

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**Appeal No. 298 of 2015**

**Dated: 31<sup>st</sup> January, 2018**

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**In the Matter of:**

EMCO Energy Limited  
(now known as GMR Warora Energy Limited)  
7<sup>th</sup> Floor, Naman Centre, A-Wing  
BKC (Bandra Kurla Complex), Bandra  
Mumbai-400051

**...Appellant**

**Versus**

1. Central Electricity Regulatory Commission  
3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok Building  
36, Janpath, New Delhi – 110 001
2. DNH Power Distribution Corporation Limited  
Vidhyut Bhavan, Opp. Secretariat Silvassa  
396230 Dadra and Nagar Haveli
3. Power Grid Corporation of India Ltd.  
B-9, Qutab Institutional Area, Katwaria Sarai  
New Delhi – 110 016
4. Gujarat Energy Transmission Corporation Ltd.  
Sardar Patel Vidyut Bhavan Race Course  
Vadodara – 390 007
5. Western Regional Load Despatch Centre  
F-3, M.I.D.C. Area, Marol  
Andheri (East), Mumbai - 400093

**... Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur  
Mr. Akshat Jain  
Mr. Vishrov Mukherjee  
Mr. Sameer Jain  
Ms. Nishtha Sikroria  
Mr. Ashok Jain

Counsel for the Respondent(s) : Mr. Anand K. Ganesan  
Mrs. Swapna Seshadri  
Ms. Rhea Luthra  
Mr. Ashwin Ramanathan  
Ms. Neha Garg  
Mr. Sanjeeb Rajpurohit for R-2

Mr. Abhis Zaid  
Mr. Ashok Ranjan for R-5

### **J U D G M E N T**

#### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The present Appeal has been filed u/s 111 of the Electricity Act, 2003 challenging the order dated 17.09.2015 (“**Impugned Order**”) passed by the Central Electricity Regulatory Commission. The Impugned Order dismissed EMCO’s (now known as GMR Warora Energy Ltd.) Petition No. 53/MP/2014 seeking recovery of Capacity Charges under the Power Purchase Agreement dated 21.03.2013 executed between EMCO Energy Limited and Electricity Department Dadra and Nagar Haveli (**DNH**). The impugned order has *inter-alia*, held that:-
  - a) Obtaining long-term open access (“**LTOA**”) was GMR’s obligation.
  - b) LTOA was not granted on account of transmission system constraints.
  - c) GMR is not entitled to capacity charges for the period from November, 2013 to February, 2014 since it failed to obtain LTOA.

2. The Appellant is a generating company having composite scheme for generation and sale of electricity to Maharashtra, Tamil Nadu and Dadra and Nagar Haveli (**DNH**). The Appellant has developed a coal based thermal power plant having installed capacity of 600 MW in the Warora Taluka, District Chandrapur in the State of Maharashtra (the “**Project**”). The Project comprises of two units of 300 MW each. Unit 1 of the project was commissioned on 19.03.2013 and Unit 2 was commissioned on 01.09.2013.
3. The Respondent No. 1, Central Commission is a statutory authority constituted under the Electricity Regulatory Commission Act, 1998 with specific powers vested under Section 79 of the Electricity Act, 2003 (“**Electricity Act**”)
4. The Respondent No. 2, DNH Power Distribution Corporation Limited (formerly known as Electricity Department of Union Territory of Dadra and Nagar Haveli at the time of signing of the DNH PPA), is a distribution licensee operating in the Union Territory of Dadra and Nagar Haveli (**DNH**).
5. The Respondent No. 3, Power Grid Corporation of India Ltd. (**PGCIL**) is a transmission licensee under Section 2 (73) of the Electricity Act, 2003. PGCIL being the Central Transmission Utility (“**CTU**”) is engaged in bulk power transmission and is responsible for ensuring planning, coordination, supervision and control over inter-State transmission system.
6. The Respondent No. 4, Gujarat Energy Transmission Corporation Ltd. (**GETCO**) is a company incorporated under the provisions of the

Companies Act, 1956 and looks after the operation of transmission system in the State of Gujarat.

7. The Respondent No. 5, Western Regional Load Despatch Centre (**WRLDC**) is a statutory body set up under Section 27 of the Electricity Act and performs the functions specified in Section 28 of the Electricity Act, 2003.

8. **Brief background and facts of the case leading to this Appeal by the Appellant are stated below:**

8.1 The Appellant was granted Long Term Open Access (“**LTOA**”) on 22.10.2007, for a total capacity of 520 MW for supply of power to the following States:

- (a) Madhya Pradesh Power Transmission Company Limited (**MPPTCL**): 200 MW.
- (b) Maharashtra State Electricity Distribution Corporation Limited (**MSEDCL**): 200 MW.
- (c) Gujarat Urja Vikas Nigam Limited (**GUVNL**): 100 MW.
- (d) Western Region Constituents: 20 MW.

8.2 The Respondent No.2, intending to procure power through competitive bidding under Section 63 of the Electricity Act initiated a competitive bidding process on 15.03.2012, through issuance of a RFP document for procurement of power on Long Term Basis under Case-I bidding procedure for meeting its base load power requirement.

8.3 The Respondent No. 2 issued an amendment of the RFP (“Amended RFP”) on 23.05.2012, whereby, among other provisions, the terms in relation to Schedule Delivery Date (“**SDD**”) were modified. In terms of the Amended RFP, the proposed Delivery Point was the Ambheti Sub-Station of PGCIL.

- 8.4 The Appellant emerged as successful bidder, for supplying Aggregated Contracted Capacity of 200 MW to the Respondent No. 2 with a levelled tariff of Rs. 4.618 per unit. On 14.08.2012, the Respondent No. 2 issued the Letter of Intent for procurement of 200 MW of power.
- 8.5 On 01.09.2012, the Appellant wrote to Respondent No. 3 requesting for a change in the LTOA beneficiaries on account of the fact that the Appellant had won the bid for supply of power to the Respondent No. 2. In terms of the said letter, PGCIL was requested to change the beneficiaries as under:

<b>Sl. No.</b>	<b>Target Beneficiary (Region)</b>	<b>LTA quantum (as per BPTA)</b>	<b>Modification requested</b>
1.	MPPTCL (WR)	200MW	100MW
2.	MSEDCL (WR)	200MW	200MW
3.	GUVNL (WR)	100 MW	<b>DNH (WR) 200MW</b>
4.	WR Constituents	20MW	20MW

- 8.6 On 26.09.2012, the Respondent No. 2 filed Petition No. 87/2012 before the Joint Electricity Regulatory Commission (“**JERC**”) for approval of the DNH PPA and adoption of tariff. On 19.02.2013, the JERC, granted approval for the DNH PPA.
- 8.7 On 20.06.2013, the Appellant sought Open Access concurrence for scheduling of 150MW as per the terms of the DNH PPA from the Respondent No. 3. However, the Respondent No. 3 denied consent for scheduling power more than 100 MW due to overloading at the Ambheti sub-station which was the Delivery Point. The reason for not granting consent for 150MW was the following message received from PGCIL:

***“At present 400KV 3 ICTs are loaded nearly 256MW and load current is nearly 435Amp at HV side. Please regulate the load immediately to avoid overloading of ICTs.”***

- 8.8 On 05.12.2013, the Appellant wrote to the Respondent No. 2 with regard to the curtailment of capacity to 100 MW for the month of November, 2013 and 90 MW for the month of December, 2013. In the said letter, the Appellant claimed that it is entitled to Capacity Charges as per Clause 4.2.2 of Schedule 4 of the DNH PPA for the unscheduled power. The Appellant also raised invoice accordingly for the month of November 2013 for the unscheduled power.
- 8.9 On 16.12.2013, the Respondent No. 2 submitted notice disputing the invoice raised by the Appellant for the month of November, 2013. The Respondent No. 2 contended that it is not liable to pay Capacity Charges as per Clause 4.2.2 of Schedule 4 of the DNH PPA on the following grounds:
- (a) No monthly capacity charges are payable for the settlement period during which RLDC has not allowed operation of the Power Station due to Seller’s failure to operate as per the Grid Code.
  - (b) Obtaining LTOA till the Delivery Point is the obligation of the Appellant.
- 8.10 On 10.03.2014, aggrieved by the actions of Respondent No. 2, the Appellant filed Petition No. 53/MP/2014 before the Central Commission. On 17.09.2015, Central Commission passed the Impugned Order *inter alia* directing that after denial of long term access, the Appellant supplied power by availing short-term open access which was granted subject to availability of transmission margin. Since the Appellant could not meet the requirement of availing open access for the transmission of aggregated contracted capacity of power in terms of Article 4.2.1(d) of

the DNH PPA, the Appellant has to bear the consequences of the same in terms of the PPA.

9. Aggrieved by the Order dated 17.09.2015, the Appellant filed this Appeal being Appeal No. 298 of 2015 and prayed to allow the Appeal and set aside the Order dated 17.09.2015, passed by the Central Commission.
10. **The Appellant through the present Appeal has challenged the impugned order dated 17.09.2015 of the Central Commission mainly to the extent of the following:**

- a) Whether Central Commission failed to consider that non-grant of LTOA was solely on account of Respondent No. 2 not being able to arrange adequate evacuation facilities at the Delivery Point?
- b) Whether Central Commission failed to consider that the refusal of PGCIL to grant LTOA to GMR is solely on the ground of insufficient capacity beyond the Delivery Point due to overloading on the GETCO network being used by Respondent No. 2 for evacuation of power?
- c) Whether the Central Commission failed to appreciate that there was a reciprocal obligation on Respondent No. 2 to ensure adequate capacity for evacuation of power which Respondent No. 2 has failed to ensure?
- d) Whether Central Commission failed to appreciate that the Delivery Point was designated by Respondent No. 2, being well aware of the system constraints?
- e) Whether Central Commission failed to consider that the Appellant is not responsible for transmission constraints faced by Respondent No. 2 or overloading of the GETCO transmission network which resulted in the non-grant of LTOA by PGCIL?

11. **The following are the gist of submissions made by Mr. Amit Kapur, Ld. Counsel, appearing for the Appellant:**

#### 11.1 **Contractual obligations under the DNH PPA**

- 11.1.1 The Appellant was selected as the successful bidder by DNH pursuant to the competitive bidding process conducted by DNH. In this regard, the following is noteworthy:-

- (a) DNH issued the Request for Proposal (“**RFP**”) on 15.03.2012, for procuring the Contracted Capacity under Case – I bidding, wherein:-
- (i) Delivery Point shall mean the STU Interface(s) within the region of the Procurer.
  - (ii) As per Article 1.3.1, Clause 10, Seller shall be responsible for arranging transmission access from the Injection Point to the Delivery Point and the Procurer shall be wholly responsible to arrange transmission access from the station switchyard of the generating source in case of generating source being in the same state as that of the Procurer.
  - (iii) As per Article 1.3.2: Evacuation of Power - The responsibility for evacuation of power beyond the Delivery Point will be of the Procurer, who shall ensure the interconnectivity of STU Interface(s) for evacuation of power.

11.1.2 On 23.05.2012, DNH issued an Amended RFP whereby, among other provisions, the terms in relation to Schedule Delivery Date (“**SDD**”) were modified. In terms of the Amended RFP, the proposed Delivery Point was the Ambheti Sub-Station of PGCIL. The operative portion of the Amended RFP Is reproduced below:

“1.3.1 Scope

... ..

- (1) Contract period (in years) – Seven (07) years and three (3) months.
- (2) Requisitioned Capacity (MW) – Total of 100MW from 1st October, 2012; additional 50 MW (i.e. total 150MW) from 1st January, 2013, and additional 50MW (i.e. total 200MW) from 1st April, 2013.

During the evaluation of bids and based on the competitiveness of the bid process, the Procurer retains the right to increase or decrease the Requisitioned Capacity by a quantum of twenty percent (20%) of the quantum indicated herein.



... ..

- (6) Scheduled Delivery Date – 1st October, 2012 for 100MW; 1st January, 2013 for additional 50MW; 1st April, 2013 for additional 50MW

Scheduled Delivery Date for additional power (50MW + 50MW) shall be revised as per the scheduled commissioning of Ambheti 400/220 kV ICT-3

However, the Scheduled Delivery Date can be preponed on mutual consent of the Seller and the Procurer, subject to availability of transmission capacity, as per the provisions of the PPA”

- (7) Pursuant to the bidding process, the Appellant was selected as the successful bidder and on 21.03.2013, the DNH PPA was executed between the Appellant and DNH for supply of contracted capacity to DNH.

11.1.3 In terms of the DNH PPA, following were the illustrations:-

- (a) Delivery Point shall mean STU interface as specified in Schedule 1 of this agreement.
- (b) Schedule 1: Delivery Point is AMBHETI 400/220 KV substation of PGCIL, Vapi, Gujarat
- (c) Article 4.2: Seller’s Obligations provided as follows:-

“4.2.1 Subject to the terms and conditions of this agreement, the Seller undertakes to be responsible, at the Sellers own cost and risk, for:

- a) obtaining all Consents, Clearances & Permits other than those obtained under Article 3.1.1 and maintaining all Consents, Clearances and Permits in full force and effect during the term of this Agreement;

...

- b) obtaining all the necessary permissions for long term open access or short term open access for the intrastate transmission system for evacuation of power from the Power Station bus bar to the Injection Point (except in the case of dedicated

transmission lines) and execute all necessary agreements for such transmission access and provide a copy of the same to the Procurer;

c) obtaining open access for transmission of Aggregated Contracted Capacity of power from the Injection point to the Delivery Point ...”

(d) Article 4.3: Procurer’s Obligations provided as follows:-

4.3.1 Subject to the terms and Conditions of this Agreement, the Procurer shall:

a) Ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be ...”

11.1.4 The supply of power under the DNH PPA commenced from 01.04.2013. As per Clause 4.1.1 of the DNH PPA, the Aggregate Contracted Capacity was 100 MW from 01.04.2013, increasing by 50 MW (i.e. 150MW Total) from 01.07.2013 and by an additional 50 MW (i.e. 200MW) from 01.10.2013 onwards. As per the terms of the Amended RFP, the Delivery Point was stated to be Ambheti substation and the load increase was subject to the commissioning of the ICT-3, which was commissioned in March, 2013 prior to the commencement of supply of power as per the DNH PPA.

11.1.5 The Appellant was, therefore, responsible for transmission of power from the power station to the Delivery Point i.e. the Ambheti 400/220 KV substation of PGCIL (Article 4.2.1 ( c) and (d) of the PPA). On the other hand, DNH was responsible for ensuring sufficient facilities at the Delivery Point for evacuation of power (Article 4.3.1 of the PPA)

**11.2 Non-grant of LTOA was on account of DNH owing to unavailability of adequate transmission capacity and evacuation facilities beyond the Delivery Point.**

11.2.1 The non-grant of LTOA was solely on account of failure of DNH to fulfil its obligation of ensuring sufficient transmission capacity at and beyond the Delivery Point for evacuation of power. The Ambheti Sub-station was identified by DNH after taking into consideration the existing transmission facilities and all augmentation activities were to be undertaken by DNH to ease the overloading of the GETCO network thereby resolving the long pending issue of transmission constraints.

11.2.2 The Central Commission failed to appreciate that:-

- (a) Scheduled delivery dates were agreed upon and the DNH PPA executed solely on the premise that adequate evacuation facilities would be available once ICT-3 is installed and commissioned at Ambheti Sub-station.
- (b) Inadequacy in the system for evacuation of power was within the knowledge of DNH and that DNH was to ensure the implementation of necessary transmission facilities to resolve the issue of overloading and that the Appellant was coerced into accepting Ambheti Sub-station as the Delivery Point.

11.2.3 The facts that open access was not granted due to transmission constraints beyond the Delivery Point are evident from:-

- (a) GETCO's letter dated 12.04.2013 written to PGCIL wherein GETCO stated that:-

*"It was informed to us that GETCO did not respond timely. Now you can see from above that we responded within a time, so you have to consider the same.*

*As we got little relief, to the tune of 60 MW on 66 KV system, after commissioning of 400/220 KV, 315 MVA (3rd) ICT at Vapi (PG) substation along with 400 KV D/C Navsari (PG) – Vapi (PG) line, but 66 KV network is fully loaded and our customers are denied*

power. In the existing conditions, UT of DD & DNH is drawing 200 MW power from 66 KV GETCO grid.

In view of above, we don't recommend this 100 MW/200 MW LTA to DNH before transfer of entire load from GETCO network and also already granted 40.5 MW MTOA to DNH shall be withdrawn with immediate effect.”

- (b) Minutes of meeting of the 18th Meeting of the Western Region Constituents of the WRPC on 29.08.2013:-

“POWER GRID informed that GMR EMCO Energy Limited vide its letter dated 12th March, 2013 has informed that they have signed PPA with Dadra & Nagar Haveli (DNH) for 200 MW. In view of this, they have requested to change the LTA beneficiaries as below:

Sl. No.	Target beneficiary (Region)	LTA Quantum (As per BPTA)	Modification requested
1	MPPTCL (WR)	200 MW	100 MW
2	MSEDCL (WR)	200 MW	200 MW
3	GUVNL (WR)	100 MW	<b>DNH (WR) – 200 MW</b>
4	WR Constituents	20 MW	20 MW

Earlier, GMR EMCO had indicated target beneficiaries based on which the requirement of transmission system was examined and agreed in the 9th meeting of WR constituents dated 30.07.2007. The requirement of transmission system with earlier indicated beneficiaries as well as with modified beneficiaries as required by GMR EMCO, has been examined and it is observed that the existing transmission system is adequate to transfer power for earlier beneficiaries as well as modified beneficiaries, except DNH. Presently, UT DNH has been drawing its share through interconnections with: (a) ISTS system at 220 KV Vapi sub-station and (b) GETCO system at 220 KV and 66 KV level.

Recently due to overloading of GETCO network, the interconnections between UT DNH and GETCO are being opened in a phased manner. This has limited the transfer capacity to DNH. However, a 400 / 220 KV substation at Kala in UT of DNH is under implementation by Power Grid. It is proposed to modify the beneficiaries of GMR EMCO as per their request after availability of 400 / 220 KV Kala substation.

After discussion, it was agreed to grant LTA to GMR EMCO for 520MW:- MPPTCL-100MW, MSCDCL-200MW, WR-20MW with existing system and DNH-200MW with the availability of 400/220Kv Kala Substation being implemented by POWER GRID.

**Till then, GMR EMCO may apply short-term open access for power supply to DNH.”**

- 11.2.4 The Impugned Order passed by Central Commission records the above two documents evidencing the existence of transmission constraint in the system. Further, Central Commission also notes the submissions of PGCIL wherein it was stated that:-

*“15. PGCIL in its reply affidavit dated 6.6.2014 has endorsed the averments made by the petitioner regarding the deliberations at the meeting of the Western Region constituents held on 29.8.2013. PGCIL has stated that load of the Union Territories of Daman & Diu and Dadra & Nagar Haveli was being fed from 400/220 kV, 3X315 MVA transformer at Vapi sub-station of PGCIL and 66 kV lines from Vapi and Bhilad sub-station of GETCO. It has been stated that on account of the increased load of the two Union Territories, overloading of 200/66 kV transformers at Vapi and Bhilad sub-stations was being reported by GETCO for the previous 2 years. PGCIL has stated that in order to meet the increasing load of DNH, it has implemented 400/220 kV, 2X315 MVA sub-station at Kala in Union Territory of DNH through LILO of one ckt of 400 kV Vapi-Navasari D/C transmission line. However, for drawl of power from Kala sub-station, DNH was to implement 220 kV D/C lines to Kharadpada and Khadoli sub-stations. These works were given to PGCIL in June, 2012 on deposit work basis with completion schedule of October,*

*2014. PGCIL has stated that 220 kV Kala-Khadoli D/C transmission line was expected to be completed by June, 2014. With the availability of the transmission line, there would be no constraints for supply of 200 MW power to DNH from ISTS.”*

From the above submission of PGCIL, it is evident that DNH was aware of the transmission constraint in the system and had accordingly placed work orders on PGCIL as early as June 2012 for implementation of 220 kV D/C lines to Kharadpada and Khadoli substations. The period in dispute in the present Appeal is from November 2013 to February 2014.

11.2.5 In the present case, DNH is using the Inter-State transmission network of PGCIL 400 KV Ambheti Substation and Intra-State transmission network of GETCO to meet its load requirement. The Appellant is scheduling the power to DNH at the delivery point i.e., 400 KV Ambheti substation (CTU – STU interface as per the PPA) and is not being permitted to supply 200 MW to DNH for the following reasons:-

- (a) Scheduling of power by Appellant required transfer of some capacity from Ambheti to the GETCO network.
- (b) GETCO opposed such transfer since its network was already overloaded on account of power being evacuated to DNH.
- (c) Due to overloading by DNH, the transmission facilities on the Procurer side i.e. the evacuation facilities are constrained and consequently despite the commissioning of ICT-3 there is no capacity at delivery point to accommodate 200 MW supply from the Appellant.
- (d) The constraint is solely on account of DNH not fulfilling its obligation of ensuring sufficient evacuation capacity at the Delivery Point and also its failure to timely resolve the issue of overloading of the GETCO network.
- (e) The evacuation facility is fully under the control of DNH.

11.2.6 The open access transaction from the point of injection to the point of drawl is one single transaction and any constraint in any of the segments

between these two points would result in the Appellant not being granted the open access. In the present case, evidently, the Appellant's obligation was to deliver power up to the Delivery point, i.e., the Ambheti sub-station and it was DNH's obligation to off take power from such Delivery Point. Unlike other goods, electricity cannot be stored to be used at a later point in time. Therefore, if there is any constraint in the transmission system, the electricity generated will not be consumed and result in wastage.

11.2.7 The Appellant had been making applications for the scheduling of Power as per the terms of the DNH PPA. However the permission was being granted for capacity much lesser than the Contracted Capacity. This is due to transmission constraints being faced by DNH and overloading at the Delivery Point preventing DNH from evacuating the power.

11.2.8 It is evident from the foregoing that the Appellant could not be granted LTOA for supply of 200 MW to DNH even though there was sufficient capacity from the Power Station to the Delivery Point. DNH being aware of the transmission capacity beyond the Delivery Point had called for bids and entered into a PPA with the Appellant. Therefore, DNH continues to be liable to pay capacity charges for the contracted capacity which cannot be scheduled on account of such transmission constraints beyond the Delivery Point.

11.2.9 The Appellant had submitted its bid as per the bid conditions laid down under the RFP and the Amended RFP and has subsequently planned its cash flows accordingly. The Appellant cannot be wrongfully denied Capacity Charges as per Clause 4.2.2 of Schedule 4 of the DNH PPA for the fault of DNH and subsequent Non-Scheduling / curtailment of Power due to transmission constraints being faced by DNH. The same is not contemplated as per the terms of the RFP and the Amended RFP or in the

DNH PPA which is a standard PPA. As per the terms of the RFP, Amended RFP and DNH PPA, the Appellant has been making applications for short term open access and is ready to supply power at the Delivery Point.

- 11.2.10 The Interconnection Facilities as defined in the DNH PPA needs to be made available by the Procurer, DNH. It is further submitted that, as has been noted in the minutes of the 18<sup>th</sup> Meeting of the Western Region Constituents of the WRPC on 29.08.2013 that there has been overloading of transformers at the Ambheti Substation since DNH has been drawing the power through the existing available network. Thus, it is because of such a situation that WRLDC is unable to grant open access up to the contracted capacity to the Appellant.
- 11.2.11 Despite prior knowledge of the transmission system constraints, DNH identified Ambheti Sub-station as the Delivery Point and coerced the Appellant to supply power up to the Delivery Point on the premise that with the commissioning of ICT-3 the overloading at the Delivery Point will be relieved. The Scheduled Delivery Dates were also revised accordingly, to facilitate supply of power up to the Contracted Capacity in tranches.
- 11.2.12 Even though it was clarified that the solution to the constraints being faced by DNH is the development of another substation located at Kala and its associated downstream transmission network, the curtailment of power supply to the Appellant till the Kala substation is implemented is not envisaged as part of the scope of the DNH PPA or the RFP and Amended RFP. As per the DNH PPA, the obligation of the Appellant is to supply electricity to the Delivery Point located at Ambheti, which the Appellant is in a position to do, had it not been for the constraints being faced by DNH for no fault of the Appellant.



**11.3 Reliance placed by DNH on its Affidavit dated 27.07.2016.**

11.3.1 DNH has, inter alia, submitted the following in its Affidavit dated 27.07.2016 to infer that there was sufficient capacity in the DNH system to draw the power generated by the Appellant for DNH:-

- (a) The obligation to obtain open access up to the Delivery Point of the Ambheti substation of PGCIL was that of the Appellant as provided in the PPA. The obligation of DNH was to obtain open access beyond the delivery point.
- (b) The Ambheti substation caters and connects to DNH, Union Territory of Daman and Diu and also to Gujarat. It is not the case that the entire evacuation from the Ambheti substation of PGCIL is by DNH resulting in transmission constraints.
- (c) From the 400 KV Ambheti substation at Vapi, DNH is connected by a 220 KV D/C Ambheti/Vapi-Kharadpada line and 220 KV D/C Ambheti/Vapi-Khadoli line. These lines were the same prior to and after the open access was granted to the Appellant.
- (d) During the period in issue during 2013-14, the total transmission capacity of the 220 KV D/C Ambheti/Vapi-Kharadpada line and 220 KV D/C Ambheti/Vapi-Khadoli lines was 1000 MW (1200 MVA) and the actual utilization only between 650 MW to 700 MW. The Appellant's entire 200 MW could be accommodated on the said lines.
- (e) Substantial capacity was available on the transmission lines beyond the Delivery Point to DNH after catering to even the peak capacity. There was no transmission constraint of DNH beyond the Delivery Point and the transmission constraints were only at and up to the Delivery Point.

11.3.2 The averments of DNH in the Affidavit dated 27.07.2016 are false and misleading and ought not to be relied upon by this Hon'ble Tribunal. The data of actual flow of power and claimed capacity of the Ambheti-Kharadpada and Ambheti-Khadoli transmission lines as stated in the Affidavit filed by DNH do not appear to be prudent in context of the transmission planning criterion brought out by CEA and the prevalent industry practice. Considering the N-1 redundancy, the transfer capacity

of 1000 MW (1200 MVA) for 2 nos., 220 KV, D/C transmission lines as indicated by DNH appears to be on higher side.

11.3.3 DNH did not have the capacity to transfer the additional 200 MW through LTOA requested by the Appellant beyond the Delivery Point of Ambheti (Vapi) S/S based on DNH's own data and in contravention of the statutory and mandatory requirement to provide margins for contingencies.

11.4 **Central Commission erred in holding that DNH is not responsible for refusal of LTOA**

11.4.1 The Appellant had filed Petition No. 53/MP/2014 before Central Commission to claim Capacity Charges that the Appellant is entitled to in terms of the DNH PPA. The findings of Central Commission in the Impugned Order are erroneous since the Central Commission has while passing the Impugned Order noted the following:-

- (a) The Appellant is responsible for obtaining LTOA for supply of power from the Power Station to the Delivery Point.
- (b) As per the Amended RFP and Schedule I of the DNH PPA, the Delivery Point is the Ambheti 400/220 kV sub-station. The increase in Aggregate Contracted Capacity from 100 MW to 200 MW is subject to commissioning of ICT 3 at Ambheti substation which was charged on 28.02.2013 and was ready for commercial operation as on 01.03.2013 much prior to the Scheduled Delivery Date for commencement of supply, i.e., 01.04.2013.
- (c) The responsibility of ensuring availability of interconnection facility and evacuation of power from the Delivery Point is the obligation of DNH. [Article 4.3.1 of the DNH PPA]
- (d) In terms of the Minutes of Meeting dated 29.08.2013 the existing transmission system was insufficient to accommodate supply of the Contracted Capacity owing to due to overloading of the GETCO network and phased opening of the interconnections between DNH and Respondent No. 4, as such the Appellant could not be granted LTOA for supply of 200 MW to DNH.

(e) The Appellant was not granted LTOA by PGCIL due to constraints in the system and DNH has no way contributed to it.

11.4.2 The Central Commission has ignored the admitted factual position that with the amendment of the RFP, DNH identified the Delivery Point as Ambheti Sub-station on the premise that with the commissioning of ICT-3 there would be adequate capacity available at Ambheti Sub-station for transmission of the Contracted Capacity of 200 MW as per the DNH PPA. Ambheti Sub-station having been identified by DNH as the Delivery Point, the non-availability of adequate capacity resulting in the non-grant of LTOA in favour of the Appellant cannot be fastened upon the Appellant. Moreover, since the failure to ensure adequate evacuation facilities was that of DNH, DNH is liable to pay capacity charges on the entire contracted capacity.

11.4.3 Even though Central Commission has noted that there were system constraints beyond the Delivery Point, Central Commission has gone on to hold that the Appellant is not entitled to capacity charges. This finding is erroneous and contrary to the Connectivity Regulations read with the Detailed Procedure, terms of the DNH PPA, RFP and the facts that were placed on record.

11.5 **Not possible for the Appellant to fulfil its obligation to obtain LTOA due to non-fulfilment of reciprocal obligation on DNH's part to ensure adequate evacuation facilities**

11.5.1 In terms of the provisions of the Indian Contract Act, 1872, regarding reciprocal promises, the following is evident:-

- (a) Section 51 identifies reciprocal promises as promises that have to be simultaneously performed.
- (b) Section 53 stipulates that when one party to the contract prevents the other party from performing its promise, the party so prevented

is entitled to compensation for loss sustained due to the non-performance.

- (c) Section 54 provides that where one promise cannot be performed without the other and one party fails to perform its obligation, it must compensate the other party for the losses incurred as a result of the non-performance.

11.5.2 In the present case, the obligations of the Appellant under Article 3.1.1 (b) and (c) of the DNH PPA is to obtain LTOA for supply of power to the Delivery Point which is contingent upon the obligation of DNH to ensure adequate evacuation facilities beyond the Delivery Point. However, in terms of Section 54 of the Contract Act, 1872, the Appellant cannot perform its obligation since DNH has not performed its obligation in terms of the DNH PPA. In this regard, the following judgments are noteworthy:-

- (a) ***Saradamani Kandappan v. S. Rajalakshmi***: (2011) 12 SCC 18:-

*“54. The order of performance of reciprocal promises does not depend upon the order in which the terms of the agreement are reduced into writing. The order of performance should be expressly stated or provided, that is, the agreement should say that only after performance of obligations of the vendors under Clause 3, the purchaser will have to perform her obligations under Clause 4. As there is no such express fixation of the order in which the reciprocal promises are to be performed, the appellant's contention is liable to be rejected.”*

- (b) This Hon'ble Tribunal's judgment dated 11.07.2014 in ***Raghu Rama Renewable Energy Ltd. v. Tamil Nadu Generation and Distribution Corporation Limited***: Appeal No. 181 of 2013:-

*“37. Hon'ble Supreme Court in (2001) 5 SCC 629 – Sikkim Subba Associates vs. State of Sikkim held as under:*

*“The agreement between parties in this case is such that its fulfilment depends upon the mutual performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that one party who*

*fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming even damages for non-performance by the other party. He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future good conduct and adherence to the promises of the defaulter, the so-called waiver cannot be considered to be forever and complete in itself so as to deprive the State, in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of the appellants continued till even the passing of the Award in this case. So far as the defaults and consequent entitlement or right of the State to have had the lotteries either foreclosed or stopped further, the State in order to safeguard its own stakes and reputation has continued the operation of lotteries even undergoing the miseries arising out of the persistent defaults of the appellants. The same cannot be availed of by the appellants or used as a ground by the Arbitrator to claim any immunity permanently for being pardoned, condoned and waived of their subsequent recurring and persistent defaults so as to deny or denude forever the power of the State as other party to the contract to put an end to the agreement and thereby relieve themselves of the misfortunes they were made to suffer due to such defaults. Once the appellants failed to deposit the prize money in advance within the stipulated time, the time being essence since the prizes announced after the draw have to be paid from out of only the prize money deposited, the State was well within its rights to repudiate not only due to continuing wrongs or defaults but taking into account the past conduct and violations also despite the fact that those draws have been completed by declaration or disbursement of prize amounts by the State from out of its own funds. The conclusion to the contrary that the State has committed breach of the contract is nothing but sheer perversity and contradiction in terms.”...*

*40. In the present case also TANGEDCO did not comply with its obligation to make payment even after receiving contracted power supplies for four months from June 2011 to September 2011 and thereafter also delaying payment by 4 to 9 months despite Appellant's repeated requests, which had direct bearing on the performance of Appellant and the Appellant could not meet its obligation for supplying full contracted quantum of power in the subsequent months from November 2011 onwards. TANGEDCO which had failed to perform into own reciprocal promise cannot*

*claim for performance of the Appellant and claim damages for non-performance of the Appellant caused due to non receipt of payment.”*

11.5.3 In view of the above, it is submitted that DNH failed to perform its reciprocal obligations under the DNH PPA and the Appellant cannot be made to suffer on account of DNH’s failure in fulfilling its reciprocal obligations.

**12. Per Contra, the following are the gist of submissions made by Mr. Anand K. Ganesan, Ld. Counsel, appearing for Respondent No. 2, DNH Power Distribution Corporation Ltd.:**

12.1 The PPA was entered into pursuant to a competitive bidding process under Section 63 of the Electricity Act. The PPA was in terms of the documents circulated in the bidding process. The rights and obligations of the parties were made known prior to the bid.

12.2 It is relevant to mention that at no point prior to 2013, the Appellant had applied for or had obtained open access for supply to DNH. In this regard, the Long Term Open Access of the Appellant in the year 2007 was as under:

<p><i>(b) Name of drawee utility</i></p> <ul style="list-style-type: none"> <li>• <i>Point(s) of drawl of power (Nearest EHV Substations and Ownership of EHV substations)</i></li> <li>• <i>Name(s) of concerned SLDC</i></li> </ul>	<p><i>MPPTCL -200 MW, MSEDCL-200 MW, GUVNL-100 MW, WR constituents-20 MW</i></p> <ul style="list-style-type: none"> <li>• <i>Uniformly distributed to various load centers of respective utilities viz. Mah, MP and Guj.</i></li> <li>• <i>M.P.S.L.D.C, Gujarat S.L.D.C &amp; Maharashtra SLDC</i></li> </ul>
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12.3 In the bidding documents, it was made known to all the prospective bidders that the Delivery Point shall be the STU interface within the

region of the Respondent No. 2 – Procurer. Delivery Point was provided as under:

***“Delivery Point” shall mean the STU Interface(s) within the region of the Procurer, where power is delivered to the Procurer after it is injected by the Seller at the Interconnection Point;***

12.4 It was also clearly provided in the RFP that the responsibility for transmission was that of the Seller – bidder, as under:

<b><i>Sr. No.</i></b>	<b><i>Scope</i></b>	<b><i>Details</i></b>
<b><i>10.</i></b>	<b><i>Arranging Transmission Access</i></b>	<p><b><i>Seller shall be responsible for arranging transmission access from the Injection Point to the Delivery Point. Such arrangement shall be as per the regulations specified by the Appropriate Commission, as amended from time to time.</i></b></p> <p><b><i>The Seller shall initiate action for development of the requisite transmission system from Injection Point to the Delivery Point by co-ordinating with the CTU and concerned STU in accordance with the relevant regulations of the Appropriate Commission.</i></b></p> <p><b><i>The Seller shall be wholly responsible to arrange transmission access from the Interconnection Point to the Injection Point.</i></b></p> <p><b><i>The Procurer shall be wholly responsible to arrange transmission access from the station switchyard of the generation source in case of the generating source being in the same state as that of the Procurer.</i></b></p>

12.5 The bidding documents also clearly provide that the obligation to verify the grid conditions, open access etc. any factor that would affect the bid and obligation of the Seller was that of the bidders and no claim can be made thereafter. Article 2.6.1, 2.6.2 and 2.6.3 of the RFP provides as under:

## **2.6 Bidder to inform itself fully**

**2.6.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the require information, inputs, conditions and circumstances and factors that may have any effect on its Bid. Once the Bidder has submitted the Bid, the Bidder shall be deemed to have examined the laws and regulations in force in India, the grid conditions, and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly the Bidder acknowledges that, on being selected as Successful Bidder, it shall not be relieved from any of its obligations under the RFP Documents nor shall be entitled to any extension of time for commencement of supply or financial compensation for any reason whatsoever.**

**2.6.2 The technical requirements of integrated grid operation are specified in the Indian Electricity Grid Code (IEGC) 2010. The Bidders should particularly acquaint themselves with the requirements of connection conditions, operating code for regional grids, scheduling and dispatch code etc. The Bidders are also advised to fully familiarize themselves with the real time grid conditions in India. Information regarding grid parameters such as voltage and frequency is readily available on the websites or Regional Load Despatch Centers. The Protection trip setting of the generation or under frequency df/dt and defence plan are coordinated at the RPC forum in consultation with all stakeholders duly taking into account the design parameters of the various machines.**

**In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Forest (Conservation) Act 1980, the Land Acquisition act 1984, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India, as amended from time to time. The Procurer/ Authorized Representative shall not entertain any request from clarifications from the Bidders regarding the same. Non-awareness of these laws of such information shall not be a reason for the Bidder to request for extension in Bid Deadline. The Bidder undertakes and agrees that, before submission of its Bid; all such factors as**



*generally stated above, have been fully investigated and considered while submitting the Bid.*

***2.6.3 The Bidder shall familiarize itself with the procedures and time frames require to obtain all Consents, Clearances and Permits required for the supply of power to Procurer. The Procurer shall have no liability to obtain any of the Consents, Clearances and Permits required for setting up of the generation facilities and/ or supply of Power.***

12.6 The Appellant accepted all the terms of the bidding process and submitted its bid. It was for the Appellant to ensure the delivery of power till the Delivery Point.

12.7 The PPA clearly provides for the Delivery Point as the 400/220 KV Ambheti sub-station of Power Grid at Vapi, Gujarat, the obligation of obtaining open access till the Delivery Point to be of the Appellant and obligation of the Respondent No. 2 to be only to ensure transmission facilities beyond the Delivery Point for taking the power from the Delivery Point. In this regard, the following are relevant

- (a) Article 1.1 defines Delivery Point as under:  
*“Delivery Point” shall mean the STU Interface as specified in Schedule I of this Agreement.*
- (b) Schedule I of the PPA provides as under:

***SCHEDULE 1: NAME AND DETAIL OF THE PROCURER***

<i>Sl No</i>	<i>Name of the procurer</i>	<i>Address of the registered office of procurer</i>	<i>Law under which incorporated</i>	<i>Contracted Capacity (MW)</i>	<i>Delivery Point</i>
<i>1</i>	<i>Electricity Department of Silvassa</i>	<i>Office Executive Engineer VidyutBhawan, Opp</i>	<i>---NA---</i>	<i>200</i>	<i>AMBHETI 400/200 KV SUBSTATION OF PGCIL,</i>

		<i>Secretariat 66 KV Road Silvassa 396210 U.T. of Dadra &amp; Nagar Haveli</i>			<i>VAPI, GUJARAT</i>
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- (c) The STU Interface is the obligation of the Respondent No. 2, which is defined as under:

*“STU Interface” shall mean the point at which the CTU network is connected to the intrastate transmission system of the Procurer’s State(s), and at which the Procurer agree to receive power to the Requisitioned Capacity;*

*For generation source in the same state as that of the Procurer, the STU Interface shall be the bus-bar of the generating station from which power is contracted to be supplied, at an appropriate voltage level as specified by the STU.*

- (d) The obligation to enter into the Transmission Service Agreement is that of the Appellant and not the Respondent No. 2. Transmission Service Agreement is defined as under:

*“Transmission Service Agreement” shall mean the agreements (s) signed by the Seller and the relevant transmission licensee for transmission of power up to the Aggregate Contracted Capacity from the Injection Point to the Delivery Point.*

- (e) Article 3.1.1(c) of the PPA provides for the open access to be obtained by the Appellant up to the Delivery Point and execution of the Transmission Services Agreement as a condition subsequent to be fulfilled by the Seller (**Appellant**). The said Article reads as under:

**3. ARTICLE 3: CONDITIONS SUBSEQUENT TO BE SATISFIED BY SELLER PROCURER.**

**3.1 Satisfaction of conditions subsequent by the seller**

3.1.1 *The seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and rest within twelve (12) months from the Effective Date, unless such completion is affected by any Force Majeure event or due to Procurers' failure to comply with their obligations under Article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the Procurer:*

.....  
c) ***The Seller shall have obtained the necessary permission for long term open access or short term open access (for the initial period) as deemed necessary for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission license for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer;***

(f) Article 3.2 provides for the Obligations of the Procurer (**Respondent No. 2**). This open access is not the obligation of the Respondent No. 2.

(g) Article 4.2 provides for the Obligation of the Seller (**Appellant**). Sub-clause (c) and (d) provides as under:

*4.2 Seller's obligations*

*Subject to the terms and condition of this Agreement, the seller undertakes to be responsible, at sellers own cost and risk, for:*

.....  
d) ***Obtaining open access for transmission of Aggregated Contracted Capacity of power from the Injection Point to the Delivery Point;***

(h) Contradistinction to the above, the only obligation of the Procurer under Article 4.3.1(a) is to ensure availability of Interconnection Facilities and evacuation of power from the Delivery Point, as under:

*4.3 Procurer's Obligations*

*4.3.1 Subject to the terms and conditions of this Agreement, the Procurer shall:*

*a) ensure the availability of **Interconnection Facilities and evacuation of power from the Delivery Point** before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be.*

- (i) As per Article 4.3.1, “*Interconnection Facilities*” is the responsibility of the Procurer, and not “*Interconnection Point*”. The term “*Interconnection Facilities*” is defined in the PPA under Article 1.1 as the “Procurers’ side” of the delivery point, as under:

*"Interconnection Facilities shall mean the facility on the Procurers' side of the Delivery Point for receiving and metering the electricity output in accordance with this Agreement and which shall include, without limitation, all with transmission lines and association equipments, transformers, relay and switching equipment and proactive devices, safety equipment and, subject to Article 6, the Metering System required for supply of power as per the terms of this Agreement;*

- (j) Therefore, it is clear that the Respondent No. 2 cannot be held responsible for any constraint ‘at’ the delivery point i.e Ambheti Sub-Station, which is neither controlled, nor owned by the Respondent No. 2.

12.8 In terms of the above, it is abundantly clear that the obligation to obtain open access up to the Delivery Point is that of the Appellant, while the obligation of the Respondent No. 2 was to ensure transmission facilities beyond the Delivery Point. The only obligation of the Appellant is from and beyond the Delivery Point and not at the Delivery Point.

12.9 The primary contention of the Appellant is that the Respondent No. 2 was responsible for transmission constraints beyond the delivery point which in turn led to the refusal of LTOA by PGCIL. The Appellant has confused a transmission constraint ‘at’ the delivery point, with that of ‘beyond’ the delivery point.

12.10 The Appellant has also confused the issue of constraint in GETCO network, establishment of the Kala sub-station of Power Grid etc. with the present case. For the open access to the Appellant up to the Delivery Point, no part of the GETCO Network or the Kala sub-station of Power Grid is required to be used.

12.11 The Respondent No. 2 has on record the map of the various sub-stations and networks and also the line diagrams certified by Power Grid, to explain that there was no constraint beyond the delivery point whatsoever. The following are the relevant facts:

- (a) The Ambheti sub-station of Power Grid at Vapi was the identified Delivery Point under the PPA. There are two sets of 220KV lines from the Ambheti sub-station to DNH-Respondent No. 2, which are the 220 KV Vapi-Khadoli line and the 220 KV Vapi-Kharapada Line. Both these lines are pre-existing lines. These lines were in existence even when open access was denied to the Appellant by Power Grid and also when open access was granted to the Appellant. There was no additional line constructed by the Appellant from the Ambheti sub-station for augmentation of capacity. There was no constraint in the system of the Appellant.
- (b) There is no finding in any of the records, either by the Central Commission, by Power Grid, by GETCO or any other authority that there was transmission constraints in the 220 KV Vapi-Khadoli line and the 220 KV Vapi-Kharapada Line, which goes from the Ambheti sub-station to DNH-Respondent No. 2.
- (c) The Kala sub-station of Power Grid, the connectivity between the Respondent No. 2 and GETCO are at completely different locations

than the Ambheti sub-station. No part of either of the above are used in the supply of the Appellant's electricity till the delivery point (400 kV Vapi sub-station) or the onward evacuation facilities of the Respondent No. 2 from the Ambheti sub-station. These systems are completely irrelevant for deciding the present issue.

12.12 The Appellant's contention that since the Respondent No. 2 had identified Ambheti sub-station as the delivery point, it was to ensure sufficient capacity "at" the delivery point, has no merit. The PPA provides for the rights and obligations of the parties, and the obligation of the Appellant was till the Delivery Point. It was for the Appellant to verify the open access till the Delivery Point prior to the bidding and cannot make any claims against the Respondent No. 2.

12.13 The Appellant's reliance on the amended RFP is also misplaced. The amended RFP in so far as specifying that load increase was subject to commissioning of the ICT-3, only gave a timeline for increase in load. The said clause in no way can be interpreted to mean that ICT-3 was being commissioned to accommodate the Appellant's power at the Ambheti sub-station. It is stated that neither was ICT-3 commissioned at the cost of the Respondent No. 2, nor was the sufficiency of transmission capacity at the sub-station in any way controlled or ought to have been controlled by the Respondent No. 2.

12.14 Being a competitive bidding process, the Appellant was to factor in all risks and possibilities, including grid conditions, and that being the case, the Appellant cannot now seek capacity charges for a time period for which it ought to have enquired about the grid conditions. The RFP in section 2.6.1 explicitly states that bidders were to place their bids after making independent enquiries about relevant conditions including grid

conditions, which includes whether there was sufficient transmission capacity at the ISTS Ambheti sub-station at Vapi.

12.15 The Central Commission has rightly held that non-grant of LTOA by PGCIL was not in any way on account of DNH. In fact, the Respondent No. 2 has taken efforts in a bona fide manner to assist and help the Appellant in as much as shifting of load to another 400/220 kV sub-station at Kala of Power Grid. By this shifting of the existing capacity, the Respondent No. 2 would ensure that capacity at the Ambheti sub-station gets freed up for availability to the Appellant. This was despite the fact that there is no contractual obligation whatsoever of the Respondent No. 2 to take any such steps under the PPA.

12.16 The reliance placed on minutes of meeting of the 18<sup>th</sup> Meeting of the Western Region Constituents on 29.08.2013 is misplaced. The minutes of the meeting places the factual background, which is that the capacity at the Ambheti sub-station could be made available to the Appellant only after transfer of capacity to the Kala sub-station of Power Grid. GETCO refused to have any power transferred to its network.

12.17 The only reason why Power Grid stated that the change in target beneficiaries under the LTA of the Appellant would not be possible qua DNH was because of the transmission capacity constraint at the Ambheti sub-station due to overloading of transformers, and not because of any constraint in the downstream lines of the Respondent No. 2. The loading of transformers at the Ambheti sub-station was due to the existing capacity being handled and not on account of any new open access granted after the application of the Appellant. The Appellant cannot claim any preference to its open access application over the existing open access users.

12.18 The non-grant of LTOA was on account of constraint ‘at’ the delivery point and not beyond it. The Respondent No. 2 under the terms of the PPA was under no obligation to ensure sufficient transmission capacity at the Ambheti sub-station. The sellers’ obligation to obtain open access and further the need to make all independent enquiries regarding all conditions including grid conditions, make it clear that it was for the Appellant to look into all these aspects and place its bid. The Appellant cannot now seek to wriggle out of its obligations or seek compensation for the same.

12.19 The factual stand taken by the Appellant has also been contradictory and therefore lacks bona fide. The Appellant had taken the position that the constraint was at the Delivery Point. In this regard, the following are relevant:

(a) Letter dated 21/02/2014 of the Appellant

*“Thus EMCO received permission for scheduling of only 100 MW for the month of July, 2013 from the Western Regional Load Despatch Centre (WRLDC) on account of **insufficient capacity at the Delivery Point** for evacuation of power.”*

Having taken the position of constraints being at the Delivery Point, the same paragraph has been reproduced in the appeal as **beyond the Delivery Point**. This is only to confuse the entire issue and take contradictory stands on the factual position.

(b) Rejoinder Affidavit filed before the Central Commission

*9. It is further submitted that the refusal of PGCIL to grant LTOA is solely on the **ground of insufficient capacity at the Delivery Point** due to the transfer of the loads from GETCO to CTU to evacuate power. As a result, Respondent No. 1 continues to be liable for payment of capacity charges for the entire Contracted Capacity of 200 MW since the failure to schedule power is solely on account of non-fulfilment of obligations of Respondent No. 1.*



12.20 In the appeal, it is however sought to be contended that the constraint is both at the Delivery Point and beyond the Delivery Point. In the Rejoinder affidavit filed before the Hon'ble Tribunal, it is stated by the Appellant as under:

*12. It is submitted that non-grant of LTOA was solely on account of failure of Respondent No. 2 to fulfill its obligation of ensuring sufficient transmission capacity at and beyond the Delivery Point for evacuation of power.....*

13. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments put forth during the hearings, etc. It is summed up that the entire case under the Appeal mainly revolves around following issues:

- (i) **Whether the Respondent No. 2 was responsible for refusal of LTOA to the Appellant on account of transmission constraint at/beyond delivery point?**
- (ii) **Whether it was not possible for the Appellant to fulfil its obligation to obtain LTOA on account of non-fulfilment of a reciprocal obligation on the part of the Respondent N. 2 to ensure adequate evacuation facilities?**
- (iii) **Whether the Appellant is eligible to claim Capacity Charges due for the period from November 2013 to February 2014 along with interest thereon in terms of the PPA?**

14. **Our findings and conclusion on the above issues:**

14.1 **Issue No. 1: Whether the Respondent No. 2 was responsible for refusal of LTOA to the Appellant on account of transmission constraint at/beyond delivery point?**

14.1.1 Before analysing this issue viz. Non-grant of LTOA to GMR, we first look into power drawl by DNH for its use in the territory. The load of the Union Territories of Daman & Diu and Dadra & Nagar Havel is being fed from 400/220 kV, 3x315 MVA transformer at Vapi sub-station of PGCIL and 66 kV lines from Vapi and Bhilad sub-stations of GETCO.

For power drawl from Ambheti sub-station by DNH, there are two nos. 220 kV double circuit transmission lines namely Ambheti-Khadoli and Ambheti-Kharadpada. The GETCO sub-station (220/66 kV) is drawing power from Ambheti sub-station which has been, in turn, also catering to the loads of two Union Territories of Daman & Diu and DNH. The PGCIL has further implemented 400/220 kV, 2x315 KVA sub-station at Kala in Union Territory of DNH through LILO of one ckt of 400 kV Vapi-Navasari double circuit transmission line. For drawl of power from Kala sub-station, DNH has also constructed (through PGCIL) 220 kV double circuit transmission lines to Kharadpada and Khadoli sub-stations.

DNH had invited competitive bids under Section 63 of the Electricity Act for supply of 200 MW of power at the delivery point Ambheti sub-station. The Appellant EMCO Energy Limited emerged as successful bidder and after completion of the bidding process, PPA was signed on 21<sup>st</sup> March, 2013. As per the RFP and PPA documents envisaged under Section 63 of the Electricity Act, the responsibility for obtaining all the approvals, clearances and LTOA was that of the seller (GMR EMCO). The relevant Clause of PPA is reproduced as under:

**“3.1.1**

**c) *The Seller shall have obtained the necessary permission for long term open access or short term open access (for the initial period) as deemed necessary for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission license for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer”.***

**4.2 Seller's obligations**

***Subject to the terms and condition of this Agreement, the seller undertakes to be responsible, at sellers own cost and risk, for:***

.....

***d) Obtaining open access for transmission of Aggregated Contracted Capacity of power from the Injection Point to the Delivery Point;***

14.1.2 It is noted that the Appellant had no LTOA from the competent authority to supply 200 MW power to DNH prior to participation in the bidding process or prior to entering into PPA on 21<sup>st</sup> March, 2013. The Appellant wrote to CTU (**PGCIL**) for the first time during September, 2012 requesting change in beneficiaries of their 520 MV LTOA granted in 2007. The grant of 200 MW LTOA to the applicant was, however, denied due to system constraints at Ambheti sub-station, the delivery point. As such, the commencement of delivery of 200 MW from the injection point of the Appellant i.e. their generating station located in District Chandrapur in the State of Maharashtra could not materialise up to the full contracted capacity. The grant of LTOA by the CTU is done on the first come first serve basis and also, taking into consideration the transfer capacity, loading and adequate redundancy in the system based on the planning criteria brought out by CEA. Considering all these aspects in view, the Appellant was not granted LTOA for 200 MW mainly because of the system constraint/over loading of ICTs at Ambheti sub-station which was designated as the delivery point under the PPA. The responsibility of the Respondent No. 2, DNH was to begin only after the delivery point as stipulated in the PPA as under:

***4.3 Procurer's Obligations***

***4.3.1 Subject to the terms and conditions of this Agreement, the Procurer shall:***

***a) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be.***

14.1.3 From Ambheti sub-station, DNH had already connected two nos. 220 kV double circuit transmission lines which were adequate for accommodating additional 200 MW power covered under the PPA. Based on these facts, it is admittedly clear that the LTOA was denied to the Appellant on account of system constraint at the delivery point Ambheti sub-station and not on account of transmission constraint on the system of DNH beyond the delivery point. We, therefore, agree with the findings of Central Commission that the Appellant was not granted LTOA by PGCIL due to constraint in the system at delivery point (Ambheti sub-station) and the DNH has in no way contributed to it.

14.2 **Issue No. 2: Whether it was not possible for the Appellant to fulfil its obligation to obtain LTOA on account of non-fulfilment of a reciprocal obligation on the part of the Respondent N. 2 to ensure adequate evacuation facilities?**

14.2.1 The second issue pertains to the contention of the Appellant for non-fulfilment of its obligation under the PPA on account of non-fulfilment of reciprocal obligation on the part of the Respondent No. 2. In this regard, it is noted that the competitive bidding for procurement of 200 MW power by DNH was processed and concluded strictly as per Section 63 of the Electricity Act. The various activities beginning with the issuance of RFP, evaluation of bids, signing of PPA and adoption of tariff by JERC, etc. were carried out in systematic and transparent manner and also, envisaging clear cut obligations on the part of the procurer (DNH) and seller/supplier (GMR). While going through the provisions of RFP/PPA, it is evident that responsibility of obtaining all clearances including LTOA was of GMR up to the delivery point as indicated in the bid. The procurer's obligation was only to ensure the availability of inter-connection facilities and evacuation of power from the delivery point before the scheduled delivery date or the revised scheduled delivery date,

as the case may be. As per Article 4.3.1, “*Interconnection Facilities*” is the responsibility of the Procurer, and not “*Interconnection Point*”. The term “*Interconnection Facilities*” is defined in the PPA under Article 1.1 as the “Procurers’ side” of the delivery point, as under:

*"Interconnection Facilities shall mean the facility on the Procurers' side of the Delivery Point for receiving and metering the electricity output in accordance with this Agreement and which shall include, without limitation, all with transmission lines and association equipments, transformers, relay and switching equipment and proactive devices, safety equipment and, subject to Article 6, the Metering System required for supply of power as per the terms of this Agreement;*

14.2.2 The Applicant has put forward the case of performance of reciprocal obligations and cited two judgements, one of Hon’ble Supreme Court in the case of *Saradamanikandappan vs. S. Rajalakshmi, (2011) 12 SCC 18* and the other of this Tribunal Judgement dated 11.07.2014 in the case of *Raghu Rama Renewable Energy Ltd. vs. Tamil Nadu Generation and Distribution Corporation Ltd. in Appeal No. 181 of 2013*. We have glanced at details & findings of these judgments and arrive at conclusion that they have no relevance to the present case.

While the Appellant was not granted LTOA from their generating station to the delivery point because of system constraint, the evacuation facilities beyond delivery point already existed from where power was being evacuated through STOA. **Hence, we do not comprehend any scope for failure of reciprocal obligation on the part of Respondent No. 2 (DNH).**

14.3 **Issue No. 3: Whether the Appellant is eligible to claim Capacity Charges due for the period from November 2013 to February 2014 along with interest thereon in terms of the PPA?**

14.3.1 The third issue is regarding the claim of capacity charges by the Appellant for the period November, 2013 to February, 2014 along with

interest thereof in terms of the PPA. As brought out above in analysis of the first and second issues, the responsibility for obtaining LTOA for supply of power from the power station located outside the State/Area of the Respondent No. 2 to the delivery point was that of the Applicant. In fact, the obligation of the procurer (Respondent No. 2) for connecting to the bus bar of the generating station up to the delivery point lies only in the case if generating source is within the state/area of the procurer. The same is defined in the PPA (Schedule-I) as under:

*For generation source in the same state as that of the Procurer, the STU Interface shall be the bus-bar of the generating station from which power is contracted to be supplied, at an appropriate voltage level as specified by the STU.*

- 14.3.2 The Appellant could not obtain from the Power Grid due to one or the other reason. The grant of LTOA is processed by CTU (**PGCIL**) after receipt of the application in consultation with CEA, regional constituents and after in depth power system studies considering all the factors as enlisted in the planning criteria prescribed by CEA. The Appellant was not granted LTOA because of the fact that their application for 200 MW LTOA up to delivery point was not fitting in the load flow studies and analysis of CTU/PGCIL. The allowable transfer capacity in the system up to the Ambheti sub-station has been indicated to be saturated with the already prevailing loads of prior applicants. Moreover, DNH transmission system taking-off beyond the delivery point has, in no way, contributed to the denial of LTOA. **Thus, the question of claiming capacity charges for the period November, 2013 to February, 2014 in view of the denial of LTOA does not survive.**

## **ORDER**

Keeping all the facts and submissions in view, we are of the considered opinion that the issues raised in the appeal are devoid of merit. The impugned order dated 17.09.2015 passed by the Central Electricity Regulatory Commission is hereby affirmed. Hence, the Appeal being Appeal No. 298 of 2015 is dismissed. No order as to costs.

Pronounced in the open Court on this **31<sup>st</sup> day of January, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**