In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

Appeal No. 34 of 2016 and IA No.87 of 2016
and IA No.88 of 2016

Dated: 22nd August, 2016

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I. J. Kapoor, Technical Member

In the matter of

1. Jaiprakash Power Ventures Limited
(Ertwhile M/S Bina Power Supply Company Ltd. since merged with Jaiprakash Power Ventures Limited)
Sector 128, Noida- 201304
Uttar Pradesh

... Appellant

Versus

1. Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza,
Arera Colony, Bittan Market,
Bhopal – 462 016
Madhya Pradesh **…..Respondent No 1**

2. Madhya Pradesh Power Transmission Company Limited
Nayagaon, Rampur,
Jabalpur- 482008
Madhya Pradesh

…..Respondent No 2

3. Madhya Pradesh Power Management Company Ltd.
Shakti Bhawan, Vidyut Nagar,

Rampur,
Jabalpur – 482008
Madhya Pradesh **…..Respondent No 3**

4. State Load Despatch Centre,
Madhya Pradesh Power Transmission Company Limited
Nayagaon, Rampur,
Jabalpur- 482008
Madhya Pradesh **…..Respondent No 4**

Counsel for the Appellant(s): **Mr. Sanjay Sen, Sr Adv**
Mr. S. Venkatesh
Mr. Varun Singh
Mr. Shashank Khurana
Mr. Anuj P. Agarwala

Counsel for the Respondent(s): **Ms. Mandakini Ghosh**
Ms. Ritika Singhal for R-1

Mr Manoj Dubey for R-2 and R-4

Mr. M. G. Ramachandran
Mr. Manoj Dubey
Mr. Shubham Arya for R-3

JUDGMENT

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Jaiprakash Power Ventures Ltd. (hereinafter referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 challenging the legality, validity and propriety of the Impugned Order dated 07.01.2016 passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to

as the **"State Commission"**) in Petition No. 54 of 2015.

2. The Appellant, M/s. Jaiprakash Power Ventures Ltd is a Generating Company within the meaning of Section 2 of the Electricity Act, operating a 2x250 MW (Phase-1) Bina Power plant in the State of Madhya Pradesh.

3. The Respondent No 1 is the Electricity Regulatory Commission for the State of Madhya Pradesh exercising jurisdiction and discharging functions in terms of the Electricity Act 2003. The Respondent No 2 is Madhya Pradesh Power Transmission Company Limited ("**MPPTCL**") is State Transmission Utility in the state of Madhya Pradesh. The Respondent No 3 is Madhya Pradesh Power Management Company Limited ("**MPPMCL**"). The Respondent No 4 is State Load Despatch Centre ("**SLDC**") in the state of Madhya Pradesh.

4. Aggrieved by the Order dated 07.01.2016 passed by the State Commission, the Appellant has preferred the present appeal broadly on the following grounds:

a) The State Commission while passing the Impugned Order adopted a pedantic approach by superintending the focal issue raised by the Appellant, i.e. that each participant of the Electrical System including the Appellant generator and the Respondents have the responsibility of operating the electrical system in an efficient manner which is also enshrined under the Preamble of the Electricity Act, 2003 and the policies framed thereunder and relegated the dispute into a purely contractual matter.

b) The State Commission while passing the Impugned Order has consigned the focal issue raised by the Appellant about the efficiency of Appellants' generation into a simpliciter contractual dispute. The

Appellant in the Petition before the State Commission had urged that 'Technical Minimum' generation of the Appellant's generation capacity is not being maintained by the Respondent No 4, SLDC and the Respondent No 3, Procurer on the pretext that the same is limited to the Contract/ Agreement between the Appellant and the Respondent No.3. The Appellant's contention that it is an accepted practice that `Technical Minimum' generation as a concept is only relatable to the Generating Plant/ Unit's physical generation capacity and not an agreement was entirely ignored by the State Commission on the solitary premise that the same is not defined under the PPA or the Regulations framed by the State Commission.

c) The Appellant in the proceedings before the State Commission had raised a larger sectoral issue which was germane in the current market scenario wherein the State Utilities have tied up PPA's more than their actual demand. In the present scheme of things it is most imperative that the State Commission as a regulator ensures that the electrical system (which includes the generator) of the state operates in the most efficient and economical manner which it has failed to do so in the present case.

d) The State Commission in passing the Impugned Order has failed to address the larger issue of efficiency of the operation of Appellant's Power Plants by pedantically interpreting the PPA signed between the Appellant and the Respondent No.3.

e) The State Commission in passing the Impugned Order has failed to appreciate that the Statutory PPA was not signed with the intent that the Appellant would only receive the Capacity Charges without actually generating power leading to inefficiency in the operations of

the Appellant. Whereas the objective behind the PPA is that the Appellant would generate power in an efficient manner and the Respondent No. 3 will off take such generated power on payment of the regulated Tariff. The State Commission has also failed to appreciate that inefficient generation cannot be the intent behind the Agreement or the Act and the Regulations framed thereunder.

5. **Facts of the present Appeal:**

a) On 15.11.1994 the Appellant was incorporated under the Companies Act, 1956 by the name of Bina Power Supply Company Limited (BPSCL).

b) On 21.12.1994 Jaiprakash Hydro-Power Limited was incorporated under the Companies Act, 1956. Subsequently, the name of the company was changed to Jaiprakash Power Ventures Limited (JPVL) on 23.12.2009.

c) On 17.06.2008 a Meeting was held between the representative of the Government of Madhya Pradesh **("GoMP")**/Madhya Pradesh State Electricity Board **("MPSEB")** and the Appellant herein. As per the minutes of the meeting recorded the Appellant undertook to supply 42% of the installed capacity of the proposed capacity of plant i.e. 5 x 250 MW Phase-I (2x250 MW) and Phase-II (3x250 MW) based on availability of the coal (for Phase II) for the plant to the State and/or its Nominated Agencies for period of 25 years at the Tariff approved by the State Commission.

d) On 12.08.2008 an MoU was executed between GoMP and the Appellant for establishing and operating 5 x 250 MW thermal power

station (herein referred to as the "**Project**") in Two Phases based on the availability of coal for Phase-II.

e) On 30.01.2009 an Implementation Agreement **("IA")** was executed between the GoMP and the Appellant. As per the Concessional Energy clause of the IA, the Appellant was to provide to the GoMP or its Nominated Agency on an annualized basis 5% of the net power generated by the Project at Variable Charges as determined by the State Commission.

f) On 05.01.2011 a Power Purchase Agreement (herein referred to as "**PPA**") was executed between the Appellant and the Respondent No.3. The Appellant and the Respondent No. 3 agreed to terms envisaged in the PPA for developing, commissioning, operation and maintenance of the Power Station and for generation and sale of energy from the Power station by the Appellant to the Respondent No.3.

g) On 20.07.2011 a PPA was executed between the Appellant and GoMP for procurement of power on Variable Charges basis. GoMP has nominated Respondent No. 3 on behalf of GoMP to receive 5% net power at variable charge/cost to be determined by the State Commission.

h) On 25.07.2011 to consolidate the power portfolio of the Jaypee Group, two group power entities i.e. the Appellant and JKHCL were merged with JPVL. The Hon'ble High Court of Himachal Pradesh at Shimla has approved the merger scheme on the said date.

i) On 31.08.2012 the Appellant achieved COD of Unit I of its Power Plant. Further, in April 2013 the Appellant achieved COD of its Unit II of the Power Plant.

j) From August, 2012 to May, 2015, the Respondent No. 3 through Respondent 2 and 4 has been scheduling a minimum of approx. 140 MW unitwise from the Appellant's Power Plant. The Appellant is operating a 2X 250 MW Power Plant out of which 350 MW (65% +5%) has been contracted with Respondent No 3. Further, As per Appellant the Technical Minimum level of operation for the Appellant's Power Plant is at 55% load of unit capacity of 250 MW i.e. at about 140 MW. Therefore, the off take of 140 MW by the Respondent No.3 was as per the Technical Minimum generation capacity of the Appellant's Power Plant.

k) On 22.05.2015 the Respondent No. 3 issued a letter to the Respondent No.2/4 inter-alia stating as follows:-

"It is worth to mention the installed capacity has achieved up to 15100 MW. The total system demand is being met at present about 7000 MW average. It is expected that the demand may go up to 7500-7700 MW during remaining month of May'15. In view of the new MOD implemented from 22nd May 2015, it is observed that the variable cost & position of generating units have been changed which may have to keep in consideration while backing down of power available from the DC on bar of generating units. In case of thermal power generating units the backing down of power is to limited up to 70% in case of capacity below 250 MW and 60% in case of above 250 MW, as intimated from the SLDC and WRLDC in past. As such, it is to clarify that, MPPMCL would allow scheduling in such circumstances where the back down is required, that unit shall generate 70%-60% of the entitled power to MP on real time".

l) Subsequently, the Respondent No.2/4 issued a letter on 01.06.2015 which was inter-alia challenged by the Appellant before the State Commission. The relevant extracts of the letter dated 01.06.2015 are as follows: -

"The Chief General Manager (Power Management), M.P. Power Management Co. Ltd. Jabalpur vide letter No. MPPMCL/ PM/ 224 dated 22.05.2015 (copy enclosed) has intimated that in case of thermal power generating units the backing down of power is to be limited up to 70% of the entitled power to MP in case of capacity below 250 MW and 60% in case of above 250 MW. The above letter of CGM (PM), MPPMCL further clarified that MPPMCL would not permit generation more than above-mentioned limits of technical minimum generation under surrender conditions. In view of the above, whenever the power surrender instructions to technical minimum quantum of MP is issued the same shall be limited to 60% / 70% (as the case may be) of the contracted ex-bus capacity of MP."

m) In response to the letter dated 01.06.2015 of the Respondent No.2/4 , the Appellant on 03.06.2015 communicated to Respondent no 2/4 that the definition of Technical Minimum is for Machine/ Unit, as explained in the letter dated 22.05.2015 from MPPMCL. This Technical Minimum cannot be applied to the contracted capacity.

n) The Respondent No.2/4 on 03.06.2015 responded to the Appellant saying that the technical minimum is for the unit. However, it is the responsibility of the generator to have long term procurers for its full capacity and if not, to sell the balance quantity through bilateral/collective transactions. The only long term customer of

having 37.5% contracted capacity in the station cannot take responsibility of supporting technical minimum for full unit capacity.

o) Even though the Technical Minimum of the Appellant's Unit of 250 MW was at 140 MW, the Respondent No.2/4 issued a scheduling of 109.56 MW on 27.08.2015. The Appellant on the same date responded to the Respondent No.2/4 with regard to the scheduling sought by stating that the technical minimum of 250 MW machine is approx. 140 MW (export), which has been historically and religiously followed by SLDC. Therefore any deviation below 140 MW (export) on account of oil and other expenses (including reduction in efficiency) would be to the account of Respondent No.3.

p) On 28.08.2015 the Respondent No. 2 communicated to the Appellant and stated that as decided by MPPMCL technical minimum of contracted power comes to 109 MW. Hence the Appellant herein is instructed to maintain 109 MW as per schedule given by SLDC. Excess generation may be treated as non-compliance of SLDC instruction.

q) The Appellant on the same date responded to the Respondent No. 2 and stated that all things regarding technical minimum have been cleared in earlier communications and unit cannot be run at 109 MW and unit will be run accordingly to previous communications.

r) The Respondent No. 2 on 06.09.2015 communicated to the Appellant stating that “JP Bina Unit # 1 has been synchronised at 5.16 hours and schedule was given by SLDC. JP Bina unit is over injecting into the grid since it attained the load more than 110 MW. This is violation of grid code. It is requested to adhere to schedule given by SLDC.”

s) The Appellant on 06.09.2015 issued a letter to Respondent No.2 inter-alia stating that “Jaypee Bina can’t have merchant power tie up in anticipation of MP giving generation schedule; these require 24 hrs notice to tie up the balance 30-40MW capacity on Power Exchange to ensure machine operation above technical minimum. In the interim if “Jaypee Bina is not scheduled at technical minimum then the deviation on account of DSM, any penalty on account of over injection and the difference in additional cost would be to the account of Respondent No.3.”

t) The Appellant filed Petition No. 54 of 2015 before the State Commission seeking the following prayers :-

   a) Set aside the Impugned Letter dated 01.06.2015 issued by the Respondent No. 2 and 4.

   b) Allow the recovery of any additional cost incurred by the Petitioner in operating in accordance with the directions issued by the Respondent No. 2 and 4.

   c) Grant such order, further relief/s in the facts and circumstances of the case as this Hon’ble Commission may deem just and equitable in favour of the Petitioner.

u) On 14.12.2015 the Appellant plant received the MOD from the Respondent No.3. As per Appellant the MOD so being prepared by the Respondent No. 3 was not on the basis of variable cost but on the basis of variable cost, transmission losses and statutory taxes.

v) The State Commission passed the Impugned Order on 07.01.2016 inter-alia holding as follows:-

"16. In view of the above, it is observed by the Commission that the use of expression like Technical Minimum by the respondents in the

impugned communication has no relevance since the provisions under the PPA executed between the procurer and the petitioner are explicitly clear for commercial and technical obligation to be met by each of them. It is further observed that the respondent (MPPMCL) is responsible only up to the contracted capacity of the generating unit as per PPA. Any unscheduled available capacity within the contracted capacity is compensated by way of fixed cost/ capacity charges paid by the Respondent No.2 in terms of PPA. Besides, the petitioner is responsible at its own expenses for maintaining the technical requirement during operation of the plant while making its obligations under the power purchase agreement. Therefore, no merit is found in the prayer of the petitioner for recovery of any additional cost incurred by the petitioner in operating in accordance with the directions issued by the Respondent No 1 in the impugned communication. In view of the above observations and discussions, the subject petition is dismissed and disposed-of."

w) Aggrieved by the Impugned Order, Appellant has preferred the present Appeal.

6. **QUESTIONS OF LAW**

As per Appellant, following questions of law arise for consideration in the present Appeal:

I. Whether the State Commission in passing the Impugned Order has adopted a pedantic approach by superintending the focal issue raised by the Appellant, i.e. that each participant of the Electrical System including the Appellant generator and the Respondents have the responsibility of operating the electrical system in an efficient manner

which is also enshrined under the Preamble of the Electricity Act, 2003 and the policies framed thereunder?

II. Whether the Appellant in the proceedings before the State Commission had raised a larger sectoral issue which was germane in the current market scenario wherein the State Utilities have tied up PPA's more than their actual demand? Whether in the present scheme of things it is most imperative that the State Commission as a regulator ensures that the electrical system (which includes the Appellant) of the state operates in the most efficient and economical manner which it has failed to do so in the present case?

III. Whether the State Commission in passing the Impugned Order has failed to address the larger issue of efficiency of the operation of Appellant's Power Plants by pedantically interpreting the PPA signed between the Appellant and the Respondent No.3?

IV. Whether the State Commission in passing the Impugned Order has failed to appreciate that the Statutory PPA was not signed with the intent that the Appellant would only receive the Capacity Charges without actually generating power leading to inefficiency in the operations of the Appellant? Whether the objective behind the PPA is that the Appellant would generate power in an efficient manner and the Respondent No. 3 will off take such generated power on payment of the regulated Tariff? Whether the present Impugned Order has not considered the above and the State Commission has also failed to appreciate that inefficient generation cannot be the intent behind the Agreement or the Act and the Regulations framed thereunder?

V. Whether the State Commission in passing the Impugned Order could brush aside the focal issue raised by the Appellant against

Respondent SLDC on the basis of the Affidavit filed by the Respondent No.2?

VI. Whether the State Commission in passing the Impugned Order has failed to address the issue of **'Technical Minimum'** as an industry practise only the pretext that the same is not defined under the State Commission's Regulations or the PPA signed between the Appellant and the Respondent No.3?

VII. Whether the State Commission has erred in passing the Impugned Order by not going into the losses incurred by the Appellant due to scheduling below 'Technical Minimum' on the premise that Respondent No.3 is only obligated to pay capacity charge for the un-requisitioned capacity?

VIII. Whether the State Commission in passing the Impugned Order has failed to appreciate that CERC Draft Notification / CERC Order though not notified/ passed in the context of the Appellant / Respondents but in fact is applicable upon all generators who are directed by the Procurer/ SLDC to operate below the `Technical Minimum'?

IX. Whether the State Commission has erred in passing the Impugned Order as the Respondent SLDC in terms of the Extant Regulations and the scheme of the Act has to act as the apex body and safeguard the interest of the generator as well as the procurer?

X. Whether the State Commission in passing the Impugned Order has erred in not appreciating that as an industry wide practice it is the SLDC/ RLDC who object to scheduling below 'Technical Minimum' if such a requisition is made, as the same was also observed in the Explanatory Memorandum issued by the Central Commission which

lead to the Draft Indian Grid Code being notified for public comments?

XI. Whether the State Commission has failed to appreciate that mandate of Section 32 is to ensure `Optimum Scheduling' and not `Scheduling' as being interpreted in the Impugned Order?

XII. Whether the State Commission in passing the Impugned Order has wrongly relied upon Article 4.3.5 of the PPA to hold that the Respondent No.3 procurer can requisition any capacity from the generator without considering the fact that Article 4.3.5 is not the objective behind the Agreement as ultimately the Agreement was entered for the purpose of setting up a power plant to supply 70% power? Whether Article 4.3.5 of the Agreement is only an exceptional provision which comes into play in exceptional scenarios and cannot be used to regulate the manner in which supply of power will be effected between parties?

XIII. Whether the State Commission in passing the Impugned Order has wrongly considered Article 4.3.3 of the PPA which does not cast any obligation upon the generator to sell the un-requisition capacity but only provides an enabling provision?

XIV. Whether the State Commission in passing the Impugned Order has erroneously held that the payment of 'Capacity Charges' is the only obligation of the Respondent No.3 procurer especially when the said procurer has not invoked Article 4.3 in terms of the PPA?

XV. Whether the State Commission in passing the Impugned Order incorrectly held that 'Technical Minimum' is of no relevance especially when the Central Commission is now seeking to amend the existing Gird Code to ensure that generation below `Technical Minimum' is

curtailed as a practice and therefore it is a larger issue at play presently?

XVI. Whether the State Commission has erred in not appreciating that the issue of operation below 'Technical Minimum' is an issue which affects the financial health of all generators in times to come?

XVII. Whether the State Commission has erred in not considering the submission of the Appellant that the MOD being prepared by the Respondent No.3 is contrary to the Extant laws and hence cannot be the basis for the Respondent No.3 scheduling power below the 'Technical Minimum' capacity of the Appellant's generating unit/ plant?

XVIII. Whether the State Commission has gravely erred by accepting the contention of the Respondents that due to 'proposed regulation of power' the scheduling of the Appellant was done below the commercially accepted 140 MW which is the 'Technical Minimum' of the Appellant's Generating Unit without appreciating that 'Regulation of Power' per se as a concept has also not been defined under the extant Regulation of the State Commission or the PPA signed between the Appellant and the Respondent No.3.?

XIX. Whether the State Commission in passing the Impugned Order has failed to appreciate that Appellant's station, being a thermal power station, is a Base Load Station by design and such stations are designed to operate at a near constant load and such frequent changes in load can cause severe damage to the plant and its equipment?

XX. Whether the State Commission in passing the Impugned Order has failed to appreciate that in the present market scenario where

admittedly the Respondent No.3 is power surplus greater responsibility is required to be exercised by the Respondent SLDC in ensuring that the Appellant's Power Plant is not operated below its technical minimum especially since the Appellant is the only generator with 70% tied up capacity with the State Procurer?

XXI. Whether the State Commission in passing the Impugned Order has failed to appreciate that the Appellant's Power Project has been established for the specific purpose of ensuring supply of power to the State of Madhya Pradesh and therefore higher regulatory accountability is required to be exercised by other State Players to ensure that no undue financial and technical prejudice is caused to the Appellant?

XXII. Whether the State Commission in passing the Impugned Order has failed to appreciate that due to sudden and erratic scheduling being sought the Appellant had been compelled to incur losses and to maintain its 'Technical Minimum' by supplying power on day ahead basis in open market?

XXIII. Whether the State Commission in passing the Impugned Order has wrongly relied solely upon Article 7.1.1 by not seeing the other comprehensive provisions of the PPA such as Article 6.1.3 wherein it was the obligation of the Procurer to keep available the entire contracted capacity unless a notice from the Procurer under Article 4.3.3 was issued which has not been done till date?

7. We have heard at length Mr. Sanjay Sen, the learned senior Counsel for the Appellant and Mr M. G. Ramachandran, the learned Counsel

for Respondent No 3, Ms. Mandakini Ghosh, the learned Counsel for the State Commission and Mr Manoj Dubey, the learned Counsel for Respondent No 2 and Respondent No 4 and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is discussed hereunder.

8. The learned Counsel for the Appellant has made following submissions on the various issues raised in the Appeal for our consideration :

a) In scheduling optimum power from the Generator it is the duty and responsibility of the Respondent No. 4 to ensure that the generator is not asked to operate below its machine's Technical Minimum Capacity as the same would cause severe operational prejudice to the generator, including the requirement to operate the plant inefficiently on the basis of expensive fuel oil. However, in the present case the SLDC blindly relied on the letter issued by the Respondent No.3 to interpret the 'Technical Minimum' of the Appellant's generating capacity to the contracted capacity in terms as provided in the Power Purchase Agreement dated 05.01.2011.

b) The State Commission completely erred in holding that technical minimum is to be read in terms of the contract and not the installed capacity of the plant. This view of State Commission is different from the view of other State Commissions like MERC Judgment dated 29th January, 2016 passed in Petition No. 121 of 2015 titled Maharashtra

State Electricity Distribution Co. Ltd. vs Maharashtra Veej Grahak Sanghatana and UPERC Judgment dated 20.01.2016 passed in Petition No. 1070/2015 titled Rosa Power Supply Company Limited vs UPSLDC &Anr.

c) The Merit Order placed before the State Commission was issued on the basis of misconceived principles. The State Commission has turned a blind eye towards the issue of Merit Order Despatch (MOD) and has not recorded any findings on the issue.

d) **Technical Minimum of a Generation Power Plant is based upon the Unit/ Plant Capacity and not the Contracted Capacity.**

i. 'Technical Minimum' as a concept means the technical parameters below which the machines should not be permitted to operate as below this level the machines become unstable and inefficient. This aspect has been recognised by the Commissions, utilities, generating companies etc. from the very inception.

ii. It is an accepted practice that 'Technical Minimum' Generation as a concept is only relatable to the Generating Plant/ Unit's physical generation capacity and not an agreement between a generator and DISCOM. The Technical Minimum of the Appellant's Power Plant is not being maintained by the SLDC on the pretext that the same is limited to the Contract/Agreement between the Appellant and the Respondent No.3. The said restriction has been imposed by the SLDC pursuant to the letter

dated 22.05.2015 of the Respondent No.3 which was challenged before the State Commission.

iii. This issue of Technical minimum was deliberated at length by the Central Commission in Petition No. 142/MP/2012 wherein the Central Commission vide its order dated 02nd September 2015 held as follows: -

"45. From the submissions of CEA, it is inferred that the technical minimum of thermal generating units should not be less than 50% of MCR loading of the unit for old as well as new plants. In our view operation of thermal generating station on technical minimum has commercial implication for the generator in terms of increase in heat rate, secondary fuel oil consumption and auxiliary energy consumption which enhances the actual energy charges and the same cannot be loaded to other beneficiaries which are not being regulated. Therefore there is a need for adjusting the implication of enhanced energy charges from the revenue earned from sale of regulated power apart from normative energy charges and fixed charges. The Commission has proposed amendment to the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 by prescribing a technical minimum of 55% along with compensation mechanism to make good the loss of the generating station. Therefore, the issue of operation of the thermal generating unit at technical minimum and its operational and financial implication during the period of regulation of power supply shall be dealt with in accordance with the amendment to the Grid Code which will be finalized and notified shortly. "

iv. The Central Commission issued Draft Notification of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2015 in July,2015 , wherein the Central Commission had sought to introduce the definition of "Technical Minimum Schedule" at sub-regulation 6.3 B of Draft Regulations which is as follows: -

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

v. In the Explanatory Memorandum of the draft regulations issued by Central Commission, following was specified for specifying minimum technical operation of generating stations on unit basis:

"36. It is proposed that the technical minimum may initially be kept as 55% of Installed Capacity/ MCR of unit/units for old as well as new plants in due consideration of CEA recommendations and giving some margin over the recommended technical minimum of 50% by CEA. However, the operation at 55% loading has commercial implication for the generator in terms of increase in heat rate, secondary fuel oil consumption and auxiliary energy consumption, thereby increasing the actual energy charges. The generator will have to be compensated for this increase in energy charges.

37. It is felt that any reduction in loading of units below 85% on account of low despatch schedule given by beneficiaries /RLDCs

may have to be compensated by the beneficiaries. The Standard Bidding Documents (SBD) for case-II/UMPP projects brought out by Ministry of Power provide for heat rate degradation for part load operation corresponding to different unit loadings. In accordance with the same, following heat rate degradation for part load operation corresponding to different unit loadings may be provided:

.....

.....

.....

Below 55%, the station may go for reserve shut down.

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 exbus, 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 which 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."

vi. Therefore, in terms of the above it is an accepted Industry and Technical Practice that 'Technical Minimum' as a concept can only be made applicable on the Unit Capacity of a Generating Station as it relates to the physical generation ability of a Unit. The Draft IEGC has now been notified on 6th April, 2016 wherein the provision in Relation to 'Technical Minimum' has been incorporated in the Grid Code.

vii. Since the Commissioning of the Plant by the Appellant, it is an accepted operational practice that a minimum threshold of 140 MW per Unit has been maintained by the Respondents in procuring and scheduling power from the Appellant's Generating Station. If the contention of the Respondents is to be accepted then the Technical Minimum of the Appellant generation power plant would be kept at 96 MW per Unit i.e. 70% of the Contracted Capacity per Unit.

viii. It was always known between parties including SLDC that the Appellant unit cannot operate below 140 MW and whenever Appellant had a higher tie up from its balance un-contracted capacity, the Respondent No 3 has taken benefit of the same and has scheduled power much below 96 MW for the

Respondent No. 3 based on its requisition. The ability to tie-up the untied capacity in the short term is based on market dynamics. The generator can only offer power in the power exchange. Whether that offer will result in contract of sale depends on the then existing market conditions.

ix. The SLDC has also failed to appreciate that it is an accepted industry practise that the RLDC/ SLDC often reject the scheduling from procurers or force technical minimum scheduling upon procurers/buyers if their schedule results in operating the plant below the technical minimum of the generating station. It is incumbent upon the SLDC to follow the aforementioned practice in order to optimize the scheduling and dispatch.

x. The CERC in its Statement of Reasons to the IEGC 4th Amendment Regulation has elaborately stated the requirement of maintaining Technical Minimum Generation even when the power scenario is in surplus and also the need to compensate the generators if the scheduling is below the 85% PLF.

e) **The Respondent SLDC while discharging its functions has to act as an independent autonomous body**.

i. The Respondent SLDC without exercising its powers of regulating, scheduling and dispatch of electricity in an optimum manner within the State of Madhya Pradesh, has wrongly issued the challenged communications to the Appellant. The SLDC at the behest of the Respondent No.3 has forced the Appellant to operate its plant much below the Technical Minimum operation level of its plant capacity.

ii. The Judgment of this Tribunal in Appeal No 175 of 2012 titled as M/s Tata Power Company Limited vs. Maharashtra Electricity Regulatory Commission & Ors. may be referred to which states as follows: -

"29. Let us now discuss the issue. The State Load Despatch Centre (R2) is constituted under Section 31 (1) of the Act as an independent body, which was responsibility for carrying out optimal scheduling and dispatch of electricity within the State. SLDC while dispatching its statutory function is covered by the provisions under Section 33(1) of the Act. Under Section 33(1) of the Act, SLDC has to decide the request for scheduling made by the Appellant only in accordance with the parameters prescribed under the Act. Thus, SLDC is required to take into account only issues relating to transmission and the transmission network when deciding any request for scheduling of power. "

In view of the above observations of this Tribunal, it is abundantly clear that the SLDC while discharging its functions has to act as an independent autonomous body and cannot in any manner act as an extended arm of the Government Utility.

iii. As per clause 4.3.5 of the PPA, it is the Procurer, who is required to issue Notice to the Appellant to the effect that it will not procure its contracted capacity for a particular period. The SLDC cannot now be permitted to say that the letter dated 28.08.2015 is a notice under Clause 4.3.5 of the PPA, which notice had to be issued by the Respondent Procurer, who is a party of the PPA (and not the SLDC). The notice for seeking power below the contracted capacity has till date not been issued by the

Respondent Procurer. It is only after such notice, the Appellant can plan the sale of its un-scheduled capacity. The procurer has been drastically reducing the schedules on a day ahead basis for a base load thermal power plant, which is both contrary to the intention of the contract and impractical for day to day operations.

iv. As per Regulation 1.6.6 of the State Commission's Grid Code, the SLDC is obligated not to unduly discriminate or prefer amongst any stakeholders. However, in the present case, SLDC in the guise of carrying out its responsibility of optimum scheduling and dispatch of electricity has issued the impugned communications fixing the Technical Minimum of the Appellant's Power Plant to the contracted capacity with the Respondent No.3.

v. The running of Project below technical minimum has led to severe expenditure on account of secondary fuel consumption and other related costs which has not been compensated to the Appellant.

vi. Further, for any offer of power on Exchange the Appellant cannot take recourse to FSA Coal (obtained under Coal India's linkage policy) and is necessarily compelled to procure Coal from open market, which substantially increases the cost of generation. This makes the offer uncompetitive. If the procurer had followed the due procedure stipulated under the PPA then this situation could have been avoided and an equitable opportunity would have been given to the Appellant to ensure that its generation is suitably tied up.

vii. As an accepted practice if there is any difference between the scheduling of the Procurer and the generators availability, the RLDC/ SLDC refuse scheduling and direct the parties to come at a settlement and such RLDC/ SLDC under no circumstance impose the requisition of the procurer upon the generator. Reference has been made to the communication of WRLDC dated 03.06.2015 wherein it was stated “that WRLDC schedules contracts which are mutually agreed. In case of disagreement, it is not a contract and hence from now onwards such disputed requisitions shall be scheduled as zero.”

viii. The action of SLDC to ensure that the requisition of procurer i.e. Respondent No.3 is implemented at any cost without considering the technical minimum limitations of the Appellant is also contrary to the mandate of Section 32 of the Act.

f) The Act mandates "Optimum Scheduling and Dispatch"

i. The Act or the Regulation in no manner indicates that the SLDC shall act only to promote procurement by state utilities without considering the technical capabilities of the Appellant’s generating plant. If the intent of the legislature was to limit the operation of SLDC to the contract entered into between the procurer and the generator, then the legislature would not have used the word 'optimum' in Section 32 of the Act. The sole purpose of incorporating the word 'optimum' in Section 32 is to entrust the responsibility upon SLDC to balance the interest of both the procurer as well as the generator, which the said Respondent SLDC has failed to do in the present case.

ii. The Respondent No. 3 procures 70% of the power generated from the Appellant's plant, which is a substantial portion of the entire generation by the Appellant. Further, in such circumstances, wherein the Respondent No. 3 has tied up PPA's for more than its actual demand, the Respondent SLDC is obligated to ensure that the electrical system (which includes the generator) of the state operates in the most efficient and economical manner. In such a situation, greater regulatory responsibility, judiciousness and ownership is required to be exercised by the Respondents, in ensuring that the Appellant's Power Plant is not operated below its Technical Minimum ability especially since the Appellant is the only generator with 70% tied up capacity with the State Procurer.

g) Any off take/scheduling below the contracted capacity has to be done strictly in accordance with the Terms and Conditions of the PPA.

i. Any off take/scheduling below the contracted capacity can only be made if two conditions are satisfied i.e.

a) Firstly, a due Notice under Article 4.3.5 is to be issued by the Procurer to the Generator for the lower quantum specifying the period for which such a supply would be taken, and

b) Secondly, when the said Quantum is either above 'Technical Minimum' of the Unit Capacity or Zero in cases of RSD as enumerated in the 4th Amendment of the IEGC.

ii. In the present case, the requirement of Article 4.3.5 of the PPA has admittedly not been fulfilled till date. Therefore, by virtue of Section 54 of the Contract Act 1872, the Respondent No. 3 is in

breach of the PPA signed between the Appellant and the Respondent No.3.

Section 54 of the Contract Act is reproduced below: -

"When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."

Therefore, in terms of the above quoted Section 54 of the Contract act, 1872 since the Respondent No.3 has not followed the procedure as prescribed under Clause 4.3.5 the said Respondent cannot claim equity in its favor. Moreover, the financial hardship caused to the Appellant will have to be appropriately compensated.

iii. Further , in terms of the PPA the exact period of shortfall in off take of power is to be informed to the Appellant as the words "for a period specified in such notice" mentioned in Article 4.3.5 of the PPA.

iv. The Article 4.3.4 of the PPA dated 5th January 2011, provides for sharing of "sales realization in excess of Energy Charges". It is an agreed and accepted position that a share in profit is equally applicable to share in loss. Therefore, the claim of the Appellant must be considered on account of losses incurred in this additional light.

v. The performance of the Contract cannot be permitted to be done in an inefficient and uneconomical manner which is contrary to the very preamble of the Electricity Act, 2003 and the various policies framed thereunder and in terms of Regulation 6.3 B of the IEGC any scheduling below the 'Technical Minimum' of the Unit Capacity would result into RSD.

h) **The MOD is not in accordance with the Regulations of the State Commission and MP Balancing and Settlement Code, 2009**.

i. The entire case of the Respondents was predicated on the averment that the Respondent procurer is seeking scheduling of power in terms of the MOD being prepared by it and therefore, the scheduling from the Appellant's Generating station has gone down from 140 MW to 109 MW and to 94 MW since May, 2015.

ii. The MOD received by the Appellant from the Respondent No.3 itself shows that it is not in accordance with the Regulations of the State Commission and the Balancing and Settlement Code, 2009. The MOD has been prepared after including Cess on Intrastate Sales at the rate of Rs 0.15/ unit, when in fact the Regulation only provides for the MOD to be prepared on the basis of variable cost only. The inclusion of Cess in the MOD is in contravention to Regulation 5.3 of the State Commission's (Balancing and Settlement Code), 2009.

iii. The MOD is being implemented on total cost (after considering Transmission Losses and Statutory Duties and Taxes) basis whereas the same should be on energy cost only. The above is in violation of Regulation 5 (3) of Madhya Pradesh Electricity Balancing and Settlement Code, 2015.

iv. The concept of MOD is to ensure that the most efficient fuel gets dispatched first. For this small hydro, solar power, wind power is termed as "must run" plants. The merit order stack is based on cost of fuel alone and local taxes, which are only applicable to IPPs, cannot be considered for purposes of deciding MOD.

v. If the said MOD is incorrect, then the entire basis of Respondents' arguments to limit the Appellant's generation to 'Technical Minimum' of the contracted capacity are not sustainable since the Appellant's cost of energy is lower than several State owned generating stations, its power (under a proper MOD principle) would be dispatched, without the need to reduce the schedules below the technical minimum.

vi. The Respondents are in fact operating the MoD to ensure that preference is given to the more expensive and inefficient State Generating Stations which is not permissible in law.

i) MP grid operations have to be in consent with the IEGC, as amended from time to time.

i. The CERC has notified the draft Amendment to Indian Electricity Grid Code ("IEGC") on 06.04.2016 which includes the issue of 'Technical Minimum' of Generating Stations and its consequent compensation to generators. Further, the CERC has kept the requisite regulation i.e. Sub-Regulation 6.3 (B) in abeyance as the modalities for operation of low system demand are yet being finalized by National Load Dispatch Centre ("NLDC").

ii. In terms of Section 86 (1) (h) of the Electricity Act, 2003, the State Grid Code has to be consistent with the Grid Code specified by the CERC. Therefore, even though the concept of

'Technical Minimum' at present does not find mention in the State Commission's Grid Code but by virtue of the CERC (IEGC) 4th Amendment read with Section 86 (1)(h) the said concept of 'Technical Minimum' and Reserve Shut Down **("RSD")** below 'Technical Minimum' is also applicable upon the State of Madhya Pradesh.

iii. In terms of the observations of the Hon'ble Supreme Court in the case of Central Power Distribution Co. and Ors. vs. CERC &Anr (2007) read with Section 86(1)(h) of the Electricity Act, 2003, the Amendments made in the CERC (lEGC) 4th Amendment are also required to be followed by the State Commission. Therefore, the State Commission must amend the MPERC Grid Code to bring it into parity with the latest Amendments in the CERC notified IEGC.

iv. Since the IEGC has been amended as on 06th April, 2016 Clause 6.3B has come into effect and is applicable upon the State of Madhya Pradesh in terms of Section 86 (1) (h) of the Act.

j) The Appellant has a Legitimate Expectation to be protected against Regulatory certainty and consistency.

i. Right from the inception, the Appellant was aware that the Technical Minimum Operation of the Appellant's Unit was largely based upon the Unit's generation ability and not upon the contracted capacity with Respondent No.3.

ii. The Respondents by fixing the Technical Minimum of the Appellant's Generating Unit much below the accepted and followed industry practice has, arbitrarily and unfairly, taken away

the Appellant's legitimate expectation to be protected against violations of Regulatory consistency and certainty.

k) Orders passed by the other State Commissions on the issue of Technical Minimum.

i. Other State Commissions are also debating about the issue of Technical Minimum and the unanimous direction of all Commissions is to either operate a Plant (irrespective of the agreement) at its Technical Minimum or grant Reserve Shut Down. The practice has been universally accepted.

l) Order passed by the commission has failed to correctly interpret Clause 7.1.1 of PPA

i. The State Commission in the Impugned Order has failed to take note of the term "prudent utility practices" mentioned in clause 7.1.1 of the PPA. The said term has been defined in the definition section of the PPA. Prudent Utility practices in the PPA has been defined to mean practices, methods, techniques and standards that are generally accepted by electric utilities for the purpose of ensuring physical safety and efficiency of the Power Station and its various components.

ii. A conjoint reading of the clause 7.1.1 along with the definition of prudent utility practices would show that it is unviable and impractical for the Appellant to function against the generally accepted practice for the physical safety of its power station.

9. The learned Counsel for the State Commission has made following submissions on the various issues raised in the Appeal for our consideration:-

a) The basic allegation of the Appellant is that the State Commission dismissed the Petition while taking a narrow view of the entire situation. The Appellant has contested that the State Commission has interpreted the PPA and the Regulations cited by it in a narrow and restrictive manner to reach an incorrect conclusion.

b) The Appellant wants that its power plant be allowed to schedule at the 'technical minimum threshold' of 140 MW and to recover additional cost incurred allegedly by it in operating its plant as per the directions of Respondent No. 4/ SLDC.

c) The Respondent No.4, SLDC vide communication dated 01.06.2015 instructed the Appellant as:

"Whenever the power surrender instruction to technical minimum quantum of MP is issued the same shall be limited to 60% / 70% (as the case may be) of the contracted ex-bus capacity of MP."

d) The Appellant approached the State Commission under incorrect provisions of the Act. The Appellant filed Petition 54 of 2015 under Section 86(1)(f), (h) and (k) of the Act, 2003. Clause (1) of Section 86 provides that the State Commission shall adjudicate upon the disputes between the licensees and generating companies whereas, in Petition no. 54 of 2015, the Appellant challenged the legality, validity and proprietary of the directions issued by Respondent SLDC which is not the licensee. Secondly the other Sections invoked by the Appellant, 86(1)(h) and (k) pertain to the general functions of the State Commission relating to specifying M.P. Electricity Grid Code and discharge such other functions as may be assigned to the State Commission under the Act.

e) The Appellant has relied heavily upon the Draft CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations 2015 to show 'technical minimum schedule for Operation and Generating Stations', however these Regulations are meant for Inter State Generating Stations (ISGS) whereas, the Appellant's power plant is not ISGS as per the provisions of M.P. Electricity Balancing and Settlement Code and M.P. Electricity Grid Code and therefore cannot rely upon the aforementioned Regulations.

f) The State Commission in its Impugned Order has observed that the use of the term "Technical Minimum" by SLDC/Respondent No.4 and M.P. Power Management Company/ Respondent No.3 had no relevance since the provisions of the PPA executed between the Appellant and Respondent No.3 are explicitly clear with regards to the commercial and technical obligation to be met by each of them. The State Commission vide Impugned Order has rejected the Appellant's prayers for compensation in light of the PPA executed between the Appellant and Respondent No.3. Therefore, there is no question for grant of compensation for distress sale and excess oil usage due to lowered generation.

g) The Appellant has challenged the Impugned Order on the following grounds:

(i) The State Commission has failed to address the issue of 'Technical Minimum' as an industry practice. The State Commission has erred in relying upon the PPA and the MPERC Grid Code;

(ii) The State Commission has erred by not accounting for the damage caused to the Appellant's unit due to frequent changes

in load. The State Commission has erred by not directing Respondent No. 3 to compensate the Appellant for the distress sale of its' power on lEX and increased use of oil due to lower/inefficient generation;

(iii) The State Commission has misinterpreted the provisions of the PPA that Respondent No.3 is only obligated to pay capacity charge for unrequisitioned capacity. Such a narrow and pedantic interpretation will result in inefficient generation which could not have been the intent behind the PPA, the Act and the Regulations framed therein;

(iv) The State Commission has failed to appreciate that the MOD prepared by Respondent No.3 is incorrect and is in violation of Regulation 5(3) of the Madhya Pradesh Balancing and Settlement Code, 2015.

(v) The State Commission has failed to realize that the Respondent No.4 has erroneously acted in contravention of Section 32 of the Act by directing the Appellant to schedule below 140 MW is the 'Technical Minimum' of the Appellant's generating unit;

h) The State Commission had correctly rejected the Appellant's prayer for setting aside the impugned letter dated 01.06.2015 issued by Respondent no. 4 and disallowing recovery of any additional cost incurred by the Appellant in operating of the plant on account of the directions issued by Respondent no. 2. The State Commission has refrained from allowing recovering of additional cost in light of the provisions of the PPA, executed between the Appellant and Respondent no. 3. The terms of the PPA are explicitly clear and the

Appellant is adequately compensated by Respondent no. 3 under the PPA for any unscheduled/unavailed contracted capacity.

i) The State Commission has passed the Impugned Order on examination of the following two issues while considering Petition 54 of 2015 filed by the Appellant:

   i. Whether the instructions of backing down of power issued by Respondent no. 4 to the Appellant on the basis of contract capacity with Respondent No.3 are incorrect and bad in law?

   ii. Whether the Appellant can be allowed to recover additional cost incurred by it while operating the power plant, as per the directions of Respondent no. 3, communicated to it by Respondent no. 4?

The State Commissions finding on these two issues are as follows:

Issue No. (i) : Whether the instructions of backing down power issued by Respondent no. 4 to the Appellant on the basis of contract capacity with Respondent No.3 are incorrect and bad in law?

a) The scheduling instructions issued by SLDC/ Respondent no 4 to the Appellant on the basis of contract capacity with Respondent No.3 are correct and good in law.

b) The Appellant has argued that the scheduling instructions issued by Respondent no. 4/ SLDC required the Appellant to operate its power plant below its technical minimum capacity and thus the same are in violation of the Prudent Utility Practices since the instructions require the plant to operate at a level which is highly inefficient and uneconomical. However these averments made by the Appellant are untenable in view of the PPA, MPERC Grid Code.

c) The Appellant and the Respondent No.3 have executed PPAs for supply of 70% (inclusive of 5% of net generated power at variable cost) of the installed capacity of Appellant's 2x250 MW (Phase 1),i.e. 350 MW for a period of 25 years at a tariff to be approved by the State Commission. The PPA between the Appellant and Respondent No. 3 is explicitly clear and has the necessary provisions for commercial and technical obligations/ arrangements that have to be met by each party to the contract. It is stated that the PPA does not provide for any kind of minimum generation to be compulsorily maintained by the Appellant. The Appellant is entitled to sell any unscheduled Available Capacity to an entity other than the Respondent No. 3/procurer on one hand and also entitled to recover the Fixed (capacity) charges corresponding to such unscheduled Available Capacity from the procurer on the other hand. The same has also been acknowledged by the Appellant as being an enabling provision.

d) Under the PPA, no restrictions have been imposed on the Respondent no. 3, to limit the quantum of 'Available Capacity' to be scheduled by it between zero and the full contracted capacity declared available by the Appellant. Article 4.3.3, 4.3.4, 4.3.5 of the PPA dealing with 'Available Capacity' provides that Respondent No 3 may, at any time and without assigning any reason request the Appellant to schedule whole or part of contracted/ available capacity. However, the PPA provides for the Appellant to be compensated by way of fixed cost to be paid by Respondent No.3, in terms of PPA, in the event the Respondent No.3 off takes less than the contracted capacity. It is reiterated that the Respondent No. 3 is responsible only

up to the contracted capacity of the generating unit as per the PPA and any unscheduled available capacity within the contracted capacity is compensated by way of fixed cost to be paid by Respondent No.3 in terms of PPA.

e) Further, in the event the Respondent No.3 does not schedule full contracted power under the PPA, the Appellant may arrange to sell the remaining power to third party as per terms & conditions of the agreement (Article 4.3.3, 4.3.4. and 4.3.5 of the PPA).

f) The Appellant's 2x250 MW generating plant has only one beneficiary - Respondent No. 3 for 70% and the 30% remains with the Appellant as mercantile capacity.

g) The lEGC 2016 mentions that the relief of adjustment in energy charges due to lowered generation as envisaged under the aforementioned Regulations will be only available to generating plants whose tariff is determined / adopted by the CERC. Further, the IEGC 2016 carves out an exception for generating plants which are not regulated by the CERC and specifically state 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. The relevant extracts of IEGC 2016 are as given below:

"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"

h) Respondent No. 3 prepares MOD list on monthly basis considering variable cost and the same is provided to all stake holders including SLDC on regular basis. Respondent No. 3 has notified the procedure of preparing MOD vide its letter No. 1270 dated 18.12.2013. As per the PPA, the answering respondent has full rights to schedule power to the extent of its choice. The Appellant had not sought any relief regarding 'Merit Order Despatch' in its petition filed before the State Commission. Secondly, the question raised by the Appellant regarding preparation of MOD had been adequately replied/ addressed by Respondent No. 3 during the course of proceedings and as recorded in the Impugned Order.

Issue No (ii): Whether the State Commission has correctly disallowed the Appellant's prayer seeking recovery of additional cost incurred by it, if any due to lowered operation?

a) The Appellant has prayed that it be allowed to recover additional cost from Respondent no. 3 since it is incurring heavy operational cost while running its power plant at the capacity instructed by the SLDC/ Respondent no. 4. From the aforementioned provisions of the PPA, it is clear that in the event Respondent No.3 requisitions less than the contracted energy of 350 MW from the Appellant, Respondent No. 3 is liable to pay the full fixed charges for the unscheduled/unavailed power from the Appellant. The Appellant is also free to sell the unavailed power to any third party. Therefore, there is no compulsion on Respondent No. 3 to off-take any amount of minimum power under the PPA. It also untenable that the Appellant will be financially aggrieved as Respondent No. 3 is paying the Appellant fixed/

capacity charges for the unavailed power under the PPA. Further, the Appellant has admitted that it has been selling the unavailed power on the lEX. Also, the Appellant has tied up only the 70% of the installed capacity with Respondent No.3. Therefore, the Appellant is at liberty to sale the non-contracted 30% power through any other route also which the Appellant does from balance 30% of its non-contracted capacity through Short Term Open Access for sale of additional power. The Appellant has been selling the 30% on a merchant basis in the past and may continue doing so in the future. This will ensure that the Appellant is able to maintain the generation of both the units at the desired levels without inflating the ARRs of the state distribution licensees by forcing them to off-take expensive surplus power from its generating units.

b) The Appellant has also prayed that it be allowed to maintain a generation of 140 MW per unit as an otherwise lowered generation will damage the plant's equipment. Article 7.1.1 of the PPA which deals with efficient and economical operation of the power station provides that the Appellant is made responsible at its own expenses to ensuring the operation of power station in an efficient, coordinated and economical manner so as to meet its obligation under the PPA and also to avoid any adverse effect on the grid operation. Therefore, any financial impact suffered by the Appellant due to alleged damage to the generation plant which in turn is caused by lowered generation is to be absorbed by the Appellant. The PPA envisages such aforementioned costs (if at all incurred) to be the Appellant's responsibility even if caused by lowered generation as long as the

levels of generation have been maintained so as to not adversely affect the grid operations.

c) As per Article 7.1.1 in PPA it is clear that the Appellant may not seek scheduling of power at 'Technical Minimum' nor can they seek any compensation for lowered generation under the lEGC 2016. It is once again reiterated that the lEGC 2016 is applicable to ISGS units and CGS where many constituents are having share as per their allocation and responsible for submission of requisition up to 55% of their share. The Appellant's 2x250 MW generating plant has only one beneficiary - Respondent No.3 for 70% and the 30% remains with the Appellant as mercantile capacity. Further, the lEGC clearly states that for entities not regulated by the CERC, compensation may be sought at the end of the year only if such provision is included in the PPA. Clearly, the Appellant cannot seek compensation for increased oil usage due to lowered generation and distress sale on lEX as the PPA for sale of power does not provide for compensations for operating at the technical minimum schedule (as understood under the IEGC 2016 for ISGC and CGS).

j) In view of the afore-mentioned, the State Commission has correctly passed the Impugned Order while dismissing Petition no. 54 of 2015.

10. The learned counsel for the Respondent No 3 , MPPMCL has made following submissions on the various issues raised in the Appeal for our consideration:-

a) The Appellant's contention is that the Respondent No 3 should be responsible for maintaining technical minimum of the installed

capacity of the Unit instead of limiting the same to the contracted capacity agreed between the Appellant and the Respondent No 3.

b) POWER PURCHASE AGREEMENT ("PPA"):

i. The contracted capacity in the PPA dated 05.01.2011 is not for the full installed capacity of the Appellant's power plant. The contracted capacity is 70% of the installed capacity.

ii. As per the PPA, there is no obligation for the Respondent No 3 to schedule any minimum capacity of power and there is no provision of technical minimum limits.

iii. The Appellant is made responsible at its own expenses to ensure the operation of power station in an efficient, coordinated and economical manner so as to meet its obligation under the PPA and also to avoid any adverse effect on the grid operation.

c) Technical minimum as approved by the Central Electricity Regulatory Commission in the amendment to the Indian Electricity Grid Code (Fourth Amendment), Regulations, 2016

i. The technical minimum criteria has been approved by the Central Electricity Regulatory Commission (vide Amendment dated 06.04.2016 to Indian Electricity Grid Code Regulations at 55% of Unit capacity. Though the amendment has been notified but has not been given effect to in the absence of the detailed procedure notified by the National Load Dispatch Centre (NLDC).

ii. Moreover, the amendment is applicable to the Inter-State Generating Stations units where many constituents are having share as per their allocation and responsible for submission of requisition upto 55% of their share. The Appellant's power plant is not an Interstate Generating Station as per the M. P. Electricity Balancing and

Settlement Code and M.P. Electricity Grid Code. Even assuming that the Amendment is applicable to the Appellant's power plant, the Answering Respondent is responsible for the 70% of the Plant's capacity and 30% is left with the Appellant. The 30% capacity remains with the Appellant as merchantile capacity and the Appellant for the purposes of 30% capacity is to be treated as deemed beneficiary.

iii. The Appellant's contention that the technical minimum should be on the basis of total generating station capacity and not the contracted capacity of a particular purchaser is erroneous. In a scenario where generator is not having long term PPA of a full quantum, it is for the generator to have some form of arrangement (medium-term open access/third party/sale through power exchange) so that the technical minimum quantum could be achieved, which is required for ensuring grid stability and security during low load, high availability condition etc. For an example, 'A' has a Power Plant having capacity of 500 MW. 'A' enters into a PPA with 'B' for a capacity of 200 MW.The technical minimum of the plant is 275 MW (55% of 500 MW). If the Appellant's contention is to be accepted, then 'B' would be forced to purchase not only full contracted capacity but also additional 75 MWs (275 -200 MW) that it had never contracted for.It is for 'B' to purchase the proportionate of the contracted capacity to the installed capacity namely 55% of the 200 MW i.e. 110 MW only.

d) MERIT ORDER:

i. The Appellant has incidentally raised issues on merit order when the same has no application to the matter in issue.

ii. The scheduling done by the Respondent No. 3 is also in strict compliance of the Merit Order dispatch principles. The same is in the larger public interest. The Respondent No. 3 is bound to protect and safeguard the consumers and to provide cheaper power in the State of Madhya Pradesh.

iii. Scheduling and requisitioning of power is done keeping in view these principles in most impartial manner, not only by the Respondent No.3, but also by SLDC and the same is based on the Balancing and Settlement Code, 2009 issued by the State Commission which provides for economical dispatch based on Merit Order. The procedure of preparing Merit Order has been notified by the Respondent No. 3 vide letter dated 18.12.2013. The Respondent No.3 is following the same methodology since then and any party including the Appellant has never challenged it.

iv. The Merit Order dispatch is being made in accordance with the State Commission's Balancing and Settlement Code, 2009. The Respondent No. 3 backs down costly power to save on the account of variable cost as the fixed charges are payable in terms of the PPA. The Merit Order is prepared on a monthly basis keeping in view the variable cost and is provided to all the stakeholders including SLDC on a regular basis.

v. The State Commission, to the knowledge of the Respondent No. 3, has never observed that Merit Order Dispatch is being prepared on unacceptable principles. Even otherwise, if Merit Order Dispatch is prepared taking in to consideration the capacity charges along with variable charges in one case and only variable charges in the other, then too, in both cases the Appellant’s generating station finds place

at the highest levels, i.e. to say that, the Appellant's generating station delivers costliest power in both the cases.

vi. The Appellant's submission that Merit Order is wrong as the Merit Order is prepared based on variable charges at common point i.e. Madhya Pradesh periphery for all the generators supplying power to Madhya Pradesh as some plants are within the State and some are outside. In the most impartial manner, the total variable costs are brought out at a common platform for comparison and as such equal treatment is given to all. This procedure has throughout been in the knowledge of the Appellant and from time to time, all the stake holders have been apprised of this information.

vii. The Respondent No. 3 further submits that the issue of merit order is between the Respondent No. 3, the consumers at large and for the State Commission to decide. The merit order is decided on consideration of various factors including the meeting of sustained load demands in the State of Madhya Pradesh. The Appellant cannot compel the Respondent No. 3 to schedule power, so long the Appellant is being paid the fixed charges in terms of the applicable regulations of the State Commission and in accordance with the PPA entered into between the parties.

viii. The allegation made by the Appellant on the aspect of merit order proceeds on a fundamentally wrong assumption that the generating units of the State Generating Companies are always being run in an inefficient manner and that the Appellant's units are being run in an efficient manner. Many of the State Generating Units are old. The Appellant ought to be in a position to compete in an efficient manner to produce electricity at which cheaper cost of generation as

compared to the cost of generation of the old generating units, despite paying cess of 15 Paise per unit. The cess of 15 Paise per unit is a cost of generation. Ultimately, the Respondent No. 3 is concerned with the total procurement cost i.e. variable cost, fixed cost need to be paid in any case. The total variable cost would include Electricity Duty and Cess payable on the units of electricity generated. These cannot be excluded for the purpose of comparison.

ix. There is absolutely no rational for the Respondent No. 3 to procure costly power by considering all the cost factors, when cheaper power is available. Accordingly, if the imposition of 15 Paise Cess on the power generated by the Appellant increases the cost of the power procurement of the Appellant as compared to other generating stations, the Respondent No. 3 is duty bound to purchase the power from other generating stations and thereby reduce the financial impact on the consumers at large.

x. In the context of the above, the Regulation notified by the State Commission on merit order need to be decided with the object and purpose to be achieved. It is, therefore, wrong on the part of the Appellant to contend that additional cost item such as Electricity Duty, Cess etc should not be considered while determining the merit order. There is absolutely no warrant for such allegations being made.

xi. Clause 5.3 of the Madhya Pradesh Electricity Regulatory Commission (Balancing and Settlement Code) provides as under:

"Merit Order Operation: Discorns, will give their requisitions based on their individual Merit Order i.e. in ascending order of cost of energy (i.e. variable cost) of ISGS, SSGS, Bilateral and Collective transactions allocated to individual Discorn"

xii. The merit order operation is on the cost of energy i.e. variable cost. The cost of energy i.e. variable cost under the Tariff Regulations includes the cess to be paid on units of electricity generated and sold. If there is no generation, no cess is paid. The term 'cost of energy', therefore, would include the cess payable as per Clause 5.3.

e) Appellant's obligation regarding the sale of power to third party for maintaining the technical minimum of the Plant

i. The Respondent No. 3 had provided 140 MW as technical minimum for the unit in the past when the power requirement was matching to availability, however, after commissioning of new plants of 4680 MW having comparatively very less variable cost, the gap between the demand and availability is reduced and now the Respondent No. 3 has surplus power. The Respondent No. 3 having surplus power at a cheaper price is not obliged to provide higher percentage as technical minimum to the Appellant as the same is not in the interest of the consumers in the State at large. In any event, the provision in the past of scheduling 140 MW does not in any manner take away the rights of the Respondent No. 3 to claim equitable treatment of taking appropriate power to meet the obligation of Technical minimum.

ii. Further, a perusal of some of the instances for the period of August 2015 to November 2015 filed by the Respondent No. 3 (when the Respondent No.3's requisition was for technical minimum of its contracted capacity) would show that the Appellant has arranged to sell the remaining power i.e. against 30% of its un-contracted capacity through Power Exchange and had run their unit at required technical minimum quantum.

iii. From the period of August 2015 to November 2015, the machines of the Appellant's power plant was on generation for a total of 5684 time blocks, out of which for only 159 time blocks, the Appellant failed to arrange third party sale. However, during such instances, the Appellant has run the units at their technical minimum of 140 MW. There cannot be any allegation to the effect that the Appellant has been forced either by the Respondent No. 3 or SLDC to operate below its technical minimum.

iv. In the appeal, the Appellant had challenged the above decision of the State Commission. The Appellant has also raised the issue of the merit order to contend that the power generated by the Appellant should be given preference in the merit order over the power generated by various other generating stations. The Appellant claims that the Appellant has been discriminated by considering an extra element of 15 Paise cess imposed by the Government of Madhya Pradesh. All these allegations of the Appellant have been found baseless and dealt with the right perspective by the State Commission as brought out hereunder;

The impugned Order clearly brings about that the concept of 'technical minimum' has no application to the generation and supply of electricity by the Appellant's generating unit in the State of Madhya Pradesh. This is because –

a. the PPA does not provide for any concept of 'technical minimum'. The PPA inturn clearly states that the Respondent No. 3 will pay the capacity charges for the un-availed capacity out of the contracted capacity. In terms of the PPA, the Respondent No. 3 has no

obligation whatsoever to pay in excess of the contracted capacity, namely, beyond 350 MW up to 500 MW;

b. the capacity in excess of the contracted capacity of 350 MW (175 MW in case of one unit) is the responsibility of the Appellant to deal with it in such manner as it considers appropriate, namely, whether on Long Term basis or Medium Term basis or on Short Term basis or off-loaded through the platform of Power Exchange or use for any captive purpose extra;

c. besides the PPA, there is no provision for the 'technical minimum' either in the State Grid Code or the State Commission's Balancing and Settlement Mechanism ,

d. the' technical minimum' is provided only in IEGC notified by the Central Commission by way of amendment on 06.04.2016, these aspect have not so far been implemented by the Central Commission;

e. On its term, Clause 6.3 (b) of IEGC which deals with 'technical minimum' applies only to the Central Generating Stations and Inter-State Generating Stations. Clause 6.3 (b) does not apply to any other categories of the generating stations;

f. Thus, the IEGC notified by the Central Commission bringing into effect the concept of 'technical minimum' for the first time restricts the same to the Central Sector Generating Stations or the Inter State Generating Stations;

g. There is no dispute that the Appellant is neither a Central Sector Generating Station nor an Inter State Generating Station. The Appellant is, therefore, not covered by Clause 6.3 B (i) which reads as under: "6.3 B 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 a 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"

The above has been further clarified in Clause 6.3B (4) as under:

"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"

h. In terms of the above, the issue of 'technical minimum' in the case of other generating stations or units will be applicable only if there is a provision in the PPA dealing with the same. In the absence of any provision in the PPA, the concept of 'technical minimum' cannot be enforced;

i. In the PPA dated 05.01.2011, there is no provision dealing with 'technical minimum'. In fact, Clause 7.1.1 of the PPA provides for no obligation on the Respondent No. 3 to maintain any such thing as and when the category 'technical minimum' comes into force, There is no such statutory requirements to maintain the 'technical minimum'. In any event, even if there is any statutory effect of mandating the 'technical minimum', the same is the responsibility of the Appellant and not of the Respondent No. 3;

j. The contention that the IEGC amendment makes an inroad into the PPA dated 05.01.2011 is totally misconceived. Firstly, the IEGC itself says that it is not applicable to other than the Central Sector Generating Stations and ISGS. There is no question of any inroad being made in the PPA. The reliance place on PTC's judgement on Regulations superseding the contract has no application as in the present case, the Regulation itself expressly states its non application to a generating station other than the CGS or ISGS. Secondly, even the Indian Electricity Grid Code has so far not been implemented to maintain the' technical minimum'.

k. In the circumstances, the adoption of 'technical minimum' in the State of Madhya Pradesh was only a voluntary act on the part of the Respondent No. 3 in a bonafide attempt. The' technical minimum' was not mandated on the Respondent No. 3.

l. Despite the above, the Respondent No. 3 was willingly taking the part of the electricity under 'technical minimum' which is proportionate to its contracted capacity viz-z-viz the total installed capacity of the power plant. It is the responsibility of the Appellant to find other purchasers at a price which would enable the Appellant to sell electricity to them to the extent of meeting the 'technical minimum' qua the balance 150 MW capacity as against the installed capacity of 500 MW (175 MW out of 250 MW in respect of one unit).

11. **After having a careful examination of all the issues brought before us, our observations on the various issues raised under the questions of law are as follows:-**

a) On Question No. 1 i.e. Whether the State Commission in passing the Impugned Order has adopted a pedantic approach by superintending the focal issue raised by the Appellant, i.e. that each participant of the Electrical System including the Appellant generator and the Respondents have the responsibility of operating the electrical system in an efficient manner which is also enshrined under the Preamble of the Electricity Act, 2003 and the policies framed thereunder?

i. The preamble of the Electricity Act, 2003 states as :

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

The preamble of the Electricity Act 2003 specifies the broader framework for taking measures conducive to:

- Development of electricity industry,
- Promoting competition therein,
- Protecting interest of consumers and supply of electricity to all areas,

- Rationalization of electricity tariff,
- Ensuring transparent policies regarding subsidies,
- Promotion of efficient and environmentally benign policies

Promotion of efficient policies is one of such area in addition to other objectives such as protecting interest of the consumers.

ii. The State Commission while passing the Impugned Order has observed at Para 12 as :

"12. On combined perusal of the contents in the petition and also the arguments/counter reply put forth by the parties in this matter, it is noted that the following documents have been referred by the parties:

a) Power Purchase agreement (PPA) entered into by the Petitioner and Respondent No.2 on 5th January' 2011 whereby, the power is supplied from the petitioner's power plant and purchased by M.P. Power Management Co. Ltd., Jabalpur. The three Distribution Companies in the State are the confirming parties in the aforesaid PPA.

b) Clause 1.10.1 and 8.3.1(a) of the M.P.Electricity Grid Code (Revision 1), 2005.

c) Draft amendment to CERC (Indian Electricity Grid Code) with regard to the Technical minimum criteria.

d) M.P. Electricity (Balancing and Settlement Code), 2009.

e) Section 54 of the Contract Act, 1872.

iii. Further the State Commission has dealt with the issue of Technical Minimum in Para 13, 14 and 16, of the Impugned Order dated

07.01.2016 the issue of optimum scheduling and despatch by Respondent No. 4 under section 32 of the Electricity Act, 2003 has been dealt with in Para 15 and 16.

Hence we do not find that while passing the Impugned Order the State Commission has adopted a pedantic approach.

iv. We note that the State Commission in its Order dated 07.01.2016 have dealt with every related aspect on the efficient performance of the generating stations and the responsibility thereof and adopted a well reasoned approach in its Order dated 07.01.2016.

v. Hence this issue is decided against the Appellant.

b) On Question No. 2 i.e. Whether the Appellant in the proceedings before the State Commission had raised a larger sectoral issue which was germane in the current market scenario wherein the State Utilities have tied up PPA's more than their actual demand? Whether in the present scheme of things it is most imperative that the State Commission as a regulator ensures that the electrical system (which includes the Appellant) of the state operates in the most efficient and economical manner which it has failed to do so in the present case?

i. On the issue of operation of electrical system in the State in the most efficient and economical manner and role of Regulator to ensure the same in the current market scenario where State utilities have tied up PPA's more than their actual demand, we note that the State Commission in exercise of the powers conferred by Section 181 read with Sections 39(2)(d)(i), 40(c)(i), 66, 86(1)(c) and 86(2)(i) of the Electricity Act 2003, , had notified Balancing and Settlement Code

(BSC) in October 2009 which was applicable within the geographical area of the State of Madhya Pradesh. The Preamble of the BSC 2009 states as :

"1. Preamble

1.1 The National Electricity Policy (NEP) envisages implementation of the Availability Based Tariff (ABT) at State level to establish a credible settlement mechanism for Intra-day power transfers among Intra-State Entities. As per the Tariff Policy, this framework should be extended to Generating Stations (including Grid connected Captive Plants of capacities as determined by the SERC). This Code has been specified to give effect to the intentions of Section 5.7.1(b) & (d) of the NEP as well as Section 6.2(1) & 6.3 of the Tariff Policy."

ii. The provisions of Section 5.7.1 (b) and (d) of the National Electricity Policy as well as Section 6.2(1) of the Tariff Policy state as :

National Electricity Policy

"5.7.1 (b) - The ABT regime introduced by CERC at the national level has had a positive impact. It has also enabled a credible settlement mechanism for intra-day power transfers from licenses with surpluses to licenses experiencing deficits. SERCs are advised to introduce the ABT regime at the State level within one year.

5.7.1 (d) - Development of power market would need to be undertaken by the Appropriate Commission in consultation with all concerned.

National Tariff Policy

6.2 Tariff structuring and associated issues

(1) A two-part tariff structure should be adopted for all long term contracts to facilitate Merit Order dispatch. According to National Electricity Policy, the Availability Based Tariff (ABT) is to be introduced at State level by April 2006. This framework would be extended to generating stations (including grid connected captive plants of capacities as determined by the SERC). The Appropriate Commission may also introduce differential rates of fixed charges for peak and off peak hours for better management of load.

Hence the above provisions of National Electricity Policy and National Tariff Policy identify the need of establishing a framework for implementing Merit Order Despatch which itself is based on principle of efficient and economical despatch.

iii. As per Section 5.3 of the BSC 2009, the principle of Merit Order Despatch has been identified by the State Commission.

"General Principles: Scheduling

5.3 Merit Order Operation: Discoms, will give their requisitions based on their individual Merit Order i.e. in ascending order of cost of energy (i.e. variable cost) of ISGS, SSGS, Bilateral and Collective transactions allocated to individual Discom."

iv. As per the learned Counsel of the State Commission, the Appellant had not sought any relief regarding 'Merit Order Despatch' in its petition filed before the State Commission. Secondly, the question raised by the Appellant regarding preparation of MOD had been

adequately replied/ addressed by Respondent No. 3 during the course of proceedings and as recorded in the Impugned Order.

v. Regarding the issue of "Technical Minimum", the State Commission in the Para 13 of the Impugned Order stated that the term/expression i.e, "Technical Minimum" for thermal power plant is not mentioned in any provision of the Power Purchase Agreement executed between the parties in the matter or M.P. Electricity Grid Code or Balancing and Settlement Code notified by this Commission. Moreover, Clause 6.3(b) for Technical Minimum Schedule for "Operation of Generating Stations" in CERC's draft notification is for Inter State Generating Stations (ISGS) whereas, the petitioner's power plant in the subject matter is not ISGS as defined in M.P. Electricity Balancing and Settlement Code and M.P. Electricity Grid Code. In the Para 16, State Commission observed that the use of expression like Technical Minimum by the respondents in the impugned communication has no relevance since the provisions under the PPA executed between the procurer and the petitioner are explicitly clear for commercial and technical obligation to be met by each of them. Besides, the Appellant is responsible at its own expenses for maintaining the technical requirement during operation of the plant while making its obligations under the power purchase agreement. As the Appellant in its petition before the State Commission has not specifically sought the level of Technical Minimum to be identified by the State Commission and only contended that the Technical Minimum to be considered for the Unit and not for the contracted capacity for scheduling purposes, we do find that the State Commission has discharged its role in ensuring efficient and economic operation of electrical system in the State.

vi. Hence this issue is also decided against the Appellant.

c) On Question No. 3 i.e. Whether the State Commission in passing the Impugned Order has failed to address the larger issue of efficiency of the operation of Appellant's Power Plants by pedantically interpreting the PPA signed between the Appellant and the Respondent No.3? and

Issue No 12 i.e. Whether the State Commission in passing the Impugned Order has wrongly relied upon Article 4.3.5 of the PPA to hold that the Respondent No.3 procurer can requisition any capacity from the generator without considering the fact that Article 4.3.5 is not the objective behind the Agreement as ultimately the Agreement was entered for the purpose of setting up a power plant to supply 70% power? Whether Article 4.3.5 of the Agreement is only an exceptional provision which comes into play in exceptional scenarios and cannot be used to regulate the manner in which supply of power will be effected between parties?

i. Under Section 32 of the Electricity Act 2003, it is provided that the State Load Despatch Centre shall be responsible for optimum scheduling and dispatch of electricity within the State, in accordance with the contracts entered into with the licensees and the generating companies operating in that State.

ii. The relevant provisions of the PPA dated 05.01.2011 entered between the procurer i.e. M.P. Power Trading Company Ltd. (now

M.P. Power Management Co. Ltd.), Jabalpur and the Appellant are as under:

"1**.1 Definitions**

"Available Capacity" shall mean such the contracted capacity declared available by the Company in accordance with the ABT;

"**Contracted Capacity**" shall mean the capacity equivalent to 65% of the Phase I (2x250 MW) and 37% of the Phase II (3x250MW) (subject to availability of coal for Phase II 3x250 MW) of Power Station's Installed Capacity contracted with the Procurer as terms of this Agreement

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4.3 Right to Contracted Capacity and Scheduled Energy

4.3.3 If the Procurer does not schedule the whole or part of the Available Capacity for any reason whatsoever, the Company shall be entitled to make available such Available Capacity not scheduled by the Procurer, to any other person without losing the right to receive the Capacity Charges from the Procurer for such unscheduled Available Capacity. During this period, this Company will continue to receive the Capacity Charges from the Procurer. For any such third party sale, all open access charges including losses, as may be applicable, shall not be payable by the Procurer. The Company shall maintain accounts and provide all details regarding price of sale etc. to the Procurer in respect of such sales under this Article.

4.3.4 In the cases referred in Article 4.3.3, the sale realization in excess of Energy Charges shall be equally shared by the Company and the Procurer. In the event, the Company makes available such Available Capacity to any direct or indirect Affiliate of the Company/shareholders of the Company without obtaining the prior written consent of the Procurer, the Company shall be liable to make available such Available Capacity to such entity at a tariff being not less than the Tariff.

4.3.5 Where the sale under Article 4.3.3 by the Company is consequent to a notice issued by the Procurer to the Company indicating its unwillingness to schedule the whole or part of the Available Capacity for a period specified in such notice, the Procurer shall be entitled to request the Company for the resumption of availability of the Available Capacity at any time, however, the Company shall not be liable to resume such availability earlier than the period specified in the said notice, and subject to the provisions regarding scheduling as per the Grid Code.

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7.1.1 The Company shall be responsible at its own expense for ensuring that the Power Station is 'operated and maintained in an efficient, coordinated and economical manner and in accordance with all legal requirements, including the terms of all Consents, Clearances and Permits, Prudent Utility Practices, and in

particular, the Grid Code, so as to meet its obligations under this Agreement and so as not to have an adverse effect on the Grid operation."

iii. The State Commission while issuing the Impugned Order has considered the above provisions of PPA. The State Commission has observed that the Respondent No. 3 is responsible only up to the contracted capacity of the generating unit as per PPA. Any unscheduled available capacity within the contracted capacity is compensated by way of fixed cost/capacity charges paid by the Respondent No.3 to the Appellant in terms of PPA.

iv. Hence we do not find any merit on the issue raised by Appellant on the failure of State Commission in addressing the issue of efficiency of the operation of Appellant's Power Plant.

v. **Hence both the above issues are decided against the Appellant**.

d) On the Question No. 4 i.e. Whether the State Commission in passing the Impugned Order has failed to appreciate that the Statutory PPA was not signed with the intent that the Appellant would only receive the Capacity Charges without actually generating power leading to inefficiency in the operations of the Appellant? Whether the objective behind the PPA is that the Appellant would generate power in an efficient manner and the Respondent No. 3 will off take such generated power on payment of the regulated Tariff? Whether the present Impugned Order has not considered the above and the State Commission has also failed to appreciate that inefficient generation cannot be the

intent behind the Agreement or the Act and the Regulations framed thereunder?

i. The PPA was signed by the Parties for supply of power for 25 years. From the various provisions of the signed PPA, it is evident that intent of PPA was to pay Capacity Charges to the Appellant even without scheduling of power for the contracted capacity from the Appellants plant. Considering the dynamic requirement of power demand/surpluses, it seems that the provision regarding right to contracted capacity and scheduled energy was incorporated in the PPA under Para 4.3. The provisions of PPA under this section deals with the option of providing such Available Capacity not scheduled by the Procurer, to any other person without losing the right to receive the Capacity Charges from the Procurer for such unscheduled Available Capacity. The State Commission while issuing the Impugned Order has considered the various provisions of the PPA including provisions of Para 4.3.

ii. The PPA was signed between the Parties for supply of 70% (inclusive of 5% of net generated power at variable cost) of the installed capacity of Petitioner's 2x250 MW (Phase I) of the power station for a period of 25 years at the Tariff to be approved by the Commission.

iii. The Tariff of the Appellant Power Plant is being determined by the State Commission in accordance with the Tariff Petition filed by the Appellant as per Generation Tariff Regulations issued by the State Commission. The Generation Tariff Regulations are issued by the State Commission for a specific Tariff Period after considering dynamics of the power market, promoting efficiency, balancing the interest of Consumers as well as Generators and consultation with the

Stakeholders. The State Commission issues the Tariff orders after scrutiny of the petition and consultation with the Stakeholders and proper due diligence.

iv. The issue of efficiency of power generation from the Appellants Power Plant was not at all the matter raised by the Appellant before the State Commission. The Appellant had raised its claim before the State Commission to allow the recovery of any additional cost incurred in operating in accordance with the directions issued by the Respondent No 2 herein.

v. In view of above, we are not inclined to accept the allegations on the issue as raised by the Appellant.

vi. Hence this issue is decided against the Appellant.

e) On the Issue raised in Question No 5, 6, 7, 8, 15, 16, 19, 20 & 22 related to Technical Minimum, we observe as follows:

i. The term 'Technical Minimum' is provided in the Indian Electricity Grid Code (IEGC) notified by the Central Commission in exercise of its powers under Section 79 (1) (h) of the Electricity Act, 2003. Clause 6.3 (B) of the IEGC provides on the aspect of Technical Minimum 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 a 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.

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"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"

ii. As per the IEGC itself, the Technical Minimum in the case of entities other than the Central Sector Generating Units and Inter State Generating Stations have to be in accordance with the PPA entered into between the parties

iii. By the time the Impugned Order was passed by State Commission, the amendment had not become effective. The amendment is still not given effect to pending the detailed procedure to be notified by the National Load Dispatch Centre. In view of the above, the Respondents are right in their contention that there is no legal mandate as at present in the State of Madhya Pradesh for the Appellant's generating unit to maintain the Technical Minimum as per the provisions of the Indian Electricity Grid Code notified by the

Central Commission or any other Regulations notified by the Central Commission or State Commission.

iv. The Appellant has contended that the IEGC is required to be followed by all concerned including the generating units which are only Intra State Generating Entities and not merely by the Central Sector Generating Units and Inter State Generating Stations. It has also been contended that in terms of Section 86 (1) (h) of the Electricity Act, 2003 that the Grid Code to be notified by the State Commission is to be consistent with the Grid Code notified by the Central Commission. There is no dispute on the scope of the applicability of the Indian Energy Grid Code to the State Generating Units. The IEGC would apply to all entities connected to the Grid irrespective of whether they are connected to the Inter State Grid or the Intra State Grid. Both the Inter State and Intra State Grid are integrated. Respondent No. 3, MP Discoms and other entities in the State of Madhya Pradesh connected to the integrated Grid are required to follow the IEGC. The issue is not on the applicability of IEGC to the Intra State Entities such as Respondent No. 3, MP Discoms and the Appellant's Generating Units. The issue is whether within the scope of IEGC as notified by the Central Government and amended from time to time, is there any requirement for the generating units other than the Central Sector Generating Units and Inter State Generating Stations to implement Technical Minimum and more, particularly, is there any requirement under the IEGC or any other Regulation for a State Entity such as Respondent No. 3 acting on behalf of MP Discoms to schedule power to the extent of the Technical Minimum

qua the installed capacity, when Respondent No. 3 had contracted not for the entire capacity but only part of the capacity.

v. In the absence of any mandatory provision either under the IEGC notified by the Central Commission or the State Grid Code notified by the State Commission or under any other statutory Regulation, the obligation of Respondent No. 3 to schedule power is traceable only to the PPA executed between Respondent No. 3 and the Appellant. Clause 6.3B (4) of the IEGC also affirms the above in respect of the generating stations other than the Central Sector Generating Stations and Inter State Generating Stations.

vi. It cannot be disputed that the Technical Minimum has envisaged the operation of the generating units qua its installed capacity and not in respect of the part of the installed capacity. The issue, however, is not in regard to the quantum of generation that should be undertaken for meeting the Technical Minimum of the generating unit but is in regard to the obligation of a Procurer which had contracted to procure only part and not the whole of the capacity of the generating units.

vii. The provisions of the PPA do not contain any mandate on Respondent No. 3 to schedule a specific quantum of electricity, though it provides for payment of fixed charges for any unscheduled available capacity within the contracted capacity. On the other hand, Clause 7.1.1 of the PPA specifically provides that the Appellant shall be responsible to operate and maintain the generating station in accordance with the legal requirements and in particular, the Grid Code.

viii. As per IEGC 2016, in order to claim compensation because of lower schedule, provision under Clause 6.3 B (4) provides that “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".

ix. In view of above in the absence of any statutory requirement or PPA conditions mandating the Respondent No. 3 to schedule minimum quantum of power from the generating unit of the Appellant, the Respondent No. 3 cannot be compelled to schedule at near constant load or the quantum of power to reach the Technical Minimum of 140 MW for the generating unit of the Appellant to operate.

x. The Appellant must have made necessary arrangements for sale of balance power (other than the contracted capacity of 70 % with the Respondent No 3) so as to avoid any such situations where the unit has to operate below technical minimum causing difficulties in the operation of the Unit and causing financial distress to the Appellant.

xi. We do not find any error on the related issues raised by the Appellant in the Impugned Order issued by the State Commission.

xii. Hence all the issues as above are decided against the Appellant.

f) On Question No. 9 i.e. Whether the State Commission has erred in passing the Impugned Order as the Respondent SLDC in terms of the Extant Regulations and the scheme of the Act has to act as the apex body and safeguard the interest of the generator as well as the procurer? And

Question No. 11 i.e. Whether the State Commission has failed to appreciate that mandate of Section 32 is to ensure `Optimum

Scheduling' and not `Scheduling' as being interpreted in the Impugned Order?, we observe as follows:

i. Admittedly Respondent No. 3 had contracted to purchase only 70% of the capacity of generating station of the Appellant. In the Impugned order the State Commission has referred to clauses 4.3.3, 4.3.4, 4.3.5 and 7.1.1 of the PPA entered into between the Appellant and Respondent No. 3 and has concluded that on combined reading of the provisions of the PPA, there is no obligation on the part of Respondent No. 3 to maintain the technical requirements as claimed by the Appellant.

ii. As per Section 32 of the Electricity Act 2003, SLDC have been given the responsibility for optimum scheduling and dispatch of electricity within the State, in accordance with the contracts entered into with the licensees and the generating companies operating in that State.

iii. In the Impugned Order, the submissions of SLDC have been recorded as under normal conditions scheduling instructions to generators are issued considering requisition received from buyers/ beneficiaries. While SLDC cannot increase the schedule of a generator unless there is a requisition from Buyer/Beneficiaries, it can curtail the schedule of the generator in order to have safe and secure operation of grid in case of transmission constraints. The SLDC through affidavit dated 10.12.2015 to the State Commission stated as under;

"The contention of the petitioner that the SLDC has marginalized its activity to the functions of a Post Office is not true and is not acceptable. As per Clause 31 (2) of the Electricity Act 2003, the State Load Despatch Centre shall not engage in the business of trading in electricity. Accordingly, in normal conditions the injection schedules

for generators is issued considering requisitions of buyers/beneficiaries. The injection schedule to the petitioner was issued considering the requisition received from MPPMCL. The SLDC has no power to increase injection schedule of a generator on its own unless there is a requisition from buyer/beneficiary. However, SLDC may curtail the injection schedule of generator and corresponding drawal schedule of buyer(s) in order to operate the system in a secure and reliable manner when there is constraint in the transmission corridor. While finalizing the schedules, SLDC always perform this activity. However, till now SLDC has not encountered with any major transmission constraint in intrastate corridor necessitating curtailment of schedules and on one or two occasions only the drawal by a Short Term Open Access customer was curtailed."

In our view, the optimum scheduling by the SLDC shall mean the scheduling of power with its control area considering the availability of the generators and corresponding requisition from the Buyers/ Beneficiaries of that Generators as per Power Purchase Agreements and considering power transmission corridors' availability to ensure safe and secure operation of the electrical grid.

iv. Hence we do not find any infirmity in the Impugned Order issued by the State Commission on this issue raised by the Appellant.

v. Hence both the above issues are also decided against the Appellant.

g) On Question No. 10 i.e. Whether the State Commission in passing the Impugned Order has erred in not appreciating that as an industry wide practice it is the SLDC/ RLDC who object to

scheduling below 'Technical Minimum' if such a requisition is made, as the same was also observed in the Explanatory Memorandum issued by the Central Commission which lead to the Draft Indian Grid Code being notified for public comments?

i. As per Appellant, the SLDC has failed to appreciate that it is an accepted industry practise that the RLDC/ SLDC often reject the scheduling from procurers or force technical minimum scheduling upon procurers/buyers if their schedule results in operating the plant below the technical minimum of the generating station and it is incumbent upon the SLDC to follow the aforementioned practice in order to optimize the scheduling and dispatch.

ii. We have already made it clear that under Section 32 of the Electricity Act 2003, it is provided that the State Load Despatch Centre shall be responsible for optimum scheduling and dispatch of electricity within the State, in accordance with the contracts entered into with the licensees and the generating companies operating in that State.

iii. The concept of Technical Minimum was not there in PPA, M.P. Electricity Grid Code as well as in MP Balancing and Settlement Code. The concept of Technical Minimum has been incorporated in the IEGC by an amendment dated 6.4.2016 notified by the Central Commission. We have already held that the Respondents are right in their contention that there is no legal mandate as at present in the State of Madhya Pradesh for the Appellant's generating unit to maintain the Technical Minimum as per the provisions of the Indian

Electricity Grid Code notified by the Central Commission or any other Regulations notified by the Central Commission or State Commission.

iv. The Appellant has extensively relied on the Explanatory Memorandum, the State of Object and Reasons issued by the Central Commission in regard to the 4th Amendment to the IEGC whereby the Technical Minimum concept has been brought into force and in particular in view of Clause 6.3B (4) of the IEGC, there is no basis on which Respondent No. 3 can be compelled to schedule power to the extent of 70% of the installed capacity of a generating unit.

v. We do not find any merit in the issue raised by the Appellant.

vi. Hence this issue is decided against the Appellant.

h) On the Question No. 13 i.e. Whether the State Commission in passing the Impugned Order has wrongly considered Article 4.3.3 of the PPA which does not cast any obligation upon the generator to sell the un-requisition capacity but only provides an enabling provision? And

Question No. 14 i.e. Whether the State Commission in passing the Impugned Order has erroneously held that the payment of 'Capacity Charges' is the only obligation of the Respondent No.3 procurer especially when the said procurer has not invoked Article 4.3 in terms of the PPA?, we decide as follows:

i. The Appellant has contended that the Article 4.3.3 of the PPA does not cast any obligation upon the Generator to sell the un-requisition capacity but only provides an enabling provision.

ii. The provisions under article 4.3.3 are reproduced once again as :

"4.3.3 : If the Procurer does not schedule the whole or part of the Available Capacity for any reason whatsoever, the Company shall be entitled to make available such Available Capacity not scheduled by the Procurer, to any other person without losing the right to receive the Capacity Charges from the Procurer for such unscheduled Available Capacity. During this period, this Company will continue to receive the Capacity Charges from the Procurer. For any such third party sale, all open access charges including losses, as may be applicable, shall not be payable by the Procurer. The Company shall maintain accounts and provide all details regarding price of sale etc. to the Procurer in respect of such sales under this Article."

iii. The State Commission in the Impugned Order under Para 15 (iv) and Para (vi) has decided as :

"(iv) The contracted capacity in the PPA is not the full installed capacity of the petitioner's power plant. In the PPA, the Available Capacity is defined as such of the Contracted Capacity declared available by the Company. Accordingly, the Company (petitioner) is entitled to sell any unscheduled Available Capacity other than the procurer (Respondent No.2) on one hand and also recover the Fixed (capacity) charges corresponding to such unscheduled Available Capacity from the procurer on the other hand. As per the PPA, no restriction is imposed on the procurer to limit the quantum of Available Capacity to be scheduled by the procurer between zero and the full contracted capacity declared available by the petitioner.

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(vi) In view of the above provisions under PPA, the "Fixed Charges" being paid/to be paid by the Respondent No.2 (procurer) against unscheduled Available Capacity in terms of clause 4.3.3 of PPA take care of all promises on the part of the Respondent No.2. Therefore, the contention of petitioner with reference to section 54 of the Contract Act, 1872 has no merit in light of provisions under the PPA (contract)."

iv. While we agree that the provision under PPA regarding sale of Un-requisition power by the Generator is an enabling provision, the State Commission has not wrongly considered this fact in its Impugned Order while considering the payment of fixed charges for the contracted capacity by the Procurers irrespective of the level of scheduling.

v. Hence both the issues are decided against the Appellant.

i) On the Question No. 17 i.e. Whether the State Commission has erred in not considering the submission of the Appellant that the MOD being prepared by the Respondent No. 3 is contrary to the Extant laws and hence cannot be the basis for the Respondent No. 3 scheduling power below the 'Technical Minimum' capacity of the Appellant's generating unit/ plant?, we observe as follows:

i. The Appellant has raised the issue that the MOD prepared by the Respondent No 3 is contrary to the extant laws and hence cannot be the basis for scheduling of power below the technical minimum capacity of Appellant's Power Station.

ii. The Appellant has made detailed submissions on the failure of Respondent No. 3 and MP Discoms of not following the merit order to

procure electricity from the generating stations. The Appellant's generating unit's variable cost is lower and ought to have been scheduled in comparison to the various other generating units such as of Madhya Pradesh Power Generating Company Limited, the State Government Undertaking.

iii. On the merit order, the contentions of the Appellant has been that only variable cost should be considered and not the landed cost which includes cess about 15 Paisa in the case of the Appellant's generating units towards electricity duty. As a result of this imposition of such electricity duty by the Government of Madhya Pradesh selectively on Private Sector Generating Companies and not on the State Sector Generating Companies, the electricity generated from the Appellant's generating units have been shown to be costlier in the merit order. While Respondent No. 3 and the Appellant had to follow the Madhya Pradesh Electricity Balancing and Settlement Code, 2015 in regard to the declaration of availability of scheduling power, dispatch etc, there is, however, no mandate in the said Code or in any other Regulations requiring the Appellant to maintain the Technical Minimum.

iv. The issue of discrimination of Private Sector Generating Stations qua the State Sector Generating Stations in the State of Madhya Pradesh by imposition of electricity duty only for the Private Sector Generating Stations and thereby affecting the merit order of such generating stations cannot be a subject matter of the proceedings before the State Commission. The levy of electricity duty is a sovereign act on the part of the Government of Madhya Pradesh. The grievance, if any, in regard to the electricity duty and its implication on the merit order

as alleged by the Appellant due to the imposition of electricity duty need a different redressal mechanism.

v. The merit order issue is not a matter considered by the State Commission in the Impugned Order. The issue whether Respondent No. 3 or the distribution licensees is violating the merit order principles cannot be a subject matter of the present appeal. The Appellant is not precluded from raising the issue in separate proceedings if it has any grievance in accordance with law.

vi. The issue is decided against the Appellant.

j) On Question No. 18 i.e. Whether the State Commission has gravely erred by accepting the contention of the Respondents that due to 'proposed regulation of power' the scheduling of the Appellant was done below the commercially accepted 140 MW which is the 'Technical Minimum' of the Appellant's Generating Unit without appreciating that 'Regulation of Power' per se as a concept has also not been defined under the extant Regulation of the MPERC or the PPA signed between the Appellant and the Respondent No.3?, our views are as follows;

i. In the Impugned Order the State Commission has made reference to the various provisions of the PPA and observed that the Procurer (Respondent No. 3) may not schedule the whole or part of the Available Capacity for any reason and in such case Appellant can make available such unscheduled Available Capacity to any third party. The Respondent No 3 shall continue to pay the capacity charges to the Appellant for such unscheduled Available Capacity

"Para 15 (iii) : There is no direct provision regarding "Technical Minimum" in the above PPA. On combined perusal of Clause 4.3.3, 4.3.4, 4.3.5 and 7.1.1, it is clear that the Procurer (Respondent No.2) may not schedule the whole or part of the Available Capacity for any reason whatsoever, and in such situation, the petitioner is entitled to make available the unscheduled Available Capacity to any party other than the procurer without losing the right to receive the capacity charges from the procurer for such unscheduled Available Capacity."

In our view, State Commission has rightly observed that the provisions of the PPA do not contain any mandate on Respondent No 3 to schedule a specific quantum of electricity and Respondent No 3 has every right to schedule the power from Appellant's power plant based on its requirement and not limiting to 140 MW of technical minimum quantity as specified by the Appellant.

ii. Further, the State Commission in its Impugned Order at Para 15 (viii) has recorded its observation on the information submitted by the parties regarding scheduling of Appellant's Power Station at around 140 MW. The Para 15 (viii) is reproduced as below:

"Para 15 (viii) : It is also mentioned in the submissions filed by the parties in this matter that the procurer (Respondent No.2) has been scheduling 140 MW power most of the time in the past. However, the petitioner had arranged sale of balance power falling short of 140 MW through collective transactions to ensure the technical minimum quantum of ex-bus capacity."

iii. In our view, the commercial and technical obligations to be met by the Appellant as well as the Respondent No.3 are explicitly clear in the PPA and they are safeguarding the interests of the Appellant and providing the Appellant to make available the unscheduled capacity of the Respondent No.3 to any party other than the procurer without losing the right to receive the capacity charges from the Respondent No.3 for such unscheduled capacity.

iii. **Hence this issue is decided against the Appellant**.

k) On Question No. 21 i.e. Whether the State Commission in passing the Impugned Order has failed to appreciate that the Appellant's Power Project has been established for the specific purpose of ensuring supply of power to the State of Madhya Pradesh and therefore higher regulatory accountability is required to be exercised by other State Players to ensure that no undue financial and technical prejudice is caused to the Appellant?, our views are as follows;

i. The Appellant's Power Plant has the Power purchase Agreement with the Respondent No 3 for supply of 70% (inclusive of 5% of net generated power at variable cost) of the installed capacity of Appellant's Power Station 2x250 MW (Phase I) for a period of 25 years at the rate to be approved by the State Commission.

ii. The Tariff for Appellant's Power Plant is being determined by the State Commission in line with the Generation Tariff Regulations

issued by the State Commission under Section 62 of the Electricity Act, 2003.

iii. For Scheduling and Despatch of the Power Station, SLDC is the nodal agency and discharging its responsibility in line with the Sec 32 of the Electricity Act, 2003.

iv. The Power purchase Agreement signed between the Appellant and Respondent No 3 specifies all the terms which may impact the Appellant finically or technically like Tariff for the sale of electricity, Contracted Capacity, Availability, Scheduling, Tariff norms as per State Commission etc.

v. Hence we do not find any merit in the issue raised by the Appellant regarding requirement of higher regulatory accountability by other State players towards the Appellant.

vi. Hence this issue is decided against the Appellant.

l) On the Question No. 23 i.e. Whether the State Commission in passing the Impugned Order has wrongly relied solely upon Article 7.1.1 by not seeing the other comprehensive provisions of the PPA such as Article 6.1.3 wherein it was the obligation of the Procurer to keep available the entire contracted capacity unless a notice from the Procurer under Article 4.3.3 was issued which has not been done till date?, our observations are as follows:

i. The Appellant has contended that while passing the Impugned Order, the State Commission has wrongly relied upon Article 7.1.1 of the PPA but not taking into consideration the other comprehensive provisions such as Article 6.1.3 and Article 4.3.3.

ii. Regarding efficient and economical operation of the Power Station, Clause 7.1.1 in PPA provides as under:

"7.1.1 The Company shall be responsible at its own expense for ensuring that the Power Station is operated and maintained in an efficient, coordinated and economical manner and in accordance with all legal requirements, including the terms of all Consents, Clearances and Permits, Prudent Utility Practices, and in particular, the Grid Code, so as to meet its obligations under this Agreement and so as not to have an adverse effect on the Grid operation."

iii. Article 6.1.3 of the PPA states as :

"6.1.3 The Company agrees that the Availability entitlement of the Procurer for despatch over any settlement period is the exclusive right of the Procurer and it cannot be offered to any third party other than for conditions under Article 4.3.3."

iv. The Article 4.3.3 states as :

"4.3.3 : If the Procurer does not schedule the whole or part of the Available Capacity for any reason whatsoever, the Company shall be entitled to make available such Available Capacity not scheduled by the Procurer, to any other person without losing the right to receive the Capacity Charges from the Procurer for such unscheduled Available Capacity. During this period, this Company will continue to receive the Capacity Charges from the Procurer. For any such third party sale, all open access charges including losses, as may be applicable, shall not be payable by the Procurer. The Company shall

maintain accounts and provide all details regarding price of sale etc. to the Procurer in respect of such sales under this Article."

v. As per PPA the definition of Availability, Available Capacity and Contracted capacity is reproduced here for comprehensive understanding:

"**Availability Factor" or "Availability**" shall have the meaning ascribed thereto in ABT and shall be reckoned with reference to Installed Capacity as defined herein

"**Available Capacity**" shall mean such the contracted capacity declared available by the Company in accordance with the ABT;

"**Contracted Capacity**" shall mean the capacity equivalent to 65% of the Phase I (2x250 MW) and 37% of the Phase II (3x250MW) (subject to availability of coal for Phase II (3x250 MW) of Power Station's Installed Capacity contracted with the Procurer as terms of this Agreement.

vi. Article 6.1.3 of the PPA gives exclusive right to the Respondent No.3 on their entitlement on the availability declared by the Appellant as per ABT. This capacity cannot be offered to any third party except as provided under Article 4.3.3 which provides for third party sale.

vii. The State Commission in its Impugned Order at Para 15 (iii) has observed as:

"There is no direct provision regarding "Technical Minimum" in the above PPA. On combined perusal of Clause 4.3.3, 4.3.4, 4.3.5 and 7.1.1, it is clear that the Procurer (Respondent No.2) may not schedule the whole or part of the Available Capacity for any reason whatsoever, and in such situation, the petitioner is entitled to make available the unscheduled Available Capacity to any party other than

the procurer without losing the right to receive the capacity charges from the procurer for such unscheduled Available Capacity."

viii. Considering above, we do not find any infirmity in the above observations of the State Commission as contended by the Appellant.

ix. Hence this issue is also decided against the Appellant.

ORDER

We are of the considered opinion that there is no merit in the present Appeal and IA and the Appeal is hereby dismissed.

The Impugned Order dated 07.01.2016 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **22nd day of August, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/NON-REPORTABLE

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