

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Dy. No. 436/2023

with

I.A Nos. 437/2023 & 438/2023

Coram:

Shri Jishnu Barua, Chairperson

Shri I.S Jha, Member

Shri Arun Goyal, Member

Shri Pravas Kumar Singh, Member

Date of Order: 4th October, 2023

In the matter of:

Petition under Section 79 (1) (f) of the Electricity Act, 2003 for adjudication of disputes between the Petitioner and the Respondent and for directions to desist from uploading bills relating of differential AFC on the PRAAPTI Portal

AND

In the matter of:

Madhya Pradesh Power Management Company Limited,
Shakti Bhawan, Rampur, Jabalpur, MP- 482008

.... Petitioner

Vs

Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054.

.... Respondents

Parties Present:

Shri C.S.Vaidyanathan, Sr. Advocate, MPPMCL
Shri Aashish Anand Bernard, Advocate, MPPMCL
Shri Paramhans Sahani, Advocate, MPPMCL
Shri Manoj Dubey, Advocate, MPPMCL
Shri Alok Das, MPPMCL
Ms. Reeta Haldar, MPPMCL
Shri. M.G.Ramachandran, Sr. Advocate, DVC
Ms. Anushree Bardhan, Advocate, DVC
Ms. Surbhi Kapoor, Advocate, DVC



ORDER

The Petitioner, MPPMCL has filed this Petition (Dy No.436/2023) seeking the following reliefs:

- A. *Be pleased to hold and declare that the Invoice No. 1624 dated 14.7.2023, Invoice no. 1626 dated 14.7.2023, Invoice no.1741 dated 31.7.2023 and Invoice no.1743 dated 31.7.2023 issued by the Respondent no.1 wherein the Respondent is seeking payment of differential annual fixed charges is violative of the provisions of the Contract Act, and section 20 of the Specific Relief Act and the Petitioner is not liable to make payment for the same;*
- B. *Be pleased to direct the Respondent to provide the complete details of the power sold and fixed charges recovered by it from third parties from the sale of power during post PPA termination;*
- C. *Be pleased to direct the Respondent to adjust the amount of fixed charges recovered from the third parties from sale of power with the fixed charges being sought to be recovered from the Petitioner for the sale of power from Durgapur Thermal Power Station Unit 1 and 2 and Chandrapur Thermal Power Station Unit 7 and 8;*
- D. *Be pleased to quash and set-aside the Invoice No. 1624 dated 14.7.2023, Invoice no. 1626 dated 14.7.2023, Invoice no.1741 dated 31.7.2023 and Invoice no.1743 dated 31.7.2023 issued by the Respondent no.1 wherein the Respondent is seeking payment of differential annual fixed charges;*
- E. *Be pleased to hold and declare that the act of the Respondent in uploading the Invoice No. 1624 dated 14.7.2023, Invoice no. 1626 dated 14.7.2023, Invoice no.1741 dated 31.7.2023 and Invoice no.1743 dated 31.7.2023 issued by the Respondent no.1 wherein the Respondent is seeking payment of differential annual fixed charges on the PRAPTI Portal is arbitrary and illegal once the original demand raised by the Respondent is pending adjudication in the Petition no. 100/MP/2021 and 102/MP/2021.*
- F. *Be pleased to direct Respondent (DVC) to desist from uploading bills relating to Differential AFC on the PRAPTI Portal when the original bills are not uploaded and its orders are pending adjudication at the judicial forums;*

Submissions of the Petitioner

2. The Petitioner, in support of the above prayers, has mainly submitted the following:
 - (a) That MPPMCL and DVC entered into a Power Purchase Agreement (PPA) for the generation and sale of 400 MW power from Mejia Thermal Power Station (MTPS) and Chandrapura Thermal Power Station (CTPS) (200 MW each) on 3.3.2006. This agreement contains a foreclosure clause. MPPMCL and DVC also entered into a PPA for the generation and sale of 100 MW power from Durgapur Thermal Power Station (DTPS) dated 14.5.2007. This agreement contains a clause for review of the agreement.
 - (b) MPPMCL on 28.2.2017 had issued notice for termination of the PPA dated 3.3.2006 (MTPS-CTPS) as per the provisions of the PPA, invoking the foreclosure clause. the Petitioner on 2.5.2017 further issued a termination notice for the PPA dated 14.5.2007(DTPS) on the basis of terms as contained in the PPA. On 12.5.2017, DVC responded to the termination notice dated 2.5.2017 (DTPS) and thereafter several correspondences are exchanged between the parties. Further, on 30.5.2017, DVC responded to termination notice dated 28.2.2017.



- (c) Thereafter, DVC on 22.9.2017, filed Petition No. 236/2017 before this Commission under section 79(1)(f) of the Electricity Act, seeking certain declarations with respect to the termination notices issued by the Petitioner under the PPA dated 14.5.2007 (DTPS). On 23.2.2018, DVC filed another Petition No.78/MP/2018 before the Commission under section 79(1)(f) of the Electricity Act, seeking certain declarations with respect to the termination notices issued by the Petitioner under the PPA dated 3.3.2006;
- (d) Thereafter, the Commission, vide its orders dated 10.1.2020 and 13.1.2020 disposed of the Petitions Nos. 236/17 and 78/2018, on merits, wherein, the termination of the PPA dated 14.5.2007 undertaken by MPPMCL with DVC was rejected, with respect to DSPTS, and however with respect to the PPA dated 3.3.2006 pertaining to CTPS and MTPS, the termination with respect to CTPS was not accepted while termination in respect to MTPS, was however upheld by Commission.
- (e) MPPMCL filed appeals before the APTEL challenging the Commission's orders dated 10.1.2020 and 3.1.2020 in Appeal Nos. 93/2020 and 94 of 2020. That the matters have been pending for the last few years and DVC has also not taken any coercive action with respect to the original demand/invoices. DVC has filed Execution Petitions (Petition Nos. 100/MP/2021 and 102/MP/2021) wherein, it sought execution of the order of this Commission dated 10.1.2020 and 13.1.2020.
- (f) MPPMCL has filed its reply to the execution petitions raising several grounds, inter-alia, such as no amount has been determined to be payable, and also that the DVC is seeking a double recovery as it has admittedly sold the power to third parties and recovered fixed charges. The same is also admitted by DVC and the relevant letter dated 17.11.2021 is enclosed;
- (g) DVC, in order to circumvent the entire judicial process has issued fresh invoices having Invoice No. 1624 dated 14.7.2023, Invoice no. 1626 dated 14.7.2023, Invoice no.1741 dated 31.7.2023 and Invoice no.1743 dated 31.7.2023 claiming Differential AFC (Durgapur and CTPS) from MPPMCL and uploaded the same on the PRAPTI Portal so as to arm-twist the Petitioner with the trigger date of 1.10.2023.
- (h) Since the PPA was already terminated and no power was scheduled under the PPA, therefore, the bills are incorrect and disputed. DVC has sold the power to third parties and therefore, it cannot recover the fixed charges, for the power already sold to third parties, from MPPMCL and therefore MPPMCL had sought reconciliation of the accounts for fixed charges with DVC.
- (i) DVC has also admitted that it has sold the power to third parties and DVC, has issued an email dated 7.9.2021 wherein it shared the calculations for revised fixed charges by admitting that power is sold to third parties and therefore DVC submitted that as per the Gain Sharing Regulations of the Commission, the amount comes to about Rs. 240 crores for CTPS Plant and about Rs. 45 cores for Durgapur TPS. This amount is also admitted by the DVC in its letter dated 17.11.2021
- (j) DVC, in complete breach is seeking to recover the entire amount from MPPMCL even though admittedly the monies of fixed charges have been recovered from third parties.
- (k) In the present case, substituted performance (under section 20 of the Specific Relief Act) has been undertaken by DVC, and therefore, no charges can be recovered from MPPMCL, once the PPA was terminated and the power scheduling was stopped under the PPA.



- (l) The main AFC bills issued by DVC are not uploaded ever on the PRAPTI Portal and in fact, DVC is seeking to enforce them through the Execution Petitions. However, to arm-twist MPPMCL, DVC has uploaded the differential annual fixed charges bills on the PRAAPTI portal to somehow coerce MPPMCL into making payments of disputed amounts rendering the entire adjudicatory process nugatory.
- (m) MPPMCL is also scheduling power on short term basis under the LOI dated 10.7.2020 from DVC with respect to CPTS and DTPS from September, 2020 and October, 2020 respectively. While the short-term power supply from CTPS came to an end in November 2021 and with DTPS, the short-term power supply is still being continued, all bills raised for this power supply have been paid regularly and are not in dispute till now.
- (n) DVC has raised Invoice nos. 1627 and 1744 for the differential AFC along-with interest for a total amount of Rs. 15,17,94,274/- to be paid in six monthly instalments and MPPMCL has approved the bills for payment in six monthly instalments and are being paid accordingly.
- (o) However, MPPMCL is not liable to pay the huge amounts raised in the Invoice No. 1624 dated 14.7.2023, Invoice no. 1626 dated 14.7.2023, Invoice no.1741 dated 31.7.2023 and Invoice no.1743 dated 31.7.2023 issued by DVC, seeking payment of differential annual fixed charges.

Interlocutory Applications

3. The Petitioner MPPMCL has also filed interlocutory Application, I.A.No.437/2023 requesting the Commission to take on record the Execution Petitions filed by DVC and also the letter dated 14.9.2023 of MPPMCL requesting amicable settlement of the issue, in terms of the Litigation Policy and Letter dated 15.9.2023 of DVC, rejecting the said proposal. It has also filed IA No. 438/2023 seeking (i) ex-parte stay of the invoices issued by DVC, (ii) directing DVC to ensure that there is no restriction of power supply in view of uploading of bills in the PRAAPTI portal, and (iii) direct DVC to remove these invoices from the said portal with immediate effect.

Hearing dated 4.10.2023

4. During the hearing, the learned Senior counsel for the Petitioner, MPPMCL submitted that the present petition has been filed in terms of the APTEL's order dated 26.9.2023 granting liberty to the Petitioner to approach this Commission, challenging the action of DVC uploading two invoices on PRAAPTI portal. He also pointed out that



the APTEL has extended the triggered date from 29.9.2023/ 1.10.2023 to 5.10.2023. The learned Senior Counsel also submitted that the Respondent, DVC has been sufficiently compensated by selling power to third parties as evidenced from its e-mail dated 7.9.2021, wherein, it has proposed the sharing of gains with MPPMCL, for Rs. 240.87 crores in respect of CTPS for the period from 1.3.2018 to 18.9.2020 and for Rs. 45.20 crores in respect of DTSPS for the period 15.5.2017 to 18.9.2020. Referring to Section 20(3) of the Specific Relief Act, the learned Senior Counsel submitted that once the parties have undertaken substituted performance, it shall recover the expenses and cost from that third party under the substituted performance and no specific relief can be granted to that party. He accordingly pointed out that since DVC has undertaken substituted performance in the present case, no charges can be recovered by it from MPPMCL, once the PPA was terminated and power scheduling was stopped. He further contended that since the amounts involved in the present petition, find mention in the Execution Petitions filed by DVC and are listed for hearing on 18.10.2023, the Commission may restrain DVC in taking any coercive action against MPPMCL, in respect of the invoices uploaded on the PRAAPTI portal, till that date. The learned Senior counsel while pointing out that the dues in respect of Ash transportation charges have been stayed by the Hon'ble High Court of Madhya Pradesh, submitted that out of an outstanding amount of Rs. 64 crores, an instalment of Rs. 10.44 crore has been paid to DVC by MPPMCL.

5. In response to the above, the learned Senior counsel for DVC clarified that the amount of Rs.155 crores (approx.) uploaded in the PRAAPTI portal, relates to the bills pertaining to true-up tariff orders issued by this Commission, for the abovesaid projects. He also submitted that the outstanding fixed charges (including LPS) for the



non-scheduled period, on account of the unilateral termination of PPA by MPPMCL (which was found to be invalid by this Commission) is around Rs. 1700 crores (approx.) and after deduction of sharing of gains amount for Rs. 285 crores (approx.) the total outstanding amount payable by MPPMCL works out to Rs. 1400 crores (approx.). Pointing out that the LPS Rules notified by the Central Government are statutory in nature, the learned Senior counsel submitted that the grant of any interim relief to MPPMCL, with regard to the bills uploaded in the PRAAPTI portal, may create cash flow problems to DVC and a wrong message to a defaulter in compliance of the order.

6. The learned Senior counsel for MPPMCL pointed out that any Regulation of Power Supply, by DVC, after the trigger date, would result in a shortfall of 600 MW power supply to MPPMCL, thereby affecting the public at large. Accordingly, the learned counsel submitted that the Commission may grant interim relief, restraining DVC from taking any coercive action against MPPMCL, and to post these petitions for hearing on 18.10.2023.

Analysis and Decision

7. We have heard the learned Senior counsels for the parties. Admittedly, the present petition has been filed by MPPMCL pursuant to the order dated 26.9.2023 of APTEL, granting liberty to MPPMCL to approach this Commission, in connection with the non-payment of the two invoices raised by DVC and uploaded in the PRAAPTI portal. The APTEL has also extended the triggered date of these invoices to 5.10.2023. While the learned Senior counsel for MPPMCL has contended that Section 20 (3) of the Specific Relief Act, 1963 bars the recovery of fixed charges from MPPMCL, since the same was recovered by DVC from third parties, the same has been objected to by the learned Senior counsel for DVC stating that an amount of Rs. 285 crores, towards gain sharing



was offered by DVC to MPPMCL, in terms of the sharing methodology under the IEGC Regulations, as amended in 2016 and 2019. We are not inclined to consider the question of application of substituted performance under the Specific Relief Act, at this juncture.

8. The learned Senior counsel for DVC has reiterated that the bills shown as outstanding in the PRAAPTI portal, relate to the bills raised pursuant to the truing-up tariff orders issued in respect of the projects (CTPS and DSTPS) by the Commission, totaling Rs. 155 crores, excluding an amount of Rs. 25 crores, towards Ash transportation charges, which has been stayed by the Hon'ble High Court of Madhya Pradesh, and the same is payable by MPPMCL. Though the learned Senior counsel for MPPMCL submitted that an amount of Rs.10.44 crores has been paid to DVC, the same could not be confirmed by the learned Senior counsel for DVC. Prima facie, from the submissions above, it is evident that huge amounts are outstanding and remain payable by MPPMCL to DVC. Therefore, keeping in view the provisions of the LPS Rules and in order to avoid any cash flow problems to DVC, we find it just and proper to direct MPPMCL to make payments to DVC as per bills raised by it on PRAAPTI portal within the trigger dates. However, the trigger dates of 29.09.2023 / 01.10.2023, which were extended by APTEL till 05.10.2023, shall stand extended upto 07.10.2023. We direct accordingly. The prayer of MPPMCL seeking interim orders/directions, in I.A No.438/2023 is disposed of accordingly. However, the parties are at liberty to explore the possibilities for an amicable settlement, on the outstanding dues payable by MPPMCL.



9. I.A No. 437/2023 filed by MPPMCL requesting the Commission to take on record the Execution Petitions filed by DVC and the letters dated 14.9.2023 and 15.9.2023 of MPPMCL and DVC respectively, is allowed and the same are taken on record.

10. The Petition (Dy No. 436/2023) is 'admitted' and shall be listed along with the Execution Petitions No. 100/MP/2021 and 102/MP/2021 for hearing on **18.10.2023**.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S Jha)
Member

Sd/-
(Jishnu Barua)
Chairperson

