

**CENTRAL ELECTRICITY REGULATORY COMMISSION,
NEW DELHI**

Petition No. 281/ MP /2021

CORAM :

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 20.04.2023

In the matter of:

Petition under Sections 61 read with 79 of the Electricity Act 2003 and Regulation 6.3.B of CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 and this Hon'ble Commission's Order No. L-1/219/2017-CERC dated 05.05.2017 seeking directions to Uttar Pradesh Power Corporation Limited for making payment for Technical Minimum Compensation on account of Part Load Operation of MB Power's 1200 MW (2x600 MW) Anuppur Thermal Power Project.

And

In the matter of:

MB Power (Madhya Pradesh) Limited
239, Okhla Industrial Estate, Phase-III,
New Delhi-110 020

...Petitioner

Versus

1. PTC India Limited
2nd Floor, NBCC Tower
15, Bhikaji Cama Place,
New Delhi-110066
2. Uttar Pradesh Power Corporation Limited
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226001
3. Pashchimanchal Vidyut Vitran Nigam Ltd
Urja Bhawan, Victoria Park,
Meerut – 250001

4. Purvanchal Vidyut Vitran Nigam Ltd
DLW Bhikaripur,
Varanasi – 221004

5. Madhyanchal Vidyut Vitran Nigam Ltd
4A, Gokhale Marg,
Lucknow – 226001

6. Dakshinanchal Vidyut Vitran Nigam Ltd
Urja Bhawan, NH – 2,
(Agra-Delhi Bypass Road)
Sikandra, Agra – 282002

.....Respondents

Parties Present:

Shri Amit Kapur, Advocate, MBPMPL
Shri Akshat Jain, Advocate, MBPMPL
Shri Avdesh Mandloi, Advocate, MBPMPL
Shri Abhishek Gupta, MBPMPL
Shri Ravi Kishore, Advocate, PTC
Shri Keshav Singh, Advocate, PTC
Shri Sitesh Mukherjee, Advocate, UPPCL
Shri Abhishek Kumar, Advocate, UPPCL
Shri Karan Arora, Advocate, UPPCL
Shri Nived Veerapaneni, Advocate, UPPCL
Shri Dhruv Tripathi, PTC
Shri Deepak Raizada, UPPCL

ORDER

MB Power (Madhya Pradesh) Limited (“**Petitioner**”) has filed the present Petition against the refusal of the Respondent, Uttar Pradesh Power Corporation Limited (“**UPPCL**”) to make payment of Rs.20,29,70,629/- toward technical minimum compensation for part load operation of its Project (i.e. part/ under scheduling by UPPCL) during the period from May 2017 to March 2021. The Petitioner has made the following prayers :

a) Direct PTC/UPPCL to make payment against the Compensation Invoice dated 11.08.2021 amounting to Rs. 12,75,62,581/- and Compensation Invoice dated 20.10.2021 amounting to Rs. 7,54,08,048 raised by MB Power seeking Compensation for the period May 2017 to March 2021 along with Late Payment Surcharge and/or Carrying Cost as per the applicable provisions under the UP PPAs;

b) Direct PTC/UPPCL to make regular timely payments against the Compensation Invoices to be raised by MB Power on account of Part Load Operation of its Generating Station for all future period based upon the Compensation Statements issued by WRPC;

c) Declare that compensation for Part Load Operations of MB Power's Generating Station is payable by PTC/UPPCL with effect from 15.05.2017 i.e., date when the Detailed Operating Procedure and the Compensation Mechanism specified in Hon'ble Commission's Order dated 05.05.2017 came into force.

d) In the interim, direct PTC/UPPCL to release 75% of the total amount due for payment under the Compensation Invoices raised by MB Power on PTC/ UPPCL till date; and

e) Pass any such further reliefs as this Hon'ble Commission s deems just and proper in the nature and circumstances of the present case

2. In support of its prayers, the Petitioner has made the submissions:

a) The Petitioner has developed and operates a 1200 MW (2 x 600 MW) coal-based Thermal Power Project in District Anuppur in the State of Madhya Pradesh ("**Project**"). Unit-I and Unit-II of the Project achieved Commercial Operation on 20.05.2015 and 07.04.2016, respectively.

b) The Petitioner has executed the following long-term Power Purchase Agreements ("**PPA**") for supplying power from its Project:

i. Supply of 361 MW of power on long term basis to UP Discoms based on competitive bidding through back-to-back arrangements, being:-

a) Long Term PPA dated 18.01.2014 entered between PTC (on behalf of MB Power) and UP Discoms for supply of 361 MW power from the Project on back-to-back basis ("**Procurers-PPA**").

b) Long Term PPA dated 20.01.2014 entered between PTC and MB Power for procurement of 361 MW power from the Project for onward supply to UP Discoms on back-to-back arrangement ("**PTC-PPA**")

ii. PPA dated 05.01.2011 executed with MPPMCL (being the lead procurer

for MP Discoms) for supplying 30% of the installed capacity of the Project for a period of 20 years (“**MP PPA**”).

iii. PPA dated 04.05.2011 executed with Government of Madhya Pradesh (“**GoMP**”) (MPPMCL being the nominated agency) for supplying 5% of the net power generated from the Project at a price equivalent to variable charges only (“**GoMP PPA**”).

c) The Commission notified CERC (Indian Electricity Grid Code) Regulations, 2010 (“**IEGC 2010**”) on 28.04.2010. Thereafter, on 6.4.2016, the Commission notified the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 (“**4th Amendment**”) and introduced Regulation 6.3(B), which pertains to technical minimum schedule for operation of Central Generating Stations and Inter-State Generating Stations.

d) In terms of Regulation 6.3(B) of the 4th Amendment to IEGC the following position emerges for consideration:

i. Technical Minimum criteria for operation of Central Generating Stations (“**CGS**”) and Inter-State Generating Stations (“**ISGS**”) was prescribed as 55% of MCR loading or installed capacity of the Unit [**Regulation 6.3.B(1)**].

ii. RLDCs and RPCs were entrusted with certain responsibilities qua Reserve Shut Down (“**RSD**”) of CGS and ISGS in case the scheduling issued by Procurer is below the Technical Minimum criteria [**Regulation 6.3.B(2)**].

iii. CGS and ISGS whose tariff is either determined or adopted by this Hon’ble Commission were entitled to grant of compensation in case of operation below normative plant availability factor but at or above technical minimum (i.e., Part Load Operations) [**Regulation 6.3.B(3)**].

iv. A generating station whose tariff is neither determined nor adopted by this Commission shall factor the above provisions relating to technical minimum and compensation in their PPAs [**Regulation 6.3.B(4)**].

v. NLDC and Regional Power Committees (“**RPCs**”) were directed to prepare a Detailed Operating Procedure in consultation with the generators and beneficiaries with regards to the procedure for taking the units under RSD, operation at Technical Minimum and mechanism for compensation for Part Load Operations [**Regulation 6.3.B(6)&(7)**].

e) On 05.05.2017, the Commission issued a suo-motu order and approved the Detailed Operating Procedure and the Compensation Mechanism needed to operationalize Regulation 6.3(B), inserted by 4th Amendment to IEGC 2010. Further, in terms of this suo-motu Order dated 05.05.2017, this Detailed Operating Procedure and the Compensation Mechanism came into force from 15.05.2017.

f) In terms of Para 6 of Appendix-II of Order dated 05.05.2017, the concerned Regional Power Committees (“RPCs”) have been directed to issue Compensation Statement for Part Load Operation of the generating station along with final REA for the month. The Petitioner has been submitting the requisite data to Western Regional Power Committee (“WRPC”) from time to time for computation of compensation due to Part Load Operation of MB Power’s Generating Station i.e., on account of part/under scheduling by UPPPCL and MPPMCL.

g) In terms of Para 6(i) of Appendix-II of Order dated 05.05.2017, WRPC from time to time has issued the Compensation Statements with respect to Part Load Operation of MB Power’s Generating Station by UPPPCL and MPPMCL, thereby stating the compensation amount payable by the respective Distribution Licensees (i.e., MPPMCL and UPPCL). Break-up off the compensation with respect to UPPCL till March 2021 as per the said Compensation Statements issued by WRPC for the Petitioner’ Generating Station is as under:-

WRPC TECHNICAL MINIMUM COMPENSATION STATEMENT			
S. No	Date	Period	Compensation Amount (Rs.)
1.	10.02.2021	May 2017- March 2018	0
2.	15.12.2020	April 2018 - March 2019	0
3.	07.09.2020	April 2019 - March 2020	4,11,46,012
4.	15.10.2020	April 2020 - August 2020	6,53,93,077
5.	20.01.2021	September 2020 – November 2020	2,10,23,492
6.	07.09.2021	December 2020 – March 2021	7,54,08,048
TOTAL			20,29,70,629

h) Based on the Compensation Statements issued by WRPC, the Petitioner

issued the following Invoices upon PTC India Limited seeking payment of Rs. 20,29,70,629/- towards compensation for the period May 2017 to March 2021 on account of part/under scheduling by UPPCL from the Petitioner's Generating Station in terms of 4th Amendment to IEGC and this Commission's Order dated 05.05.2017:-

- i. Invoice dated 11.08.2021 for Rs. 12,75,62,581/- with the payment Due Date being 11.09.2021.
 - ii. Invoice dated 20.10.2021 for Rs. 7,54,08,048/- with the payment Due Date being 20.11.2021.
- i) PTC/UPPCL has not made any payment towards these Compensation Invoices raised by the Petitioner. UPPCL vide letter dated 15.11.2021, apprised PTC that there is no provision/clause in the PPA dated 18.01.2014 for claiming compensation for operating at the technical minimum schedule. Hence, the compensation Invoices for the period April 2019 to March 2021 is being returned in original and PTC vice letter dated 17.11.2021 informed the Petitioner that UPPCL has refused to make any payment towards the compensation invoices.
- j) On the issue of Jurisdiction of the Commission in the present matter, the Petitioner has submitted that the Commission has the jurisdiction to adjudicate the present matter since **Section 79(1)(b) of the Electricity Act empowers this Commission to regulate the tariff of generating companies other than owned or controlled by the Central Government if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State** The Petitioner has entered into Long Term PPAs for sale of power with distribution licensees in the States of Madhya Pradesh and Uttar Pradesh.
- k) The Hon'ble Supreme Court in ***Energy Watchdog v CERC & Ors***, has held "*the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State*" Accordingly, the Commission has powers to regulate tariff for MB Power as MB Power is selling

power to more than one State.

l) Pursuant to the above Energy Watchdog Judgement, the Commission vide Order dated 18.01.2019 in Petition No. 224/MP/2018 and Order dated 03.06.2019 passed in Petition No. 156/MP/2018 (both filed by the Petitioner) has *inter-alia* held that this Commission has the jurisdiction to regulate the tariff of the Petitioner with respect to power supply to UPPCL under the UP PPAs by virtue of MB Power having the composite scheme; and adjudicated upon the change in law claims raised by MB Power and granted compensatory tariff to MB Power for the allowed change in law claims.

m) As per Regulation 6.3 of IEGC 2010, the Scheduling and Despatch Code is applicable to Inter-State Generation Station (“**ISGS**”) as well as Regional Entities. The Petitioner is supplying power to the States of Madhya Pradesh as well as Uttar Pradesh under Long Term Power Purchase Agreements. For this purpose, the Petitioner has obtained Long Term Access (“**LTA**”) from Central Transmission Utility India Limited and is directly connected to Inter-State Transmission System (“**ISTS**”) for evacuating power. As a result, the scheduling and metering of the Petitioner’s generating station is undertaken by the Regional Load Despatch Centre i.e., Western Region Load Despatch Centre (“**WRLDC**”). Hence, in terms of Regulation 2(1) (kkk) and 2(1) (pp) of IEGC 2010, the Petitioner qualifies as a Regional Entity as well as an Inter-State Generation Station.

n) Accordingly, by virtue of being a Regional Entity and ISGS, scheduling and despatch of power from the Petitioner’s Project is governed by IEGC 2010 and its amendments thereof. Accordingly, all aspects of scheduling and dispatch of power in terms of IEGC 2010 (and its amendments) are applicable to the Petitioner’s Project.

o) In terms of Regulation 6.3.B(3)(vi) of the 4th Amendment to IEGC, compensation shall be paid by the entity who has caused the generating station to be operated at Part Load based on the compensation mechanism finalized by the

RPCs.

p) In terms of Regulation 6.3.B(4) of the 4th Amendment to IEGC, generating stations whose tariff is neither determined nor adopted by this Commission shall factor the provisions relating to technical minimum and compensation for operating at the technical minimum schedule in their PPAs. The applicability of the Backing Down Procedure as well as the Compensation Mechanism issued by this Commission is defined in paragraph 3 of the Order dated 05.05.2017 in terms of which **Backing Down Procedure** is applicable to CGS and ISGS whose tariff is either determined or adopted by this Commission and also to generating stations which qualify as Regional Entities though their tariff is neither determined nor adopted by this Commission. Similarly, the **Compensation Mechanism** due to Part Load Operation/ under-scheduling is applicable to Coal/Gas based CGS and ISGS, whose tariff is either determined or adopted by this Commission. Other generation stations, which qualify as Regional Entity but whose tariff is neither determined nor adopted by this Commission, shall make appropriate provisions in their PPAs in light of the Compensation Mechanism.

q) Regulation 6.3B of the 4th Amendment to IEGC recognises the need for compensation to the generating stations for Part Load Operations. Sub clause 4 of Regulation 6.3B provides that where the tariff is neither determined nor adopted by this Commission, such generating company shall factor the provisions for technical minimum compensation in their PPA. In other words, for generators whose tariff has been determined or adopted by this Commission, there is no need to factor such provisions in the PPAs. The rationale behind this provision is that amended PPAs need to be approved by the Appropriate Commission. For the generating companies whose tariff is being regulated by this Commission under Section 79(1)(a) and 79(1)(b), there would not be any need for separate approval as the compensation is being provided under this Commission's own Regulations. Since the tariff for supply of power to UPPCL under the PPAs, is being regulated by this Hon'ble Commission, provisions of Regulation 6.3B(4) with respect to amendment in PPA with UPPCL for claiming technical minimum compensation from UPPCL is not required.

r) It is a settled position of law that a right is accrued upon a party from the date the law is notified in the Official Gazette. In the present case Regulation 6.3(B) of the 4th Amendment to IEGC along with the Backing Down Procedure and Compensation Mechanism (which is applicable to MB Power) came into force on 15.05.2017. Accordingly, the Petitioner has acquired a legal right to be compensated for Part Load Operation/backing down of its Generating Station from 15.05.2017.

s) The Petitioner's right to claim compensation from UPPCL on account of Part Load Operation of its Generating Station is not contingent upon PTC/UPPCL's consent to incorporate the Compensation Mechanism provided under Regulation 6.3B and Order dated 05.05.2017 in the UP PPAs. If such would be the case, then the statutory right conferred upon an ISGS or Regional Entity (whose tariff is neither determined nor adopted by this Commission) to compensation for Part Load Operation will be rendered meaningless. In this regard the following is noteworthy:

t) The Hon'ble Supreme Court in ***PTC India Ltd. v. CERC***, has held that a Regulation framed under Section 178 of the Electricity Act is in the nature of a subordinate legislation, which has the effect of interfering and overriding the existing contractual relationship between regulated entities including the PPA, which have to be aligned with the Regulations

u) In terms of Article 15.24 of the PPA dated 18.01.2014 any provision of the PPA which is in deviation or inconsistent with the provision of the Electricity Act or any regulations made thereunder shall be deemed to be amended to the extent required to make it consistent with such regulations. Thus, in terms of Article 15.24 of the Procurers-PPA dated 18.01.2014 (PPA with UPPCL is deemed amended and there is no need for separate amendment.)

v) Backing Down Procedure and the Compensation Mechanism are in force since 15.05.2017. Hence, the backing down instructions (i.e., under/part scheduling) by UPPCL/PTC to Petitioner's Generating Station from 15.05.2017 onwards entail a liability on UPPCL/PTC to pay compensation towards such Part Load Operation of

Petitioner's Generating Station. This Commission vide Order dated 13.03.2018 in Petition No.130/MP/2017 titled ***NTPC vs. Grid Corporation of Orissa Ltd & Ors*** has held that implementation of backing down instructions without compensatory mechanism would adversely affects the interest of the generating company. Thus, in terms of Regulations 6.3B(3) and 6.3B(4) of 4th Amendment to IEGC 2010 MB Power is entitled to grant of compensation for Part Load Operation of its Generating Station (i.e., implementation of backing down instructions issued by PTC/UPPCL).

w) The Petitioner has acquired the right to avail compensation from the date the law/Regulation came into force i.e., from 15.05.2017 itself. Once the said Regulations were notified in the Gazette, MB Power is entitled to seek grant of appropriate compensation for the obvious commercial fallout of the backing down instructions issued by PTC/UPPCL i.e. Part Load Operations of its Generating Station (i.e., operation below Normative Plant Availability Factor but at or above Technical Minimum) in light of Regulation 6.3B and Compensation Mechanism

x) In terms of Para 6(i) of Appendix-II of Order dated 05.05.2017, WRPC from time to time has issued the Compensation Statement with respect to Part Load Operation of MB Power's Generating Station containing the compensation amount payable by the respective Distribution Licensees (i.e., MPPMCL and UPPCL).

y) In terms of the mandate of Para 5(i) of Appendix II of Order dated 05.05.2017, the Petitioner has raised Invoices dated 11.08.2021 and 20.10.2021 upon PTC/UPPCL seeking payment of Rs. 12,75,62,581/- and Rs. 7,54,08,048/- respectively towards Compensation for Part Load Operation of its Generating Station on account of backing down instructions issued by UPPCL/PTC for the period May 2017 to March 2021 based upon the compensation amount certified by WRPC. The Due Date for payment of these Compensation Invoices expired on 11.09.2021 and 20.11.2021 respectively. However, till date PTC/UPPCL has not made any payment against these Compensation Invoices. Further by way of letter dated 15.11.2021 UPPCL has refused to acknowledge the aforesaid Compensation Invoices. Such actions of UPPCL/PTC to deny the legitimate statutory claim of MB

Power for compensation on account of Part Load Operation of its Generation Station is illegal, arbitrary and violative of Regulation 6.3.B of IEGC (Fourth Amendment) Regulations, 2016 and this Hon'ble Commission's Order dated 05.05.2017.

z) The Commission in Order dated 13.03.2018 passed in Petition No.130/MP/2017 titled ***NTPC v. Grid Corporation of Orissa Ltd & Ors*** wherein it was held that any claim for compensation on account of part load operation of the generation station can only be made from 15.05.2017 i.e., after the Backing Down Procedure and Compensation Mechanism has come into force.

3. The Petition was listed for hearing on admission on 21.1.2022. During the hearing, UPPCL submitted that the present Petition is not maintainable in the present form and sought time to file its reply. Thereafter, the matter came out for hearings on 12.7.2022, 29.9.2022 and 19.1.2023. The Commission vide RoP dated 19.1.2023 reserved the order in the Petition.

4. UPPCL vide its Reply dated 4.3.2022 has submitted as under:

a) Regulation 6.3(B) of IEGC evinces two categories of generators. First, a generating company whose tariff is either determined or adopted by this Commission and second, a generating company whose tariff is neither determined nor adopted by this Commission. Admittedly, the Petitioner for the purposes of the present petition falls under the second category of generator i.e., a generating company whose tariff is neither determined nor adopted by this Commission. It is an undisputable fact, that the tariff for MB Power's Project (*for 361 MW capacity contracted with UP Discoms*) has been adopted by the UPERC under Petition No. 911 of 2013 filed by UPPCL seeking adoption of tariff obtained through bidding process under Case -1 Standard Bidding Guidelines of Government of India.

- b) Provision 2 of the Compensation Mechanism sets out the applicability of the said mechanism to Coal/Gas based Central Generating Stations and Coal/Gas based Inter-State Generating Stations, whose tariff is either determined or adopted by this Commission. However, for the said mechanism to be made applicable to generating stations whose tariff is neither determined nor adopted by this Commission, the generating company must make appropriate provisions in their PPAs or any supplementary agreement, without which the Compensation Mechanism will not be applicable for such generating company. As on date the Compensation Mechanism for the Petitioner's generating station has not kicked in. Accordingly, the compensation invoices dated 11.08.2021 and 20.10.2021 are extraneous and are outside the scope of extant governing contracts & regulations.
- c) The obligation to give effect to Regulation 6.3(B) of IEGC is casted upon the Petitioner/ PTC i.e. provisions of IEGC relating to availability, scheduling and dispatch. As per Article 5.3 of the Procurers-PPA, the Seller is responsible to ensure that the Developer shall comply/complies with the provisions of the applicable Law regarding Availability including, in particular, to the provisions of the ABT and Grid Code relating to declaration of Availability and the matters incidental thereto. Further, as per Article 5.4, the Seller is responsible to ensure that the Developer shall comply/complies with the provisions or the applicable Law regarding Dispatch Instructions, in particular, to the provisions of the ABT and Grid Code relating to scheduling and Dispatch and the matters incidental thereto. Since, the Petitioner has failed to undertake necessary steps to comply with the provisions of IEGC pursuant to the procedure prescribed by Law, petition is premature and hence, the captioned petition deserves to be dismissed at the threshold itself.
- d) The Petitioner was aware of the fact that Regulation 6.3(B) of IEGC and Compensation Mechanism, would not *ipso facto* be applicable to its generating companies falling under Sub-Clause 4 of Regulation 6.3(B) of IEGC (*second category of generator*) and can only be given effect to pursuant to an amendment to the existing PPAs/ PSAs or by executing fresh Supplementary PPAs/PSAs to this effect. Reference is apposite to the Order dated 19.11.2019 issued by the Madhya

Pradesh Electricity Regulatory Commission (MPERC) in Petition No. 04 of 2019, which was filed by Madhya Pradesh Power Management Company Limited (MPPMCL) seeking approval of the Supplementary PPA executed between MPPMCL and the Petitioner in furtherance of the existing PPA between the said parties. The provisions in the said Supplementary PPA had been made mainly to incorporate the mechanism in relation to technical minimum schedule and other associated provisions, in accordance with the Amending Regulations followed by Detailed Operating Procedure issued by this Commission.

e) However, vide the compensation invoices dated 11.08.2021 & 20.10.2021 and the present petition, the Petitioner has sought to enforce the provisions of the said regulations without following the procedure prescribed by Law and the PPA itself i.e., seeking suitable amendment to the extant contracts entered between the parties to reflect and/or incorporate the provisions of the Amending Regulations. Such an amendment would however only be permissible on case-to-case basis depending on the specific terms of the PPA approved by the concerned State Commission, or the relevant regulations of such concerned State Commission. There is no case for an automatic determination by this Commission *dehors* an amendment in the PPA agreed to by all parties to the PPA and due approval of UPERC.

f) The introduction of Regulation 6.3(B) by way of the amending Regulations is a regulatory measure enunciated by this Commission. Accordingly, on account of the said regulation being a regulatory measure, introduction of it, would not qualify as a Change in Law event under the extant PPAs, so as to enable the Petitioner to seek compensation *dehors* IEGC and the amendments thereto. Hence no relief can be claimed under the provisions of Article 10 of the PPA

g) In the case of CIT v. Sun Engineering Works (P) Ltd. reported as (1992) 4 SCC 363, the Hon'ble Supreme Court has held that it is impermissible to pick out words or sentences from a judgment divorced from the context of the question under consideration and to treat the same as being complete law declared by the Hon'ble Supreme Court. A judgment must be read as a whole and the observations from the

judgment have to be considered in the light of the questions which were before the Hon'ble Supreme Court. Thus, a decision of the Hon'ble Supreme Court would take its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down and not pick out words or sentences from the judgment, divorced from the context of the questions under consideration before the Hon'ble Supreme Court to support their reasoning.

h) In the case of *Ashwani Kumar Singh v. U.P. Public Service Commission* reported as (2003)11 SCC 584, the Hon'ble Supreme Court held that courts should not place blind reliance on decisions without discussing as to how the factual situation of a case fits in with the fact situation on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute but in the context in which they appear. Judgments are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark on lengthy discussions, but the discussion is meant to explain and not define. Judges interpret statutes and not judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

i) In the case of *Islamic Academy of Education v. State of Karnataka* reported as (2003) 6 SCC 697, a constitutional bench of the Hon'ble Supreme Court, upon analysing a catena of previous judgments held that words of a judgment cannot be treated as words of legislation/statute and a decision is an authority for what it decides and not what can be logically deduced therefrom. Therefore, courts cannot read some sentences from here and there to find out the intent and purport of a decision by not only considering what has been said therein but the text and the context in which it was said.

j) The Petitioner's reliance on the PTC Judgement is highly misplaced, since the Hon'ble Supreme Court vide the PTC Judgement was deciding whether the regulatory measure enunciated by this Commission by way of a Regulation under Section 178 of the Electricity Act, 2003 in relation to fixing of trading margin was

valid or not. However, in the present factual matter, the question of facts and law that ought to be adjudicated upon by this Commission pertains to whether the Petitioner has complied with the Amending Regulations in its true intent and spirit. Here, it is reiterated that the Amending Regulations itself envisage that for generating companies such as the Petitioner (*whose tariff is neither determined nor adopted by this Hon'ble Commission*), certain provisions are to be reflected in/ incorporated to the pre-existing contracts in order for the generating company to claim technical minimum compensation under Regulation 6.3(B) of IEGC.

k) Further, the Petitioner's reliance on the NTPC Order is also wholly misplaced. It is pertinent to note that NTPC falls under the first category of generator (*whose tariff is either determined or adopted by this Commission*) whereas, the Petitioner falls under the second category of generator (*whose tariff is neither determined nor adopted by this Commission*).

l) The Petitioner's prayer for release of an amount equal to 75% of its compensation invoices, is in effect seeking final relief in the guise of an interim relief.

5. The Petitioner in its Rejoinder to the reply filed by UPPCL has submitted as under:

a) Section 79(1) (b) of the Electricity Act empowers this Commission to regulate its tariff by virtue of the Petitioner having a composite scheme for generation and sale of electricity in more than one State.

b) The Commission vide its order dated 03.06.2019 in the Petition 156/MP/2018 has determined Change in Law compensation payable by UPPCL to MB Power under the same PPA for supply of power to UPPCL. The determination of Change in Law compensation is nothing but tariff determination by this Commission. Hence, the Petitioner's tariff with respect to power supply to UPPCL under the UP PPAs is regulated/determined by this Commission under Section 79(1)(b) of the Electricity Act. Thus, the Petitioner falls under the first category of generators envisaged under Regulation 6.3(B) of IEGC, which does not require amendment of

existing PPA/ execution of supplementary PPA for payment of Technical Minimum compensation for Part Load Operation (i.e., part/under scheduling) of MB Power's Generating Station by UPPCL.

c) Regulation 6.3B of IEGC recognises the need for compensation to the generating stations for Part Load Operations. Subclause 4 of Regulation 6.3B of IEGC provides that where the tariff is neither determined nor adopted by this Commission, such generating company shall factor the provisions for Technical Minimum compensation in their PPA. The rationale behind this provision is that amended PPAs need to be approved by the Appropriate Commission. For the generating companies whose tariff is being regulated by this Commission under Section 79(1)(a) and 79(1)(b), there would not be any need for separate approval as the said Technical Minimum compensation is being provided under this Commission's own Regulations.

d) Accordingly, the provisions of Regulation 6.3(B) of IEGC as well as the Technical Minimum Compensation Mechanism is automatically deemed incorporated in the PPA and there is no further requirement of any amendment in the existing PPAs. Accordingly, the petitioner in due compliance of the same has raised the invoices on 11.08.2021 and 20.10.2021 claiming Technical Minimum Compensation from UPPCL. However, UPPCL despite part/under scheduling power from Petitioner's generating station has refused to pay such compensation. Hence, it is UPPCL, which is non-compliance of the provisions of IEGC.

e) UPPCL's reliance of Article 5.3.1 and 5.4.1 of the Procurers PPA to contend that it is the obligation of MB Power/PTC to give effect to Regulation 6.3(B) of IEGC is vague. UPPCL has not clearly explained the reason of its reliance on Articles 5.3.1 and 5.4.1 of the Procurers PPA.

f) Notwithstanding the fact that there is no requirement of any PPA amendment to claim compensation from UPPCL in terms of Compensation Mechanism elucidated under the Commission's Order dated 05.05.2017, even in terms of Article 15.24 of

the Procurer-PPA dated 18.01.2014, Regulation 6.3(B) of IEGC is automatically deemed to be incorporated in the PPA. Hence, there is no additional requirement/mandate on either the Petitioner/PTC or UPPCL to separately incorporate the said provision in the existing PPA or execute a Supplementary Agreement to give effect to Regulation 6.3(B) of IEGC.

g) Article 15.24 of the Procurer-PPA has a deeming provision with respect to automatic amendment of the PPA in order to make the PPA consistent with the provisions of the applicable regulations and Electricity Act. It is a settled position of law that a deeming provision is an admission of the non-existence of the fact. The word "Deemed" is an artificial and a contractual fiction which is generally used to impose for the purposes of a statute an artificial construction of a word or a phrase which does not actually exist. It means that the Courts must assume that such a fact exists as real. Courts should imagine the consequences and incidents which inevitably flow from such fact and should also give effect to the same. The above said legal position has been upheld by the Hon'ble Supreme Court in the following cases:

- i. ***G. Viswanathan v. T.N. Legislative Assembly, (1996) 2 SCC 353:***
- ii. ***State of Bombay v. Pandurang Vinayak Chaphalkar & Ors., 1953 SCR 773:***
- iii. ***Bhavnagar University v. Palitana Sugar Mills (P) Ltd. & Ors, (2003) 2 SCC***

h) In terms of the aforesaid legal and contractual position the Procurer-PPA dated 18.01.2014 is deemed to be amended to incorporate the provisions of Regulation 6.3(B) of IEGC. Accordingly, there is no further requirement on MB Power/PTC or UPPCL to execute a separate amendment to the PPA for giving effect to the provisions of Regulation 6.3(B) of IEGC and the Petitioner's claim for technical minimum compensation cannot be said to be de hors the PPA.

i) UPPCL has relied upon MPERC Order dated 19.11.2019 passed in Petition No. 04 of 2019 (filed by MPPMCL) granting approval to the Supplementary PPA executed between MPPMCL and MB Power to incorporate the mechanism in relation

to technical minimum schedule and other associated provisions for compensation. The said contention of UPPCL is wrong, misplaced and hence denied. The Petitioner has executed the Supplementary Agreement dated 14.12.2019 with MPPMCL as an amendment to MP-PPA dated 05.01.2011 to *inter-alia* incorporate the provisions related to Technical Minimum Schedule for operation of ISGS as provided under Regulation 6.3(B) of IEGC and this Commission's Order dated 05.05.2017. The Supplementary Agreement dated 14.12.2019 has been executed as per the provisions of Regulation 6.3(B)(4) of IEGC and upon the insistence of MPPMCL. It was MPPMCL that had filed Petition No. 04 of 2019 before MPERC seeking approval of the Supplementary Agreement dated 14.12.2019 and not the Petitioner.

j) The tariff for supply of power by the Petitioner to MPPMCL under the MP-PPA dated 05.01.2011 has been determined by MPERC and not this Commission. Hence, in terms of Regulation 6.3.B(4) of IEGC and upon the insistence of MPPMCL, MB Power executed the Supplementary Agreement dated 14.12.2019 to factor the provisions relating to technical minimum and compensation for part load operation of its Generating Station.

k) The Petitioner is not seeking technical minimum compensation for Part Load Operation of its generating station by UPPCL under the Change in Law provisions of the UP-PPA. The Petitioner has sought such compensation in terms of Regulation 6.3(B) of IEGC and this Commission's Order dated 05.05.2017. It is surprising as to how UPPCL is comprehending that MB Power is seeking the technical minimum compensation under Change in Law.

l) PTC Judgment and NTPC Order are squarely applicable to the present case, since both these authorities are in rem and not in personam. It is a settled position of law that the ratio decidendi of a judgment has binding precedent:-

- i. **Municipal Corpn. of Delhi v. Gurnam Kaur,**
- ii. **Krishena Kumar v. Union of India, (1990)**
- iii. **Union of India v. Dhanwanti Devi, (1996).**

m) The Petitioner's reliance upon the NTPC Order qua the finding returned by this Commission at Para 39 of the Order holding that '*implementation of backing down instructions without compensatory mechanism would adversely affects the interest of the generating company*' (i.e., the Petitioner in the present case). The said finding was returned by this Hon'ble Commission based on the:-

i. Interpretation of IEGC 2010, 4th Amendment to IEGC 2016 and Order dated 05.05.2017, hence, the same is in rem and not solely by NTPC.

ii. First principles of law that no party can be left remediless.

Hence, the findings returned by this Commission at Para 39 of the NTPC Order is squarely applicable to MB Power also and is not limited for NTPC alone.

n) The Commission has time and again issued direction for payment of 50% to 75% of the claimed amount at the interim stage itself in the following orders:

i. Order dated 06.03.2019 passed in **Execution Petition** No. 286/MP/2018 titled ***GMR Warora Energy Limited vs. TANGEDCO***

ii. Order dated 26.11.2018 passed in I.A. No. 77 of 2018 in Petition No. 284/MP/2018 titled ***GMR Warora Energy Limited vs. MSEDCL & Anr***

Hence, the interim relief sought in the present Petition ought to be granted.

6. UPPCL in its Written Submission dated 11.2.2023 has mainly submitted as under:

a) For claiming of technical minimum compensation by a generating company, this Commission envisaged different procedures. The said mechanism is directly applicable to coal/gas based central generating stations and coal/gas based inter-state generating stations, whose tariff is either determined or adopted by this Commission. However, for the said mechanism to be made applicable to generating stations whose tariff is neither determined nor adopted by this Commission, the generating company must make appropriate provisions in their power purchase agreements or any supplementary agreement, without which the Compensation Mechanism will not be applicable to such generating company.

- b) The Procurers-PPA itself under Article 15.3.1 provides that the PPA may only be amended or supplemented by a written agreement between the parties and after obtaining the approval of the Appropriate Commission. Therefore, the provisions of the Amending Regulations cannot be deemed to be incorporated in the Procurers-PPA.
- c) Petition No. 61 of 2022 was filed by the Petitioner before the MPERC seeking directions to MPPMCL for making payment for technical minimum compensation on account of part load operation of its Project. vide its order dated 27.12.2022 in the said petition has categorically held that execution of supplementary PPA for generating station/company falling under the second category is a necessary and mandatory condition for claiming compensation under the aegis of the Amending Regulations.
- d) Vide the compensation invoices dated 11.08.2021 and 20.10.2021 and the present petition, the Petitioner, has sought to enforce the provisions of the said regulations without following the procedure prescribed by Law and the Procurers-PPA. The Petitioner has failed to seek suitable amendment to the extant contracts entered between the parties to reflect and/or incorporate the provisions of the Amending Regulations. There is no case for an automatic determination by this Commission *dehors* an amendment in the Procurers-PPA, followed with due approval of the Hon'ble UPERC.
- e) **From the readings of Judgments of the Hon'ble Supreme Court in CIT v. Sun Engineering Works (P) Ltd., (1992) 4 SCC 363, Ashwani Kumar Singh v. U.P. Public Service Commission, (2003)11 SCC 584, Islamic Academy of Education v. State of Karnataka, (2003)6 SCC 697** (a constitutional bench of the Hon'ble Supreme Court) , it emerges that words of a judgment cannot be treated as words of legislation/statute and a decision is an authority for what it decides and not what can be logically deduced therefrom. Therefore, courts cannot read some

sentences from here and there to find out the intent and purport of a decision by not only considering what has been said therein but the text and the context in which it was said.

f) The Petitioner's reliance on the PTC Judgement is highly misplaced, since the Hon'ble Supreme Court vide the PTC Judgement was deciding whether the regulatory measure enunciated by this Commission by way of a regulation under Section 178 of the Act in relation to fixing of trading margin was valid or not. However, in the present matter, the questions of fact and law that ought to be adjudicated upon by this Commission pertain to whether the Petitioner has complied with the Amending Regulations in its true intent and spirit.

g) Further, Petitioner's reliance on the NTPC Order is also wholly misplaced. NTPC falls under the first category of generators (*whose tariff is either determined or adopted by this Commission*) whereas, the Petitioner falls under the second category of generators (*whose tariff is neither determined nor adopted by this Commission*). Accordingly, it is submitted that the procedure pursuant to which these generators can claim technical minimum compensation is in any case different. For NTPC the applicability of Regulation 6.3(B) of IEGC and Compensation Mechanism is automatic however, for MB Power to claim technical minimum compensation certain provisions are to be factored into the pre-existing contracts. Considering this, it is submitted that the NTPC Order is not applicable to the present factual matrix.

h) It is a well settled principle of statutory interpretation that while construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the statute. By construction, a provision should not be reduced to a "dead letter" or "useless lumber". An interpretation which renders a provision otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in "an exercise in futility" and the product came as a "purposeless piece" of legislation and that the provision had been enacted

without any purpose and the entire exercise to enact such a provision was “most unwarranted besides being uncharitable”. In this regard, reference is apposite to the following judgments of the Hon’ble Supreme Court:

- i. **Hardeep Singh v. State of Punjab & Ors., (2014) 3 SCC 92:**
- ii. **Pallawi Resources Limited v. Protos Engineering Company Private Limited, (2010) 5 SCC 196:**

i) Introduction of Regulation 6.3(B) by way of the Amending Regulations is a regulatory measure enunciated by this Commission. Accordingly, it is submitted that on account of the said regulation being a regulatory measure, introduction of it, would not qualify as a Change in Law event under the extant PPAs.

7. The Petitioner in its Written Submissions has mainly submitted as under:

a) The tariff for supply of power to UPPCL/PTC is being regulated by this Commission in terms of Section 79(1)(b) of the Electricity Act. Therefore, the Petitioner falls under the first category of generators envisaged under Regulation 6.3(B)(3) of 4th Amendment to IEGC, which does not require amendment of existing PPA/execution of supplementary PPA for seeking payment of technical minimum compensation for Part Load Operation of generating station by UPPCL.

b) The right to claim compensation on account of Part Load Operation of its Generating Station is not contingent upon PTC/UPPCL’s consent to incorporate the compensation mechanism provided under Regulation 6.3B of 4th Amendment to IEGC and Order dated 05.05.2017 in the UP PPAs. If such would be the case, then the statutory right conferred upon an ISGS or Regional Entity (whose tariff is neither determined nor adopted by this Commission) to compensation for Part Load Operation will be rendered meaningless.

c) Article 15.24 of the PPA dated 18.01.2014 has a deeming provision with respect to automatic amendment of the PPA to make it consistent with the

regulation. It is a settled position of law that existence of a deeming provision means that the Courts must assume that such a fact exists as real. Courts should imagine the consequences and incidents which inevitably flow from such fact and should also give effect to the same. In this regard, following judgment is noteworthy.

- (i) **G. Viswanathan v. T.N. Legislative Assembly, (1996) 2 SCC 353 -**
- (ii) **State of Bombay v. Pandurang Vinayak Chaphalkar 1953 SCR 773**
- (iii) **Bhavnagar University v. Palitana Sugar Mills (P) Ltd (2003) 2 SCC**

d) The Backing Down Procedure and the compensation mechanism are in force since 15.05.2017. Hence, the backing down instructions by UPPCL/PTC from 15.05.2017 onwards entail a liability on UPPCL/PTC to pay compensation towards such Part Load Operation of Petitioner's generating station.

e) It is a settled position of law that carrying cost is nothing but compensation towards the time value of money. Hence, whenever arrears of payment are directed to be paid, it is imperative on equitable principle that carrying cost/interest on compounding basis is allowed on such arrears of payment/deferred recoveries.

f) Carrying cost is a legitimate expense and that the principles governing carrying cost are well settled. Further, it is stated that carrying cost is not a penal charge since it is only a compensation in view of the fact that the party is deprived of the amount which it is entitled at an appropriate point of time. In this regard, reliance is placed on the following judgments of the Hon'ble Appellate Tribunal for Electricity ('**Tribunal**')

i. Judgement dated 15.02.2011 in Appeal No. 173 of 2009 titled as **Tata Power Co. v. MERC**: *"Carrying cost is a legitimate expense. Therefore, recovery of such carrying cost is legitimate expenditure of the distribution companies. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the Distribution Company from lenders/promoters/accruals is to be paid by way of carrying cost. In this case, the Appellant, in fact, had prayed for allowing the legitimate expenditure including carrying cost. Therefore, the Appellant is entitled to carrying cost."*

ii. Judgment dated 20.12.2012 in **SLS Power Limited v. APERC**: *"The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied*

at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time.”

iii. Judgment dated 28.11.2013 in Appeal Nos. 190 of 2011 and 162 & 163 of 2012 titled as **Torrent Power Limited v. GERC.**

iv. Judgment dated 4.10.2019 in Appeal No. 246 & 247 of 2017 titled as **Torrent Power Limited vs GERC & Ors.**: “9.4 ... Thus, the value of money is settled financial principle and the same has also been recognized by this Tribunal. The utility gets compensated by way of carrying cost on this very principle i.e., when amount is due and recovery is deferred, the utility gets compensated by way of carrying cost. Thus, when the Commission has arrived at the revenue gap after following due process of truing up exercise, the utility should be compensated for the delay in recovery of its revenue.”

g) The Hon’ble Supreme Court in catena of judgments have allowed the carrying cost for delayed payment as under:-

i. **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161**

ii. **T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd**

iii. **Uttar Haryana Bijli Vitran Nigam Limited & Anr v. Adani Power Mundra Limited & Anr., 2022 SCC Online SC 1068.**

h) In terms of Article 8.3.5 of the of the PPA dated 18.01.2014 read with Article 8.8.3 of Schedule I of the PPA dated 20.01.2014, UPPCL is mandated to pay LPS to the Petitioner, in the event of delay in payment beyond the Due Date for each day of delay.

i) The Hon’ble Supreme Court by its Judgment in **MSEDCL v. MERC & Ors, 2021 SCC OnLine SC 913** has categorically held that LPS is payable when payment against monthly bills is delayed beyond the Due Date and the object of LPS is to enforce and/or encourage timely payment of charges by the procurer i.e., LPS dissuades the procurer from delaying payment of charges.

- j) The Petitioner has executed the Supplementary Agreement dated 14.12.2019 with MPPMCL as an amendment to MP-PPA dated 05.01.2011 to *inter-alia* incorporate the provisions of Regulation 6.3(B) of 4th Amendment to IEGC and this Commission's Order dated 05.05.2017. The Supplementary Agreement has been executed upon the insistence of MPPMCL and it was MPPMCL that had filed Petition No. 04 of 2019 before MPERC seeking approval of the Supplementary Agreement and not MB Power. In terms of Regulation 6.3.B(4) of IEGC the generating stations whose tariff is neither determined nor adopted by this Commission shall factor the provisions of Regulation 6.3(B) in their PPAs. The tariff for supply of power by MB Power to MPPMCL in terms of the MP-PPA dated 05.01.2011 has been determined by MPERC and not this Hon'ble Commission. Hence, in terms of Regulation 6.3.B(4) of IEGC and upon the insistence of MPPMCL, MB Power executed the Supplementary Agreement. However, with respect to UP PPAs, the Petitioner falls under Regulation 6.3.B(3), which does not require amendment of PPA for claiming compensation for part load operation.
- k) PPA dated 18.01.2014 has a deeming provision under Article 15.24 with respect to automatic amendment of the PPA in order to make the PPA consistent with the provisions of the applicable regulations and Electricity Act. Hence, the provision of Regulation 6.3(B) of IEGC is deemed to be incorporated in the UP PPAs. Such deeming provision is not there in the MP-PPA dated 05.01.2011.
- l) The Petitioner is not seeking technical minimum compensation from UPPCL in terms of the Change in Law provisions of the UP PPAs. The Petitioner has sought such compensation in terms of Regulation 6.3(B) of IEGC and this Commission's Order dated 05.05.2017.
- m) PTC Judgment and NTPC Order are squarely applicable to the present case, since both these authorities are *in rem* and not *in personam*. The ratio enunciated by Hon'ble Supreme Court in PTC Judgment is that a Regulation framed under Section 178 of the Electricity Act is in the nature of a subordinate legislation, which has the effect of

interfering and overriding the existing contractual relationship between regulated entities including the PPA, which have to be aligned with the Regulations.

n) The issue with respect to the applicability of PTC Judgment and its ratio is no more res-integra. The Appellate Tribunal in ***Odisha Power Generation Corporation Ltd vs Odisha Electricity Regulatory Commission (2017 ELR (APTEL) 0538)*** relying upon the PTC Judgment has categorically held that:

- i. Regulation framed under Section 178 or 181 of the Electricity Act is a subordinate legislation and overrides the existing contractual relationship.
- ii. Regulations framed by the Commission under the authority of delegated legislation must be followed.
- iii. PPAs, even though approved by the regulatory commission, will stand overridden by the Regulations once they occupy the field.

Hence, PTC Judgment is squarely applicable in the present case.

o) The Petitioner has relied on NTPC Order qua the finding of this Commission holding that '*implementation of backing down instructions without compensatory mechanism would adversely affects the interest of the generating company*'. The said finding was returned by this Hon'ble Commission based on the Interpretation of IEGC 2010, 4th Amendment to IEGC and Order dated 05.05.2017. Hence, the same is in rem and not solely for NTPC.

Analysis and Decision

8. After considering the submissions of the parties, the following issues arises for our consideration:

- a) **Issue No. 1:** Whether, the present Petition is maintainable before this Commission?
- b) **Issue No. 2:** Whether the Petitioner is entitled to get compensated under Regulation 6.3B (3) or under Regulation 6.3B (4) of the IEGC, 2010 on account of Part Load Operation of its Generating Station.

Since the issue of maintainability and the Petitioner's entitlement to get compensation are inter-related and therefore both the above issues are being taken together. In the

succeeding paragraphs.

9. In the support of its prayers, the Petitioner has mainly argued as under:
 - a) In terms of Regulation 6.3.B of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 and the Commission's order dated 5.5.2017, Western Regional Power Committee ('WRPC') from time to time has issued the compensation statements with respect to Part Load Operations of the Petitioner's generating station stating the compensation amount payable by the respective distribution licensees procuring power from the Petitioner (i.e. MP and UP).
 - b) Based on the compensation statements issued by WPRC, the Petitioner had issued the invoices dated 11.8.2021 and 20.10.2021 upon PTC/UPPCL seeking compensation for Part Load Operations. However, UPPCL and PTC by their letters dated 15.11.2021 and 17.11.2021 respectively have refused to make payment towards technical minimum compensation claimed by the Petitioner stating that there is no provision in the Power Purchase Agreement ('PPA') with regard to claiming of technical minimum compensation.
 - c) Such action of UPPCL/PTC to deny the legitimate statutory claim for compensation on account of Part Load Operations of its Generating Station is illegal and violative of Regulation 6.3.B of IEGC and the Commission's order dated 5.5.2017 in terms of which the Petitioner by virtue of being a Regional Entity and Inter-State Generating Station is entitled to grant of compensation for Part Load Operations of its Generating Station.
 - d) This Commission in its Order dated 03.06.2019 in the Petition 156/MP/2018 has determined Change in Law compensation payable by UPPCL to MB Power under the same PPA for supply of power to UPPCL. As such, Petitioner's tariff with respect to power supply to UPPCL under the UP PPAs is regulated/determined by this Commission under Section 79(1)(b) of the Electricity Act. Thus, the Petitioner falls under the first category of generators envisaged under Regulation 6.3(B) of

IEGC, which does not require amendment of existing PPA/ execution of supplementary PPA for payment of Technical Minimum compensation for Part Load Operation (i.e., part/under scheduling) of MB Power's Generating Station by UPPCL.

e) In terms of Article 15.24 of the PPA dated 18.01.2014 any provision of the PPA which is in deviation or inconsistent with the provision of the Electricity Act or any regulations made thereunder shall be deemed to be amended to the extent required to make it consistent with such regulations. **Thus, in terms of Article 15.24 of the Procurers-PPA dated 18.01.2014 (PPA with UPPCL is deemed amended and there is no need for separate amendment.**

10. With regard to the applicability of Regulation 6.3B of IEGC, 2010, UPPCL has raised the following contentions:

a) Regulation 6.3(B) of IEGC envisages two categories of generators. First, a generating company whose tariff is either determined or adopted by this Commission and secondly, a generating company whose tariff is neither determined nor adopted by this Commission. The Petitioner falls under the second category since its tariff for supply of 361 MW power to UPPCL has been adopted by UPERC under Petition No. 911 of 2013 filed by UPPCL.

b) For the Compensation Mechanism to be made applicable to generating stations whose tariff is neither determined nor adopted by this Commission, the generating company must make appropriate provisions in their PPAs or any supplementary agreement, without which the Compensation Mechanism will not be applicable for such generating company.

c) Amending Regulations itself envisages that for generating companies such as the Petitioner (*whose tariff is neither determined nor adopted by this Commission*) certain provisions are to be reflected in/ incorporated to the pre-existing contracts in order for the generating company to claim technical minimum compensation under the aegis of Regulation 6.3(B) of IEGC.

d) The Petitioner falls under Sub-Clause 4 of Regulation 6.3(B) of IEGC (*second category of generator*) and can get the relief pursuant to an amendment to the existing PPAs/ PSAs or by executing fresh Supplementary PPAs/PSAs to this effect.

e) MPERC in its Order dated 19.11.2019 in Petition No. 04 of 2019, filed by MPPMCL has approved of the Supplementary PPA executed between MPPMCL and the Petitioner in furtherance of the existing PPA between the said parties. The provisions in the said Supplementary PPA had been made mainly to incorporate the mechanism in relation to technical minimum schedule and other associated provisions, in accordance with the Amending Regulations followed by Detailed Operating Procedure issued by this Commission.

11. We observe that the entire issue revolves around Regulation 6.3(B) of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 introduced by this Commission vide **4th Amendment** dated 6.4.2016. The relevant extracts of Regulation 6.3 (B) is as under:

“6.3B – Technical Minimum Schedule for operation of Central Generating Stations and Inter-State Generating Stations

1. The technical minimum for operation in respect of a unit or units of a Central Generating Station of inter-State Generating Station shall be 55% of MCR loading or installed capacity of the unit of at generating station.

2. The CGS or ISGS may be directed by concerned RLDC to operate its unit(s) at or above the technical minimum but below the normative plant availability factor on account of grid security or due to the fewer schedules given by the beneficiaries.

3. Where the CGS or ISGS, whose tariff is either determined or adopted by the Commission, is directed by the concerned RLDC to operate below normative plant availability factor but at or above technical minimum, the CGS or ISGS may be compensated depending on the average unit loading duly taking into account the forced outages, planned outages, PLF, generation at generator terminal, energy sent out ex-bus, number of start-stop, secondary fuel oil consumption and auxiliary energy consumption, in due consideration of actual and normative operating parameters of station heat rate, auxiliary energy consumption and secondary fuel oil consumption etc. on monthly basis duly supported by relevant data verified by RLDC or SLDC, as the case may be.

Provided that: (i) In case of coal / lignite based generating stations, following station heat rate degradation or actual heat rate, whichever is lower, shall be considered for the purpose of compensation:

S.No.	Unit loading as a % of Installed Capacity of the Unit	Increase in SHR (for supercritical units) (%)	Increase in SHR (for sub-critical units) (%)
1.	85-100	Nil	Nil
2.	75-84.99	1.25	2.25
3.	65-74.99	2	4
4.	55-64.99	3	6

(ii) In case of coal / lignite based generating stations, the following Auxiliary Energy Consumption degradation or actual, whichever is lower, shall be considered for the purpose of compensation

S.No	Unit Loading (% of MCR)	% Degradation in AEC admissible
1.	85 – 100	Nil
2.	75 – 84.99	0.35
3.	65 – 74.99	0.65
4.	55 - 64.99	1.00

(iii) Where the scheduled generation falls below the technical minimum schedule, the concerned CGS or ISGS shall have the option to go for reserve shut down and in such cases, start-up fuel cost over and above seven (7) start / stop in a year shall be considered as additional compensation based on following norms or actual, whichever is lower

Unit Size	Oil Consumption per start up (KI)		
	Hot	Warm	Cold
200/210/250 MW	20	30	50
500 MW	30	50	90
660 MW	40	60	110

(iv) In case of gas based Central Generating Station or inter-State Generating Station, compensation shall be decided based on the characteristic curve provided by the manufacturer and after prudence check of the actual operating parameters of Station Heat Rate, Auxiliary Energy Consumption, etc.

(v) Compensation for the Station Heat Rate and Auxiliary Energy Consumption shall be worked out in terms of energy charges.

(vi) The compensation so computed shall be borne by the entity who has caused the plant to be operated at schedule lower than corresponding to Normative Plant Availability Factor up to technical minimum based on the compensation mechanism finalized by the RPCs.

(vii) No compensation for Heat Rate degradation and Auxiliary Energy Consumption shall be admissible if the actual Heat Rate and / or actual Auxiliary Energy Consumption are lower than the normative Station Heat Rate and / or normative Auxiliary Energy Consumption applicable to the unit or the generating station.

(viii) There shall be reconciliation of the compensation at the end of the financial year in due consideration of actual weighted average operational parameters of station heat rate, auxiliary energy consumption and secondary oil consumption.

(ix) No compensation for Heat Rate degradation and Auxiliary Energy Consumption shall be admissible if the actual Heat Rate and / or actual Auxiliary Energy Consumption are lower than the normative station Heat Rate and / or normative Auxiliary Energy Consumption applicable to the unit or the generating station in a month or after annual reconciliation at the end of the year.

(x) The change in schedule of power under the provisions of Central Electricity Regulatory Commission (Ancillary Services Operations) Regulations, 2015 shall not be considered for compensation.

4. In case of a generating station whose tariff is neither determined nor adopted by the Commission, the concerned generating company shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule.

5. The generating company shall keep the record of the emission levels from the plant due to part load operation and submit a report for each year to the Commission by 31st May of the year.

6. NLDC shall prepare a Detailed Operating Procedure in consultation with the generators and beneficiaries at RPC forums within 2 months' time and submit to the Commission for approval. The Detailed Operating Procedure shall contain the role of different agencies, data requirements, procedure for taking the units under reserve shut down and the methodology for identifying the generating stations or units thereof to be backed down upto the technical minimum in specific Grid conditions such as low system demand, Regulation of Power Supply and incidence of high renewables etc., based on merit order stacking.

7. The RPCs shall work out a mechanism for compensation for station heat rate and auxiliary energy consumption for low unit loading on monthly basis in terms of energy charges and compensation for secondary fuel oil consumption over and above the norm of 0.5 ml/kWh for additional start-ups in excess of 7 start-ups, in consultation with generators and beneficiaries at RPC forum and its sharing by the beneficiaries."

12. In order to understand the applicability of Regulation 6.3B of IEGC, 2010, it is necessary to go through the Explanatory Memorandum and Statement of Reasons of Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2015. Vide notification dated 2.7.2015, the Commission issued the draft IEGC (Fourth Amendment) Regulations, 2015 and its relevant portion is as under:

"1. The technical minimum schedule for operation in respect of ISGS shall be 55% of MCR loading of unit/units of generating stations.

2. A generating station may be directed by concerned RLDC to operate below 85% but at or above the technical minimum schedule on account of grid security or due to the less schedule given by the

beneficiaries

3. Where the generating station regulated by this Commission is directed by the concerned RLDC to operate at technical minimum schedule, the generation station may be compensated subject to the prudence check by the Commission in due consideration of average unit loading based on forced outages, planned outages, PLF, generation at generator terminal, energy sent out ex-bus, number of start-stop, secondary fuel oil consumption and aux energy consumption etc on an application filed by the generating company duly supported by relevant data verified by RLDC/SLDC.

xxxxxxx

In case of generating stations not regulated by the Commission, generating company shall have to factor above provisions in their PPAs for sale of power in order to claim compensations for operating at the technical minimum schedule.

Xxxxx

It is important to note that while issuing the draft regulation, for the purpose of the compensation on account of Part Load Operations of a generating station, the Commission deliberated that in the cases where the generating station regulated by this Commission, the generation station may be compensated subject to the prudence check by the Commission in due consideration of average unit loading based on forced outages, planned outages, PLF, generation at generator terminal, energy sent out ex-bus, number of start-stop, secondary fuel oil consumption and aux energy consumption etc on an application filed by the generating company duly supported by relevant data verified by RLDC/SLDC. Whereas, in case of generating stations not regulated by the Commission, generating company shall have to factor above provisions in their PPAs for sale of power in order to claim

compensations for operating at the technical minimum schedule.

13. In the Explanatory Memorandum w for IEGC (Fourth Amendment) Regulations, 2015, the Commission explained the necessity of fourth Amendment as under :

“38. The generating company may be allowed to seek relief at the end of the year based on average unit loading due to low despatch schedule given by beneficiaries/RLDC but not because of any other reason including short supply of fuel/shortage of fuel; Commission may allow compensation for increase in station heat rate, secondary fuel oil consumption and auxiliary energy consumption after prudence check on a petition to be filed by the generating company giving requisite details of unit loadings, forced outages, planned outages, PLF , generation at generator terminal, energy sent out ex-bus, actual heat rate, number of start ups, actual secondary fuel oil consumption, actual auxiliary energy consumption etc. In case of gas based stations, compensation shall be decided based on the characteristic curve provided by the manufacturer and after prudence check of the actual operating parameters of station heat rate, auxiliary energy consumption. The compensation worked out by the Commission shall be borne by the entity was caused the plant to be operated at technical minimum. In case of generating stations not regulated by the Commission, the generating company shall have to factor these provisions in the PPA for sale of power in order to claim compensation for operating at the technical minimum schedule.

It is also important to note herein that in the Explanatory Memorandum, with regard to applicability of Regulation 6.3B, the Commission observed that in case of generating stations not regulated by the Commission, the generating company shall have to factor these provisions in the PPA for sale of power in order to claim compensation for operating at the technical minimum schedule.

14. Further, in the Statement of Reasons (SOR) dated 6.4.2016 to the Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016, the Commission made the following findings for the Compensation for Part load operation due to technical minimum schedule:

“12.3.1 The Commission is of the view that NLDC should finalize a detailed operating procedure and methodology to be followed in certain specific grid conditions of low system demand, Regulation of power supply, incidence of high renewable etc in identifying generating stations in their respective region based on merit order stacking to be backed down up to the Technical minimum, data requirements, role of different agencies, procedure for unit going in to reserve shut down in consultation with the generators and beneficiaries at RPC forums within 2 months” time in terms of above and submit to the Commission for its approval. The RPCs shall also workout a mechanism for compensation for station heat rate

and aux energy consumption for low unit loading on monthly basis in terms of energy charges and compensation for secondary fuel oil consumption over and above the norm of 0.5 ml/kWh for additional start-ups in excess of 7 start-ups, in consultation with generators and beneficiaries at RPC forum and its sharing by the beneficiaries. This would avoid the necessity of filing separate petitions before the Commission.

12.3.2 The compensation worked out based on mechanism of RPC shall be borne by the entity who has caused the plant to be operated at a schedule lower than the corresponding to normative availability and up to technical minimum schedule. In case of generating stations not regulated by the Commission, the generating company shall have to factor these provisions in the PPA for sale of power in order to claim compensation for operating at the technical minimum schedule. In case of Regulation of Power supply the compensation shall have to be factored in the sale to the third party.

We observe that in the SOR to the IEGC Fourth Amendment, the Commission observed that in case of generating stations not regulated by the Commission, the generating company shall have to factor these provisions in the PPA for sale of power in order to claim compensation for operating at the technical minimum schedule. In case of Regulation of Power supply the compensation shall have to be factored in the sale to the third party.

15. In the Statement of Reasons (SOR) to the IEGC Fourth Amendment, the Commission has noted that in the cases where the tariff of the generating station is not being regulated by **the** Commission, the generating company shall be required to factor these provisions in the PPA for sale of power in order to claim compensation for operating at the technical minimum schedule. However, in the final Regulation, the words which have been used are that the generating station whose tariff has not been determined or adopted by this Commission, shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule.

16. In *Gurudev datta VKSSS Maryadit versus. State of Maharashtra [(2001) 4 SCC 534]*, a three- Judge Bench of the Hon'ble Supreme Court interpreted the provisions of

Maharashtra Cooperative Societies Act, 1960, Maharashtra Cooperative Societies (Second Amendment) Ordinance, 2001 and observed as under:

“While the Statement of Objects and Reasons in the normal course of events cannot be termed to be the main or principal aid to construction but in the event it is required to discern the reasonableness of the classification as in the case of Shashikant Laxman Kale v. Union of India [1990 (4) SCC 366] Statement of Objects and Reasons can be usefully looked into for appreciating the background of the legislature's classification.”

17. In A. Manjula Bhashini (2009) 8 SCC 431, the Hon'ble Supreme Court held as under :

“22. The proposition which can be culled out from the aforementioned judgments is that although the statement of objects and reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The statement of objects and reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act.”

18. A conjoint reading of above judgment reveals that the Statement of Objects and Reasons can be referred to for the purpose of understanding as to why exactly the Legislature thought it necessary to bring an amended measure. Further, Statement of Objects and Reasons can be usefully looked into for appreciating the background of the legislature's classification

19. Admittedly, the tariff under the UP PPAs has been adopted by the UPERC under Petition No. 911 of 2013 filed by UPPCL. But at the same time, it is also evident that the Petitioner's generating station has the composite scheme and is supplying power to more than one state. Accordingly, subsequent to adoption of tariff by UPERC, the Petitioner always approached this Commission for adjudication of various disputes with UPPCL, for Change in Law compensation under the UP PPA dated 18.01.2014 for supply of 361 MW of power from its Project to UP Discoms on long term basis. Some of the Petitions filed by

the Petitioner under UP PPA which have been duly disposed of by this Commission are as under:

- a) **Order dated 18.1.2019 in Petition No. 224/MP/2018:** This Petition was filed by MB Power before this Commission for adjudication of a tariff related dispute between MB Power and UPPCL under the same UP PPA dated 18.1.2014. The Commission in its order observed that in respect of the UP PPA dated 18.1.2014, the Respondent, UP Discoms have invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can the said Petition be construed as a joint application by parties under Section 64(5) for invoking the jurisdiction of the State Commission. Even though the tariff discovered under competitive bidding process was adopted by a State Commission under Section 63 of the 2003 Act, Section 64(5) has no application in the present case. Further, since the generating station is supplying power to more than one State, hence in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the jurisdiction for regulating the tariff of the Petitioner under UP PPA vests with this Commission and not the State Commission. Accordingly, this Commission has adjudicated upon the tariff related dispute between MB Power and UPPCL under the same UP PPA dated 18.01.2014 and disposed off the Petition vide order dated 18.1.2019
- b) **Order dated 30.4.2019 in Petition No.289/MP/2018:** This was another Petition filed by MB Power before this Commission for adjudication of yet another tariff related dispute between MB Power and UPPCL under the same UP PPA dated 18.1.2014. This Commission observed that the Petitioner (MB Power) is supplying power to the discoms of the host State of MP and to the discoms of the State of UP under separate long term PPAs from its power project situated in State of Madhya Pradesh. In addition to this, the Petitioner has been supplying power to various other States under short term basis. It is therefore evident that the Petitioner, MB Power is supplying electricity to multiple States from the same generating station and such supply is governed by binding arrangements, namely the PPAs. Therefore, the Petitioner generating station has composite scheme and this Commission has the

jurisdiction to adjudicate the matter. Accordingly, this Commission has adjudicated upon the tariff related dispute between MP Power and UPPCL under the same UP PPA dated 18.01.2014 and disposed off the Petition vide order dated 30.4.2019

c) **Order dated 3.6.2019 in Petition No. 156/MP/2018:** This Petition was filed by MB Power before this Commission for determination of compensation payable by UPPCL to MB Power on account of various Change in Law event under the same UP PPA dated 18.1.2014. In this Petition, UPPCL had raised the objection on the jurisdiction of this Commission on the premises that the parties are covered under Section 64(5) of the Act. UPPCL had raised similar issues regarding jurisdiction of the Commission to adjudicate the dispute between the same parties and involving the same PPAs, in Petition No. 224/MP/2018 filed by the Petitioner on the ground that the provisions specified in Article 14.1.1 and Article 14.3.1.1 (b) of the PPA are covered by Section 64(5) of the Act in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case. Therefore, the adjudication of disputes raised in the Petition falls within the jurisdiction of the State Commission, UPERC which has adopted the tariff. Vide its Order dated 18.1.2019 in Petition No 224/MP/2018, the Commission rejected the contentions raised by UPPCL and determined Change in Law compensation payable by UPPCL to the Petitioner MB Power under the same PPA dated 18.1.2014.

20. We note that in all the above matters, this Commission had observed that this Commission has the jurisdiction to adjudication upon the matters of the Petitioner's generating station with respect to Supply of 361 MW of power on long term basis to UP Discoms under the UP PPA dated 18.01.2014 (with a back-to-back PPA dated 20.1.2014).

21. We also noted that with regard to the matters arising out of the PPA between MB Power and MPPMCL/ MP Discoms, the Petitioner always approached the State Commission, while with respect to claims arising out of the UP PPA dated 18.01.2014 (with

a back-to-back PPA dated 20.1.2014), the Petitioner always approached this Commission. One of such Petition filed by the Petitioner before MPERC is as under:

- a) **Petition No: 44 of 2020 : M.B Power (Madhya Pradesh) Limited versus MPPMCL & Others:** In the matter of Petition under Section 86 of the Electricity Act 2003 read with Regulation 8 and Regulation 31 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 seeking in-principle approval of the Additional Capital Expenditure to be incurred by MB Power (Madhya Pradesh) Limited for implementation of Flue-Gas Desulphurization System in compliance of the Revised Emission Standards prescribed by MoEFCC Notification dated 07.12.2015 under 'Change in Law' event in terms of Article 12 of the PPA dated 05.01.2011 and Regulation 3.1 (11) of Regulations, 2020.

22. We observe that power supply by the Petitioner from its project to MPPMCL/ MP Discoms has been regulated by the MPERC in terms of Section 86 of the Electricity Act, 2003 read with Clause 5.2 of the Tariff Policy 2016 dated 28.1.2016, notified by the Ministry of Power, Govt. of India. Clause 5.2 of Tariff Policy 2016 provides that the State Government can notify policy to encourage investment in the State by allowing setting up of generating plants, out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff shall be determined under Section 62 of the Electricity Act by the Electricity Regulatory Commission of that State. Further, even for the Projects having composite scheme, tariff determination for power supplied to the host state (upto 35% of the Project Installed Capacity) shall be done by the respective State Electricity Regulatory Commission.

23. Clause 5.2 and 5.11 of Tariff Policy 2016 are as under:

“5.2. All future requirement of power should continue to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a

company owned or controlled by the State Government as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 100% of the existing capacity.

Provided further that the Appropriate Commission, as defined in the Electricity Act, 2003, shall ensure that in case of expansion of such projects, the benefit of sharing of infrastructure of existing project and efficiency of new technology is passed on to consumers through tariff.

Provided also that the State Government can notify a policy to encourage investment in the State by allowing setting up of generating plants, including from renewable energy sources **out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff may be determined under Section 62 of the Electricity Act, 2003.**

Provided that notwithstanding the provision contained in para 5.11(j) of the policy, **the tariff for such 35% of the installed capacity shall be determined by SERC.** However, the 15% of power outside long term PPAs allowed under para 5.7.1 of National Electricity Policy shall not be included in 35% allowed to be procured by Distribution Licensees of the State.

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5.11.....

(j) Composite Scheme

Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

Explanation: The composite scheme as specified under section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of atleast 10% of the capacity of the project to a distribution licensee outside the State in which such project is located.”

24. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case has dealt with the issue of composite scheme under Section 79(1)(b) as under:

The scheme that emerges from these Sections is that whenever there is inter State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in subsections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s

jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

25. We also observed that Article 15.24 of the UP PPA dated 18.01.2014 read as under:

"Despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003, or any rules and regulations made thereunder, such provision of this Agreement shall be deemed to be amended to the extent required to bring it into compliance with the aforesaid relevant provisions as amended from time to time.

26. Accordingly, we are of the view that subsequent to adoption of tariff by UPERC vide its Order dated 24.6.2014 in Petition No. 911 of 2013 under the UP PPA dated 18.1.2014, the Petitioner started supplying power to more than one State from 20.05.2015 (Unit-1 COD) onwards and hence the Petitioner's Project constituted Composite Scheme. By virtue of the Petitioner's Project falling under Composite Scheme, this Commission has the necessary jurisdiction to adjudicate upon matters between the Petitioner and UPPCL/ regulate tariff of the Petitioner's Project under the UP PPA dated 18.1.2014 (with a back-to-back PPA dated 20.1.2014) for supply of 361 MW of power on long term basis to UPPCL/ UP Discoms. We further observe that with respect to supply of power by the Petitioner's Project to MP Discoms under the long term PPA, MPERC has the necessary jurisdiction to determine/ regulate tariff and also to adjudicate upon any disputes between the parties.

27. We are of the view that no useful purpose would be served by directing the Petitioner to approach UPERC for this particular relief and to this Commission for other reliefs under

the same UP PPA dated 18.1.2014. The Constitutional Bench of the Hon'ble Supreme Court in the matter of PTC India Ltd versus CERC has laid down well established principle that a regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations. Therefore, the parties herein are bound by the principle enunciated in the judgment of PTC India Ltd versus CERC.

28. Further, we note that in terms of Article 15.24 of the UP PPA dated 18.01.2014, any provision of the PPA which is in deviation or inconsistent with the provision of the Electricity Act or any regulations made thereunder shall be deemed to be amended to the extent required to make it consistent with such regulations.

29. We also note that UPPCL has not disputed the compensation invoice but their contention is only limited to the point that compensation is payable only after the amendment of the PPA and approval of the UPERC. In this regard, it has been argued that the PPA has been amended by the MPERC with regard to the power supply made to MPPMCL and therefore, the Petitioner should approach UPERC for the amendment of PPA. In this regard, we have already noted above jurisdiction of MPERC is on account of clause 5.2 of Tariff Policy, 2016 whereas jurisdiction of this Commission is on account of Section 79(1) (b) of the Electricity Act, 2003.

30. In view of above discussion, the prayers of the Petitioner seeking payment against the Invoices dated 11.08.2021 and 20.10.2021 of Rs. 12,75,62,581/- and Rs 7,54,08,048/- , respectively are allowed. We also direct the Respondents to make regular timely payments against the Invoices for all future periods based upon the Statements issued by WRPC.

31. Further, we observe that Article 8.8.3 of the Procurers PPA read as under:

“8.8.3 In the event of delay in payment of Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 8.3.5.

Supplementary Bill is defined as a bill other than a Monthly Bill raised by any of the Parties in accordance with Article .8 of this Agreement;

8.3.5: In the event of delay in payment of a Monthly Bill by the Procurers beyond its Due date a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of two per cent (2%) in excess of the applicable SBAR per annum, on account of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each day of the delay. The Late Payment surcharge shall be claimed by the Seller through the Supplementary Bill.”

32. In light of above Provisions, we direct UPPCL to make payments against Petitioner's Invoices dated 11.08.2021 and 20.10.2021 towards Rs. 12,75,62,581/- and Rs. 7,54,08,048/- respectively along with the applicable late payment surcharge computed from the Bill Due date of the respective invoices till the date of making final payment by UPPCL.

33. In terms of above, Petition No. 281/MP/2021 is disposed of.

sd/-

(Pravas Kumar Singh)
Member

sd/-

(Arun Goyal)
Member

sd/-

(I.S Jha)
Member