation (Rs.)
01-04-2020	100.00%	0.00%	2.307040	0.00	0.00	2.31	4465137.60
02-04-2020	100.00%	0.00%	2.499070	0.00	0.00	2.31	4021548.30
03-04-2020	100.00%	0.00%	2.568680	0.00	0.00	2.31	3860749.20
04-04-2020	100.00%	0.00%	2.621300	0.00	0.00	2.31	3739197.00
05-04-2020	100.00%	0.00%	2.379940	0.00	0.00	2.31	4296738.60
06-04-2020	100.00%	0.00%	2.428670	0.00	0.00	2.31	4184172.30
07-04-2020	100.00%	0.00%	2.276060	0.00	0.00	2.31	4536701.40
08-04-2020	100.00%	0.00%	2.457300	0.00	0.00	2.31	4118037.00
09-04-2020	100.00%	0.00%	2.362000	0.00	0.00	2.31	4338180.00
10-04-2020	100.00%	0.00%	2.114010	0.00	0.00	2.31	4911036.90
11-04-2020	100.00%	0.00%	2.346150	0.00	0.00	2.31	4374793.50
12-04-2020	100.00%	0.00%	2.604880	0.00	0.00	2.31	3777127.20
13-04-2020	100.00%	0.00%	2.674260	0.00	0.00	2.31	3616859.40
14-04-2020	100.00%	0.00%	2.501500	0.00	0.00	2.31	4015935.00
15-04-2020	100.00%	0.00%	2.516240	0.00	0.00	2.31	3981885.60
16-04-2020	100.00%	0.00%	2.528150	0.00	0.00	2.31	3954373.50
17-04-2020	100.00%	0.00%	2.394040	0.00	0.00	2.31	4264167.60
18-04-2020	100.00%	0.00%	2.490120	0.00	0.00	2.31	4042222.80
19-04-2020	100.00%	0.00%	2.440810	0.00	0.00	2.31	4156128.90
20-04-2020	100.00%	0.00%	2.386810	0.00	0.00	2.31	4280868.90
21-04-2020	100.00%	0.00%	2.339040	0.00	0.00	2.31	4391217.60
22-04-2020	100.00%	0.00%	2.252060	0.00	0.00	2.31	4592141.40

Date	% DC by MB Power	% Offtake by PTC	IEX Price (Rs. /kWh)	Shortfall in Availability	Compensation (Rs.)	Shortfall in offtake (MU's)	Compensation (Rs.)
23-04-2020	100.00%	0.00%	2.366700	0.00	0.00	2.31	4327323.00
24-04-2020	100.00%	0.00%	2.498200	0.00	0.00	2.31	4023558.00
25-04-2020	100.00%	0.00%	2.587770	0.00	0.00	2.31	3816651.30
26-04-2020	100.00%	0.00%	2.335150	0.00	0.00	2.31	4400203.50
27-04-2020	100.00%	0.00%	2.189760	0.00	0.00	2.31	4736054.40
28-04-2020	100.00%	0.00%	2.248290	0.00	0.00	2.31	4600850.10
29-04-2020	100.00%	0.00%	2.233490	0.00	0.00	2.31	4635038.10
30-04-2020	100.00%	0.00%	2.510240	0.00	0.00	2.31	3995745.60
Monthly Availability/ Offtake	100.00%	0.00%	Total	0.00	0.00	69.30	126454643.70
Shortfall in Availability/ Offtake (%)	0.00%	55.00%					
Shortfall in Availability/ Offtake (MU's)	0.00	69.30					
Compensation for less offtake/ availability (Rs.)	0.00	126454643.70					

39. We find that the said invoice for Rs. 12,64,54,644/- raised by MB Power on PTC for the period from 1.4.2020 to 30.4.2020 is as per the provisions of the PPA and as such HPPC and PTC have not disputed the above computation, in their replies. Having already decided that Covid-19 led lockdown and the consequent reduction in demand does not constitute a Force Majeure Event for the Respondents and the same does not absolve the Respondents in performing their respective contractual obligations, we hold that by non-scheduling the available Contracted Capacity during April 2020, the Respondents are liable to make the payments against the said invoice dated 2.5.2020 for Rs. 12,64,54,644/-

40. The Petitioner has sought interest/Late Payment Surcharge on the unpaid amount of Rs. 12,64,54,644/- under invoice dated 2.5.2020. The relevant provisions of the PPA (which are identical to the corresponding provisions of the PSA) pertaining to Billing, Payment and Interest/Late Payment Surcharge are as under:

“11.5 Billing and Payment

.....

11.5.3. The Aggregator shall, within 32 (thirty two) days of receipt of a Monthly Invoice in accordance with Clause 11.5.1 (the “Payment Due Date”) make payment of the amount claimed directly, through electronic transfer, to the nominated bank account of the supplier, save and except and amount which it determines as not payable or disputed (the “Disputed Amounts”)

.....

11.6 Disputed Amounts

.....

11.6.2 If any amount is payable by either Party to the other Party upon determination of a dispute regarding any Disputed Amount under the Dispute Resolution Procedure, such amount shall be deemed to be payable on the date when it first become due under this Agreement, and interest for the period of delay shall be due and payable at the rate specified in Clause 24.4

24.3 Interest

Unless otherwise specified, any interest payable under this agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

24.4 Delayed Payments

The Parties here to agree that payments due from one party to the other party under the provisions of this agreement shall be made with the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. Unless otherwise specified in this Agreement, in the event of delay beyond such period, the defaulting party shall pay interest for the period of delay calculated at the rate equal to 5% (five percent) above Bank Rate, and recovery there of shall be without prejudice to the rights of the parties under this Agreement including Termination thereof”

41. We note that the disputed invoice was raised by MB Power on 2.5.2020, which in terms of the above quoted provisions of PPA became payable on 2.6.2020 (32nd day of Invoice date), hence in terms of Articles 24.3 and 24.4 of the PPA (and Articles 23.3 and 23.4 of the PSA), the Respondents are liable to pay interest on the invoice amount of Rs. 12,64,54,644/- from 2.6.2020 onwards till the date of making complete payments to the Petitioner MB Power.

42. In view of the above discussions, the submissions of the Respondents that Covid-19 pandemic led lockdown and consequent reduction in demand constitute Force Majeure Event absolving the Respondents from making payment against the

Petitioner's Invoice dated 2.5.2020 for Rs. 12,64,54,644/- are rejected and accordingly, the Respondents are directed to make payment to the Petitioner against the Petitioner's Invoice dated 2.5.2020 for Rs. 12,64,54,644/- along with interest for the period from 2.6.2020 till the date of making complete payments in terms of Articles 24.3 and 24.4 of the PPA (and Articles 23.3 and 23.4 of the PSA) within 60 days from the date of this Order.

43. The Petition No. 253/MP/2022 is disposed of in terms of above discussions and findings.

**Sd/-
(P.K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I S Jha)
Member**