

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 304 of 2013

Dated: 8th May, 2015

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:

EMCO Energy Ltd.
701/704, 7th Floor, Naman Centre
A-Wing, BKC (Bandra Kurla Complex)
Bandra, Mumbai – 400 051

...Appellant(s)

Vs

**1. Maharashtra Electricity Regulatory
Commission**
13th Floor, Centre No.1,
World Trade Centre, Cuffee Parade
Mumbai – 400 005

...Respondent(s)

2. Maharashtra State Electricity Distribution Ltd.
Hongkong Bank Building, M.G. Road
Fort, Mumbai – 400 001

**3. Maharashtra State Electricity Transmission
Company Ltd.**
'Prakashganga', Plot No. C-19, E-Block
Bandra Kurla Complex
Bandra (East), Mumbai – 400 515

4. Wardha Power Company Ltd.
8-2 293/82/A/431/A, Road No.22
Jubilee Hills, Hyderabad – 500 033

5. **Power Grid Corporation of India Limited**
8-9, Qutub Institutional Area, Katwaria Sarai
New Delhi – 110 016

Counsel for the Appellant (s) : **Mr. Amit Kapur**
Mr. Vishrov Mukherjee
Ms. Ritika Arora
Mr. Nilesh Nema
Mr. Akshaya Babu
Mr. Aravind Shastry

Counsel for the Respondent(s): **Ms. Deepa Chavan,**
Mr. Kiran Gandhi,
Ms. Ramni Taneja
Mr. Umang Jain for
Mr. Neerav Shah R-2

Mr. M.Y. Deshmukh for R-3
Mr. P.B. Anghad,
Mr. B.S. Khasale,
Mr. R.V. Berikar,
Mr. Daulatrao,
Mr. Kakasaheb Y. Jaqtap and
Mr. Walke (Rep for R-3)

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by EMCO Energy Ltd. (“**EMCO**”) challenging the order dated 28.08.2013 passed by Maharashtra Electricity Regulatory Commission (“**State Commission**”) holding that EMCO is responsible for establishing connectivity to the State transmission network and to execute connectivity agreement with transmission licensee and shall in consultation with the transmission licensee implement the least cost

technical solution of setting up Loop-in-Loop-out (**“LILO”**) of 400 kV ECMO-Bhadravati one circuit at Warora Sub-station of the transmission licensee. The Appellant is aggrieved since the impugned order has altered the inter-se obligations under the PPA under which the Appellant is obliged to deliver power at the bus bar of its power plant and from that point the obligation to evacuate and secure connectivity is that of the Distribution Licensee, the procurer of power from Appellant’s power plant.

2. EMCO, the Appellant is a generating company which has set up a thermal power project in the State of Maharashtra. The State Commission is the first Respondent. Maharashtra State Electricity Distribution Ltd. (**“MSEDCL”**), the Distribution Licensee, is the Respondent no.2. Maharashtra State Electricity Transmission Company Ltd. (**“MSETCL”**), the Transmission Licensee, is the Respondent no.3. Wardha Power Co. Ltd. and Power Grid Corporation of India Ltd. (**“PGCIL”**) are Respondent no.4 and 5 respectively.

3. The brief facts of the case are as under:

(a) On 24.07.2009, MSEDCL issued Request for Proposal (**“RFP”**) for procurement of 2000 MW of power on long term basis through tariff based competitive bidding process. On 07.08.2009, EMCO submitted the bid premised on the “Delivery Point” of power as the bus bar of the power station.

(b) On 14.10.2009, MSEDCL wrote to EMCO seeking an undertaking that the Delivery Point quoted in the bid is connected with the STU for power evacuation purposes. EMCO replied on 22.10.2009 stating that the Delivery Point quoted in the bid was the bus bar of the power station and in terms of the RFP and the draft PPA, the responsibility of arranging transmission access

from the bus bar and evacuation of power from the bus bar of the power station situated within the State such as that of EMCO was of MSEDCL. The bid was accepted by MSEDCL and the Appellant was declared the lowest **(L-1)** bidder. Letter of Intent **(LoI)** was issued to the Appellant accepting the bid submitted by the Appellant for 200 MW at levellised tariff of Rs. 2.879/kWh.

- (c) On 17.03.2010, PPA between EMCO and MSEDCL for sale of aggregate contracted capacity of 200 MW was signed. In the PPA, the responsibility for obtaining necessary transmission linkage for long term open access for the transmission system from the power station switchyard upto Delivery Point was that of MSEDCL.
- (d) Accordingly, MSEDCL applied for allotment of Long Term Open Access **(“LTOA”)** under the Open Access Regulations, 2005 for evacuation of 200 MW from EMCO’s power station.
- (e) On 28.12.2010, the State Commission approved the PPA entered into between MSEDCL and EMCO subject to certain modifications.
- (f) Some correspondence took place between the Appellant and MSEDCL for carrying out amendment in the PPA as per the directions of the State Commission.
- (g) On 15.09.2012 MSETCL granted LTOA to MSEDCL for 200 MW on the intra-State transmission system subject to submission of copy of PPA executed with EMCO and a copy of revised BPTA. MSEDCL submitted a copy of PPA to MSETCL and sought confirmation whether power would be evacuated directly from the bus bar of EMCO. MSEDCL further informed on 19.10.2012 to

MSETCL that as per PPA, the responsibility of power evacuation from power project bus bar is with MSEDCL.

- (h) On 06.03.2013, MSEDCL filed a petition before the State Commission for directions to MSETCL to grant grid connectivity for Appellant's power station directly through STU.
- (i) Pursuant to the directions passed by the State Commission on 27.05.2013, a meeting was conducted with the representatives of all concerned to evaluate the least cost technical solution for connectivity of EMCO's power station.
- (j) Pursuant to the directions of the State Commission during the hearing held on 12.06.2013, another meeting was convened by Principal Secretary (Energy), Government of Maharashtra on 29.06.2013. At the said meeting presided over by the Principal Secretary (Energy) the following resolution/recommendation was given:
 - (i) As per PPA, the connection is to be done by the Appellant upto STU.
 - (ii) The most cost effective solution is LILO of 400 kV EMCO-Bhadravati one circuit at MSETCL 400 kV Warora sub-station and the same is to be implemented by EMCO at their cost within the time frame.
- k) EMCO vide letter dated 29.09.2013 reiterated its position that the obligation of evacuation of power beyond the bus bar of its power station is that of MSEDCL. EMCO also disputed this arrangement in its submissions before the State Commission.
- (l) The State Commission passed the impugned order dated 28.08.2013 giving effect to the resolution/recommendation in the

meeting dated 29.06.2013 convened by Principal Secretary (Energy) of the State Government against which the present Appeal has been filed.

4. This Tribunal on 11.02.2014 in order to avoid bottling up of the power at Appellant's power plant and to ensure supply of contracted power to MSEDCL passed an interim order to evacuate power through the Powergrid's transmission system without prejudice to the rights and contention of both the parties. The relevant portion of the order dated 11.02.2014 is reproduced below:

"We have heard the learned counsel for the parties in I.A. Having regard to the submissions made by both the parties, it would appropriate to record that without prejudice to the rights and contentions of both the parties, the supply from the power station of the Appellant to the Respondent No.2 be commenced from the scheduled date as per the PPA i.e. 17.03.2014. The charges for the transmission system of Powergrid will be paid by the Appellant directly to the Powergrid for the interim period, which shall be subject to the adjustment as per the outcome of the Appeal. The Appellant shall schedule the power to the Respondent No.2 at the bus bars of the power station of the Appellant. With these observations, the I.A. No. 400 of 2013 is disposed of."

5. The Appellant has made the following submissions:
 - (a) In terms of explicit provisions of RFP and the PPA, the obligation of establishing connectivity and accessing the State transmission network beyond the Delivery Point/bus-bar of the power station is that of MSEDCL. The Delivery Point is the STU interface within the region of the procurer. STU interface in case where the generation source is in the same State as that of Procurer, is the bus-bar of the generating station from which power is contracted to be supplied.

- (b) All along since July 2009 to June, 2013, the RFP, the PPA and the conduct and the correspondence between the parties reveals that the Delivery Point in terms of the PPA is the bus bar of the power station since the STU Interface, Delivery Point and the Interconnection Point are the same i.e. the bus bar of the power station. The obligation of evacuating power from the bus bar of the power station is that of MSEDCL.
- (c) In the bid evaluation report the transmission and distribution losses in case of EMCO's bid has been taken as nil since the Delivery Point is the bus-bar of the power station.
- (d) The Respondent's averment that in terms of Section 10 of the Electricity Act, EMCO is required to connect the power station to MSETCL's sub-station is without merit. Section 10 leaves the freedom to contract among the parties. In support of this Tribunal's judgment dated 04.02.2014 in Appeal no. 45 of 2013 has been relied upon.
- (e) The role of the State Commission is limited to, *inter alia*, approval of PPA and adoption of tariff. Once the PPA is approved, the Commission cannot alter or amend the terms of PPA to the prejudice of the Appellant.
- (f) The State Commission has misconstrued Article 3.1.1(c) of the PPA (which has been subsequently deleted vide agreement dated 25.11.2013) to hold that the Appellant is responsible to establish connectivity and access the State transmission network.
- (g) The impugned order amounts to altering the terms of the PPA which is not permitted. In this regard *Tata Power Co. Ltd v. Reliance Energy Ltd.*, (2009)16 SCC 659 and judgment of this

Tribunal in Appeal no. 87 and 107 of 2010 dated 20.08.2011 in Tata Power Trading Vs. MERC has been relied.

- (h) There is no ambiguity in terms of the obligation of MSEDCL to obtain open access and evacuate power beyond the bus bar. In any event since the PPA and RFP is prepared by MSEDCL, any ambiguity in the said documents has to be interpreted against MSEDCL, applying principle of *contra proferentum*. In this regard reliance is placed on Sahebzada Mohd. Kamgarh Shah v. Jagidsh Chandra Deb Dhabal Deb: AIR 1960 SC 953, Bank of India v. K Mohandas (2009), 5 SCC 313 and United India Insurance Co. Ltd v. Pushpalaya Printers, (2004)3 SCC 694.
6. In reply MSEDCL has submitted as under:
- (a) RFP provided for the Delivery Point to be the bus bar of the generating station at STU interface, as specified by STU. In its financial bid format EMCO had agreed to transfer power through STU system in conformity with the condition specified in RFP.
- (b) No transmission charges or transmission losses were considered while evaluating the bid of the Appellant. Any departure/deviation from the requirement of RFP and PPA would skew the entire evaluation undertaken in the bidding process.
- (c) The PPA has been approved by the State Commission vide order dated 28.12.2010. During the pendency of the Appeal, the PPA has been modified and the subsequent agreement has been brought on record before the Tribunal vide Affidavit dated 14.12.2013. This final PPA has to now be evaluated by the State Commission.

- (d) On 04.08.2006, the Appellant had applied for grid connectivity to the STU for their 2x135 MW power plant at Warora. On 24.04.2007, the grid connectivity on 220 kV level at 220 kV Warora sub-station was issued to the Appellant for their 2x135 MW power plant at Warora, subject to compliance of various formalities. On 18.10.2007, the Appellant had the connectivity granted to it by the STU vide permission dated 18.10.2007. As per this, STU sanctioned the 220 kV D/C line from power plant to 400/220 kV sub-station at Warora to be constructed by the Appellant before the scheduled date. On 17.01.2009, the Appellant signed BPTA with CTU for open access for 520 MW out of which 200 MW was for MSEDCL. On 14.09.2009, the Appellant has informed the STU about enhancement of plant capacity to 2x300 MW. On 03.10.2009, the Appellant was requested by STU to submit application for connectivity of their proposed 2x300 MW power plant but the Appellant did not apply for connectivity till date.
- (e) In terms of the State Grid Code Regulations, 2006, the Appellant is responsible to enter into Connection Agreement with the transmission licensee. As per Regulation 4.1 of the Transmission Open Access (Regulations), 2005, the generating company is eligible to apply for open access to intra-State transmission system. Hence, it is the responsibility of the Appellant to apply for grid connectivity.
- (f) At the time of submitting RFP, the Appellant did not disclose about the application of CTU connectivity as well as availability of the STU connectivity.

- (g) With change in capacity, the Appellant had to again apply for connectivity to STU. The failure of the Appellant to apply for grid connectivity to STU has prevented the MSEDCL from utilizing the LTOA of 200 MW allotted by STU.
7. MSETCL (Respondent no.3) has made the following submissions:
- (a) The Appellant has misconstrued the provisions of the Electricity Act and Regulations and thereby failed to understand that it was required to apply to MSETCL afresh in view of the modification and material change in its capacity as mandated in Central Commission's order dated 31.12.2009 in the matter of Grant of Connectivity, Long Term Open Access and Medium Term Open Access in Inter-State transmission and related matters. In this regard Clause 8(1) of Central Commission's Connectivity Regulation has been referred to.
- (b) As per "Regulation 4.1 of the MERC (Transmission Open Access) Regulations, 2005, it is the generator's responsibility to apply for grid connectivity. Regulation 13 of State Grid Code Regulations, 2006 state that the user (including generating station) shall submit the application for establishing new arrangement or modifying the existing arrangement of connection to and/or use of the Intra-State Transmission System to the State Transmission Utility (STU). Thus, EMCO is required to apply to MSETCL afresh in view of modification and material change in its capacity.
- (c) It is obligatory on the part of EMCO to construct separate dedicated transmission line from its generating station to Warora

sub-station of the STU as per the provisions of the Electricity Act, 2003, Transmission Open Access Regulations, 2005 and State Grid Code Regulations, 2006, CERC Connectivity Regulations, 2009 and the Electricity (Removal of Difficulties) 5th order which came into force on 08.06.2005.

- (d) PPA entered into between EMCO and MSEDCL is not binding on MSETCL, as it is not a party to the said agreement. When Clauses of the PPA are contrary to the Electricity Act, 2003 and the Regulations, the State Commission has rightly passed the impugned order directing that the Appellant is responsible for establishing connectivity and access to State Transmission Network. The Regulations or subordinate legislation can even override existing contracts including PPA which have to be aligned to the statutory provisions and the regulations framed under the Electricity Act, 2003.
 - (e) It is absolutely incorrect and contrary to the position of law to expect the STU such as MSETCL to construct transmission line for and on behalf of generating companies such as EMCO.
 - (f) As per the RFP the generating company was shouldered with the responsibility of getting the grant of connectivity as well as the transmission access arrangement with intra-State transmission system.
8. We have heard Shri Amit Kapur, Learned Counsel for the Appellant, Ms. Deepa Chavan, Learned Counsel for Respondent no.2, MSEDCL and Mr. M Y Deshmukh, Learned Counsel for Respondent no.3, MSETCL. On the basis of rival contentions of the parties, the following questions would arise for our consideration:

- i) **Whether the State Commission is correct in holding that the Appellant is responsible to establish connectivity and access to the State transmission network beyond the bus bar of the generating station contrary to the terms of RFP and PPA entered into between the Appellant and MSEDCL on the basis of tariff based competitive bidding?**
 - ii) **Whether the State Commission has erred in altering the obligations of the parties as stipulated in the concluded PPA between EMCO and MSEDCL regarding evacuation from Appellant's power plant and connectivity to the State transmission network?**
 - iii) **Whether it was the responsibility of the Appellant under the provisions of the Electricity Act and the applicable Regulations to seek connectivity and open access on intra-State transmission system by construction of a dedicated transmission line and in view of the statutory provisions, the provision of PPA and RFP regarding MSEDCL seeking open access and taking delivery of power at the bus bar of the Appellant's power station was illegal?**
 - iv) **Whether the State Commission has erred by giving directions to the Appellant to LILO of one circuit of its dedicated transmission line from EMCO to Bhadravati at MSETCL's sub-station at Warora at Appellant's cost?**
9. All the above issues are interwoven and, therefore, being dealt with together.
10. Let us examine the provisions of RFP for procurement of power through competitive bidding by MSEDCL relating to connectivity and

accessing the State transmission network beyond the bus bar of the power station. The relevant Clauses of RFP are as under:

- (a) **“Contracted Capacity”** has been defined as the net capacity of power (in MW) contracted between the Seller and the Procurer at the Interconnection Point as provided in the Selected Bid as per Format 4.10 of the RFP.
- (b) **“Delivery Point”** is defined as STU Interface(s) within the region of the Procurer where power is delivered to the Procurer after it is injected by the Seller at Interconnection Point.
- (c) **“Injection Point:** in relation to each Financial Bid by the Bidder shall mean either the CTU Interface or the Delivery Point as specified by the Bidder in format 4.10 of the RFP.
- (d) **“CTU Interface”** shall mean
 - I. the power from the power station switchyard bus of the Seller shall be injected into the interstate transmission system OR
 - II. the dedicated transmission line of the Seller shall connect the power station of the Seller to the interstate transmission system OR
 - III. the intrastate transmission system of the Seller’s state shall connect to the interstate transmission system for the purpose of transmitting power from the Seller’s power station.
- (e) **“Interconnection Point”** shall mean the point where the power from the power station switchyard bus of the Seller is injected into the inter-State/Intra-State transmission system (including the

dedicated transmission line connecting the power station with the Inter-State/Intra-State transmission system.

- (f) **“STU Interface(s)”** shall mean the point(s) at what the CTU network is connected to the intra-State transmission system of the Procurer’s State, and at which the Procurer agree to receive power upto the Requisitioned Capacity; For generating source in the same State as 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.
- (g) The RFP provides the following under brief scope of power procurement under Clause 1.3.1.

S.No.	Scope	Details
7.	<i>Interconnection Point</i>	<p><i>Bidders shall submit their Quoted Tariff at the Interconnection Point and specify the same in the Financial Bid as per Format 4.10 of this RFP;</i></p> <p><i>The PPA shall be signed between the Successful Bidder/Project Company and the Procurer for the Contracted Capacity at the Interconnection Point.</i></p>
8.	<i>Injection Point</i>	<p><i>Bidders shall specify in their Financial Bid, the Injection Point nearest to their generation source which shall be used for evaluation purpose;</i></p> <p><i>In case of Injection Point being a CTU Interface, applicable transmission charges and transmission losses up to the Delivery Point shall be considered along with the Quoted Tariff for evaluation. The transmission charges for any intrastate transmission link connecting the</i></p>

		<p><i>Interconnection Point to the Injection Point shall be borne by the Seller and no transmission charges for such intrastate transmission link shall be payable by the Procurer. However percentage loss level of such intrastate transmission link shall be specified by the Bidder in its Financial bid and shall be considered for evaluation.</i></p> <p><i>In case of injection Point being a Delivery Point, no transmission charges or losses shall be considered for evaluation.</i></p>
9.	Transmission Losses	<p><i>The transmission losses from the Interconnection Point to the Delivery Point shall be borne by the Procurer.</i></p>
10.	Arranging Transmission Access	<p><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></p> <p><i>The Seller shall initiate action for development of the requisite transmission system from Injection Point to the Delivery Point by co-coordinating with the CTU and concerned STU in accordance with the relevant regulations of the Appropriate Commission.</i></p> <p><i>The Seller shall be wholly responsible to arrange transmission access from the Interconnection Point to the Injection Point.</i></p> <p><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></p>

The scope of power procurement clearly indicates that Procurer shall be wholly responsible to arrange transmission access from the station switchyard of the generation source in case the generation source is in the same State.

- (h) Clause 1.3.2 of the RFP stipulates that the responsibility for evacuation of power beyond the Delivery Point will be of the Procurer.
 - (i) According to RFP the bidder has to submit quoted tariff at the Interconnection Point.
11. It has to borne in mind that the RFP document is based on the Standard Bidding Document of the Government of India which is statutorily used for procurement of power through competitive bidding process by the Distribution Licensee under Section 63 of the Electricity Act. RFP is a general document meant to cover procurement of power from different sources of power supply viz. generating station located within the procuring state, generation source outside the State connected directly to inter-State transmission system through a dedicated transmission system or the transmission line of inter-State transmission licensee, generating station located in another State but connected to intra-State transmission system (of another State) through a dedicated transmission line, etc. There may be an existing generating station located in the procuring State already connected to the intra-State transmission system through a dedicated transmission line and power is proposed to be supplied either from the existing capacity or extension unit through the existing dedicated transmission line connected with intra-State transmission system. There can be a

- number of combinations based on the location of the generation source and the bidding documents are framed to cover all these conditions. Therefore, the clauses and conditions relevant to the generating station located in the State of Maharashtra which is the case in the present Appeal, have to be considered to come to a conclusion. It is clear from the RFP that for a power plant located in the State, the Procurer i.e. MSEDCL is wholly responsible to arrange transmission access from the bus bar of the generating station. For such generating station the Delivery Point, Injection Point and Interconnection Point and STU Interface is the bus bar of the generating station. Such power plant has option to quote the tariff at the bus bar of the generating station. In that case, no transmission charges or losses have to be considered for evaluation of the bids.
12. There are different terms and conditions applicable to a Bidder whose source of generation is located outside the State of Maharashtra and is connected to the Inter-State transmission system or intra-State transmission system of another State through a dedicated transmission system or through inter-State/intra-State transmission system (of another State) which are not of any relevance to the present case.
 13. The Power Purchase Agreement entered into between the Appellant and the Respondent no.2 dated 17.03.2010 provides for as under:
 - (a) **“Aggregate Contracted Capacity”** has been defined as with respect to the Seller, the aggregate capacity of 200 MW contracted with the Procurer for Supply at Interconnection Point from the Power Station’s Net Capacity.
 - (b) **“Delivery Point”** shall mean the STU Interface(s) as specified in Schedule 1 of the Agreement.

- (c) The Schedule 1 stipulates the “**Delivery Point**” as Power Station Switchyard Bus Bar of EMCO Energy’s plant located at Warora.
- (d) “**Injection Point**” shall mean the power station switchyard bus as specified by the successful bidder in Format 4.10 of the Selected Bid.
- (e) “**Interconnection Point**” shall mean the point where the power from the power station switchyard bus of the Seller is injected into Inter State/Intra-State transmission system (including the dedicated transmission line connecting the power station with the inter-State/Intra-State transmission system.
- (f) Condition subsequent to be satisfied by the Seller *inter alia* has been described under Clause 3.1.1 (c) as under:

“3.1.1 The Seller agrees and undertakes to duly perform and complete the following activities at the Seller’s own cost and risk within twelve (12) months from the Effective Date, unless such completion is affected by any Force Majeure event or due to the Procurer’s 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 for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer;”

In the case of Appellant, the Injection Point and the Delivery Point are at the same place i.e. power station bus bars.

- (g) The condition subsequent to be satisfied by the Procurer or Procurer's obligation under Clause 3.2.1(b) *interalia* includes:

“The Procurer shall have obtained necessary transmission linkage for ‘long term’ open access for the transmission system from the Power Station switchyard up to the Delivery Point and shall have executed the Transmission Service Agreement with the STU for transmission of power from the Power Station switchyard up to the Delivery Point and provided a copy of the same to the Seller. Further, the Procurer shall indicate in writing to the Seller, the voltage level at which supply of power is to be made to the Procurer.”

Under the above condition MSEDCL has to obtain transmission linkage and long term open access from EMCO's switchyard and execute Transmission Service Agreement (**TSA**) with STU.

- (h) Seller's obligation under Clause 4.2.1 *interalia* includes:

“c) obtaining all the necessary permissions for the long term open access for the intrastate transmission system for evacuation of power from the Power Station bus bar to the Injection Point (except in case of dedicated transmission lines) and execute all necessary agreements for such transmission access and provide a copy of the same to the Procurer;

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

In the Appellant's case injection point and delivery point is the power station bus bar.

- (j) Procurers obligations under Clause 4.3.1 *interalia* includes:

“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;

- b) be responsible for payment of the Transmission Charges (from the Injection Point onwards) and applicable RLDC / SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurer. The Procurer shall reimburse any of the above charges, if paid by the Seller;*
- d) be responsible for making arrangements for evacuation of their Contracted Capacity from the Power Station switchyard to their respective Delivery Point, in case the Power Station is located within Maharashtra.”*

14. It is clear from the PPA that the MSEDCL, the Respondent no. 2 was responsible to arrange open access from the bus bars of the Appellant's power station and the tariff quoted by the Appellant for sale of power was at the bus bar of the power station. It is seen that some redundant Clauses have found place in the PPA as it has been copied from the Model PPA of the Standard Bidding document issued by the Central Government which is required to be followed in the competitive bidding as per Section 63 of the Electricity Act, 2003. The Model PPA provides for all possible combinations of power procurement i.e. for the Sellers power plant located in the procuring State and to be connected directly to the intra-State transmission system of that State, Sellers plant located in another State and directly connected to the inter-State or intra-State transmission system of another State through a dedicated transmission line, Seller power plant located in the procuring State and directly connected to intra-State and also inter-State transmission system, etc. In the present case where the obligation of the Procurer MSEDCL for arranging open access to intra-State transmission system

- is clearly indicated in the RFP and PPA, the conditions applicable for other bidders who are located outside the State of Maharashtra have to be ignored.
15. Under Clause 3.1.1(c) of the PPA, the Seller (EMCO) is responsible for obtaining necessary permission for long term open access for the transmission system from the injection point to the delivery point which is the same point viz. power station bus bar in EMCO's case as the power plant is located in the State of Maharashtra. Similarly under Clause 4.2.1 the Seller's obligation is to obtain necessary permissions for long term open access for the intra-State transmission system for evacuation of power from the power station bus bar to the injection point and injection power to delivery point which in the case of EMCO is same point i.e. power station bus bars. Therefore, these Clauses are redundant. There was some ambiguity in the PPA entered into between MSCDCL and ECOMO and it was directed to be corrected by the State Commission by its order dated 28.12.2010 making it clear that injection point will be the power station switchyard bus and STU interface for generating source in the same State will be bus bar of the generating station.
16. **Let us examine the order dated 28.12.2010 passed by the State Commission to grant approval for adoption of tariff for procurement of power through competitive bidding.** It is seen that the Appellant EMCO was the lowest bidder (L1 bidder) in the competitive bidding offering the most competitive tariff at Rs. 2.879 per kWh. In this order, the State Commission directed as under:

“The Standard PPA issued by MoP on March 27, 2009 in Article 1.1 under definitions states as under:

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

For generation source in the same state as that of the Procurer(s), 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.”

The above said Clause is not there in PPA signed between MSEDCL and Emco Energy Ltd. The same Clause may be inserted in the PPA signed between MSEDCL and Emco Energy Ltd”

“In case of PPA with Emco Energy Ltd., Clause 3.1.1 (c) of the PPA stipulates as follows:

“The Seller shall have obtained the necessary permission for long term open access for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer(s);

Further, the Clause 3.2.1 (b) of the PPA stipulates as follows:

The Procurer shall have obtained necessary transmission linkage for long term open access for the transmission system from the Power Station switchyard up to the Delivery Point and shall have executed the Transmission Service Agreement with the STU for transmission of power from the Power Station switchyard up to the Delivery Point and provided a copy of the same to the Seller. Further, the Procurer shall indicate in writing to the Seller, the voltage level at which supply of power is to be made to the Procurer.

The above two clauses in the PPA appears to be contradictory as the injection point is defined as Power Station Switchyard bus and hence these clauses may be amended appropriately.”

17. The State Commission by order dated 28.12.2010 also directed inclusion of Schedule 12 of the Standard PPA issued by Ministry of Power regarding substitution rights of the tenderer. MSEDCL was directed to submit the final PPA after incorporating the above observations.
18. With the above definition of STU Interface to be inserted in the PPA as per the directions of the State Commission by order dated 28.12.2010, it is clear that the STU Interface in case of the Appellant is the Power Station bus bar. The State Commission had also observed that Clause 3.1.1(c) and 3.2.1(b) of the PPA appeared to be contradictory as injection point was defined as power station switchyard bus hence these clauses were directed to be amended. This direction also indicates that Seller's obligation for obtaining long term open access from injection point to delivery point was required to be deleted. As discussed above the Clause 3.1.1 (c) was redundant as injection point and delivery point for EMCO was the same viz. power station bus bar.
19. **Let us examine the impugned order dated 28.08.2013 passed by the State commission in the petition filed by MSEDCL, the Respondent no.2. The relevant part is summarized as under:**
 - (a) MSEDCL had prayed in the petition to direct MSETCL, the transmission licensee/STU to grant grid connectivity to 200 MW power evacuation from EMCO directly through STU only and to make MSETCL liable for any penalty claimed by EMCO Energy due to delay in providing grid connectivity directly through STU

only. MSEDCL had submitted that it had applied for allotment of transmission capacity rights in intra-State transmission system through LTOA on 07.07.2010 under the Open Access Regulations, 2005 clearly stating the quantum of power (200 MW) and injection point as EMCO generating station.

- (b) During the proceedings, MSEDCL filed an amended petition raising a dispute wherein MSEDCL sought Commission's intervention to adjudicate on a dispute between MSEDCL and EMCO seeking directions against EMCO. The Appellant filed its submissions/objections.
- (d) The Commission during the proceedings directed the STU to convene a meeting and find a least cost technical solution to evacuate power from EMCO's generating station to enable implementation of the PPA. Accordingly, MSETCL/STU submitted three alternatives for evacuation of power from EMCO. The third alternative was LILO of 400 kV EMCO-Bhadravati one circuit which is a dedicated line of EMCO for connectivity to STU system at MSETCL's sub-station at Warora.
- (e) Thereafter, the State Commission directed that Principal Secretary (Energy) of Government of Maharashtra should take a meeting involving the concerned parties to resolve the issue.
- (f) Accordingly, Principal Secretary (Energy) held a hearing in the matter and passed the following order on 29.06.2013 without prejudice to the right of all parties in the case pending before the State Commission.
 - (i) As per PPA, the connection is to be done by EMCO upto STU.

- (ii) The option-3 is the least cost solution and the same to be implemented by EMCO at their own cost within the time frame.
- (g) Thereafter, the Commission suggested that MSEDCL could prefer to withdraw the present petition and file a fresh petition on which disputes are yet to be resolved. However, MSEDCL preferred to maintain the present Petition with prayer (a) of the Original Petition – To direct MSETCL (STU) to grant Grid Connectivity to 200 MW power evacuation from Warora Project of EMCO Energy Ltd. directly through STU only, prayer (b) of its revised Petition – To direct MSETCL (STU) to direct EMCO to submit technical details to the STU in line with the State grid code regulation 2006 and to apply for connectivity to the STU and prayer (c) of its revised Petition –To direct EMCO to pay the transmission charges and losses other than STU in case of delay in evacuation of 200 MW power from EMCO directly through STU due to delay in application of connectivity by EMCO. The Commission further directed all parties viz., MSEDCL, MSETCL, EMCO and WPCL to file written argument on or before 22.07.2013.
- (h) EMCO maintained that as per PPA and Bid Documents the obligation to such connectivity is upon MSEDCL.
- (i) The State Commission held as under:
 - i) From conjoint reading of Clause 3.1.1 (c) and Clause 4.2.1 (c) of the PPA and various submissions by the parties, the Commission opines that the Seller (i.e. EMCO) will have to establish connectivity with state transmission network and

execute necessary connectivity agreement with transmission licensee (i.e. MSETCL) at STU interface at 400 kV Warora substation of MSETCL. Beyond this STU interface, it is responsibility of Procurer (i.e. MSEDCL) to arrange for evacuation of power for which MSEDCL has already executed BPTA with MSETCL.

- ii) In view of above analysis and from the conjoint reading of the relevant clauses of RFP, PPA and the amendment in PPA as directed by the Commission under its Order (Case No. 22 of 2010) dated 28 December 2010, it is clear that Seller (EMCO) is responsible to establish connectivity and access the state transmission network.
- iii) In view of above, as regards the prayers (b), (d) and (f), the Commission rules the same in favour of the Petitioner (MSEDCL). The Commission further directs Petitioner (MSEDCL) and EMCO to execute amendment to PPA in line with its earlier directions under its Order (Case 22 of 2010) dated 28 December, 2010 and in view of the observations under this Order, within four weeks from date of this Order. Further, the Commission rules that the recommended least cost technical solution (i.e. Option-3: LILO of 400 kV EMCO –Bhadravati one ckt at MSETCL Warora 400 kV Sub-station) for evacuation of 200 MW contracted to be supplied to MSEDCL should be implemented by EMCO in consultation with MSETCL. The Commission further directs MSETCL to facilitate and provide necessary support to EMCO for implementation of

Option-3 and execute necessary connectivity agreement with EMCO.

- iv) The Commission hereby rules that Seller (EMCO) is responsible to establish connectivity and access the state transmission network. Further the Commission directs EMCO to establish connectivity with state transmission network and execute necessary connectivity agreement with transmission licensee (i.e. MSETCL) at STU interface at 400 kV Warora substation of MSETCL.
- v) The Commission rules that the recommended least cost technical solution (i.e. Option-3: LILO of 400 kV EMCO – Bhadravati one ckt at MSETCL Warora 400 kV Sub-station) for evacuation of 200 MW contracted to be supplied to MSEDCL should be implemented by EMCO in consultation with MSETCL. The Commission further directs MSETCL to facilitate and provide necessary support to EMCO for implementation of Option-3 (as per para 34) and execute necessary connectivity agreement with EMCO.

20. We find that the State Commission on conjoint reading of the RFP and PPA, and on the basis of its order dated 28.12.2010 and the order of the Principal Secretary (Energy) directed EMCO to establish connectivity with STU/MSETCL by LILO of one circuit of its dedicated 400 kV EMCO-Bhadravati line at Warora sub-station of MSETCL. The State Commission has adopted the order of Principal Secretary (Energy) who had no authority to pass an order in the matter when the matter was pending before the State Commission.

21. The State Commission by its order dated 28.12.2010 had directed to insert the definition of “STU Interface” as per the Standard PPA issued by Ministry of Power in the PPA entered into between EMCO and MSEDCL. The definition of STU Interface clearly indicated that for generation source in the same State as that of Procurer, the STU Interface shall be bus-bar of the generating station from which power is contracted to be supplied. It was also pointed out by the State Commission in order dated 28.12.2010 that Clause 3.1.1(c) and Clause 3.2.1(b) appeared to be contradictory as the injection point in the PPA has been defined as power station switchyard bus and hence these Clauses have to be amended appropriately. The order indicates that the State Commission was aware that the injection point was the bus-bar of EMCO’s power station and the STU Interface by introduction of definition of STU Interface was also the bus bar of EMCO’s power station. Accordingly the Clauses 3.1.1(c) and 3.2.1(b) which were contradictory had to be amended. As already discussed, Clause 3.1.1(c) was redundant as the injection point and delivery point in case of EMCO was same viz. bus-bar of EMCO’s power station. In view of the direction of the State Commission’s order dated 28.12.2010, Clause 3.1.1(c) should have been deleted. Thus, the findings of the State Commission in the impugned order is contrary to its own order dated 28.12.2010 approving the procurement of power from EMCO.
22. In *United India Insurance Co. Ltd v. Pushpalaya Printers*, (2004)3 SCC 694 it was held that where the words of document are ambiguous, they shall be construed against the party who prepared the document. In *Sahebzada Mohd. Kamgarh Shah v. Jagidsh Chandra Deo Dhabal Deo*: AIR 1960 953, Hon’ble Supreme Court held that in case of

ambiguity the court should look at all the parts of the document to ascertain the intention of the parties. In Bank of India v. K Mohandas (2009), 5 SCC 313 it was held that the true construction of a contract must depend upon the import of words used and not upon what the parties choose to say afterwards. We have already interpreted the RFP, PPA and the order of the State Commission dated 28.12.2010 in preceding paragraphs to conclude that it was the responsibility of MSEDCL to seek Long Term Open Access (**LTOA**) on the intra-State transmission system from the bus bar of EMCO's power station. Thus, the findings of State Commission in the impugned order is contrary to the RFP, PPA and its order dated 28.12.2010.

23. Let us examine the conduct of the parties.
24. In the financial bid of EMCO the Interconnection Point has been indicated as Power Station Switchyard Bus. The Injection Point has also been indicated as Power Station Switchyard Bus. The proposed Delivery Point has been indicated as Power Station Switchyard Bus. On the question whether the STU system be used to transmit power between the Interconnection Point and the Injection Point has been answered as "Not applicable as the delivery point is the Power State Switchyard Bus". Transmission loss in STU system has been shown "Not Applicable as the delivery point is Power Station Switchyard Bus." Thus, EMCO's bid made it very clear that the Interconnection Point, Injection Point and Delivery Point was the same point viz. Power Station Switchyard Bus. The bid was accepted by MSEDCL and in the evaluation of bids no transmission charges and losses were loaded on the tariff quoted by EMCO.

25. On 14.10.2009, MSEDCL sought confirmation/undertaking from EMCO stating that its power plant is connected with MSTECL for power evacuation purposes. EMCO by letter dated 22.10.2009 clarified that as per its financial bid, the proposed Delivery Point is Power Station Bus Bar as per RFP and PPA, the Procurer is responsible for making arrangement for transmission access for the power station switchyard. Thereafter, the bid of EMCO was accepted and it was declared as the L-1 bidder. Letter of Intent was issued on 20.11.2009 to EMCO accepting 200 MW power supply. On 17.03.2010, PPA was entered into between EMCO and MSEDCL for sale and supply of 200 MW power.
26. Acting upto the PPA, MSEDCL applied for allotment of LTOA for evacuation of 200 MW from EMCO's power station.
27. In a meeting held on 04.01.2011 in which MSETCL, STU, representative of State Commission and EMCO were present to discuss arrangement of evacuation of power from the power station of Respondent no.4 and the Appellant, the Appellant had submitted that they did not have objection in evacuation of power from Unit 3 of Respondent no.4, as responsibility of evacuating EMCO power rests with MSEDCL since delivery point mentioned in the PPA is ex-bus generating unit. On 13.07.2012, MSEDCL requested MSETCL to confirm the evacuation system status for 200 MW power contracted by MSEDCL with EMCO as the EMCO's project was in an advance stage of completion.
28. On 15.09.2012 MSETCL granted LTOA to MSEDCL for 200 MW on intra-State transmission system subject to submission of copy of PPA executed with EMCO and a copy of revised BPTA. On 20.09.2012,

MSEDCL submitted a copy of the PPA to MSETCL and sought confirmation whether power would be evacuated directly from the bus bar of EMCO, etc. On 19.10.2012 MSEDCL informed MSETCL that as per PPA, the responsibility of power evacuation from power plant bus bar is with MSEDCL. Only on 01.04.2013, MSEDCL requested EMCO to apply for grid connectivity to STU. On 06.03.2013 MSEDCL filed a petition before the State Commission to direct MSETCL (STU) to grant connectivity to 200 MW power evacuation from EMCO directly through STU only and to make MSETCL (STU) liable for any penalty if claimed by EMCO due to delay in providing grid connectivity. However, during the proceedings MSEDCL filed a revised petition seeking directions against EMCO.

29. Thus, all along the parties were proceeding on the correct understanding of conditions laid down in RFP and PPA regarding responsibility of MSEDCL to seek LTOA from the bus bar of the power station. However, during the proceedings before the State Commission, MSEDCL changed its position.
30. Let us now examine the provisions of the Electricity Act, 2003 and the Rules regarding dedicated transmission line and intra-State transmission of electricity.
31. Section 10 of the Electricity Act provides that subject to the provisions of the Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of the Act or the rules or regulations made there under. The generating company has also to coordinate with the CTU or STU as the case may be, for transmission of electricity generated by it.

32. Section 39 describes the functions of STU. STU has to undertake transmission of electricity through intra-State transmission system, to discharge all functions of planning and coordination relating to intra-State transmission with CTU, State Government, generating companies, Authority, Licensees, etc. STU has to ensure development of an efficient, coordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres. STU has to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges.
33. The duties of transmission licensee are described in Section 40. The duties of a State transmission licensee includes to build maintain and operate an efficient, coordinated and economical intra-State transmission system and to provide non-discriminatory open access to its transmission system for use by licensee or generating company on payment of the transmission charges.
34. The Electricity (Removal of Difficulty) Fifth Order, 2005 provides that a generating company or a person setting up a captive generating plant shall not be required to obtain licence for establishing, operating and maintaining a dedicated transmission line.
35. National Electricity Policy notified under Section 3 of the Electricity Act, provides that the network expansion shall be planned and implemented keeping in view the anticipated transmission needs that would be incident on the system in the open access regime.
36. The provision of the Act and Rules permit establishment of dedicated transmission line by a generating station for point to point transmission of electricity and if a generating station establishes a dedicated

- transmission line it is not required to obtain a licence for the same. The Act also permit establishment of transmission line from the bus bar of a generating station by a transmission licensee. A distribution licensee can also obtain open access on transmission system from the bus bar of a generating station to its own distribution system. In such case the transmission licensee has to establish the transmission line from the bus bar of the generating station. In fact the Connectivity Regulations of Central Commission for inter-State transmission provides that a thermal generating station of 500 MW and above and a hydro generating station of 250 MW and above, other than captive generating plant, shall not be required to construct a dedicated line to the point of connection and such stations shall be taken into account for coordinated transmission planning by the CTU and CEA.
37. According to Section 63 of the Electricity Act, the competitive bidding for procurement of power has to be carried out as per the guidelines issued by the Central Government. The Standard Bidding Documents provided by the Central Government under the guidelines have provision for the distribution licensee taking the responsibility of evacuation of power from the bus bar of a generating station located in the State of distribution licensee which is procuring power. If deviation is required to be made in the Standard Bidding Document then the approval of the State Commission is necessary. In the present case MSEDCL had used the RFP and PPA of Standard Bidding Document which has a provision for delivery point at the bus bar of the generating station and responsibility of the distribution licensee to take LTOA for the intra-State transmission system from the bus bar of the power station located in the State of Maharashtra. The State Commission

- misinterpreted the provisions of PPA to change the condition of bids post facto, after the award of LOI and signing of the PPA which was based on the Standard Bidding Documents, to alter the point of off-take of power from EMCO's power plant.
38. The Respondents have not quoted any provision in the Regulations which do not permit the distribution licensee to seek LOTA from the bus bar of the generating station. In fact MSETCL establishes transmission lines from the bus bars of the generating stations of the Stated owned generating companies for evacuation of power to the distribution system of MSEDCL. PGCIL also establishes transmission lines from the bus bars of generating stations of central sector power plants for inter-State transmission of electricity. Therefore, when MSEDCL had applied for LTOA from the bus bar of EMCO, the STU/MSETCL should have taken action for establishment of transmission line from the bus bar of EMCO.
39. Open Access Regulations, 2005 of State Commission defines the Applicant as a person who has made an application for open access for an intra-State transmission system in accordance with these Regulations. In the present case the Applicant was MSEDCL. The Transmission System User as per these Regulations is also MSEDCL who had been granted LTOA by STU. The Open Access Regulations allow a distribution licensee to seek open access and accordingly, MSEDCL had correctly sought open access from EMCO's power plant switchyard.
40. In judgment dated 04.02.2014, Power Corporation Ltd. Vs. R.V. Akash Ganga Infrastructure Ltd., this Tribunal decided as under:
- "25. According to Section 10 of the Electricity Act 2003, subject to the provisions of the Act, the duties of the generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected*

therewith in accordance with the provisions of the Act or the rules or regulations made there under. According to the Electricity (Removal of Difficulty) Fifth Order, 2005, the generating company does not require to obtain a licence to establish, operate and maintain dedicated transmission lines, subject to complying with certain conditions. However, there is no bar on the transmission licensee or distribution licensee to establish, operate and maintain a line connecting the generating station to the sub-station of transmission licensee or distribution licensee and such transmission system to be operated as part of intra-State transmission system or distribution system, if the State Commission in its Regulations has decided the point of inter-connection at the bus bars of the generating station.”

41. The State Commission has given directions to EMCO to LILO one of its dedicated line viz. 400 kV EMCO-Bhadravati at Warora sub-station of MSETCL at EMCO's cost. We feel that such directions changing the point of delivery of power after award of contract not only vitiate the bidding process undertaken by MSEDCL but also without any jurisdiction. The dedicated line of EMCO is connecting EMCO's power station to the sub-station of PGCIL for inter-State transmission of electricity. Such LILO has to be implemented only in coordination with CTU. Further, dedicated line for point to point transmission of power from a generating station to CTU system cannot be tapped at a STU sub-station. In such case, the portion of the dedicated transmission line from Warora sub-station to PGCIL's Bhadravati sub-station will not remain as a dedicated transmission line and will form a part of inter-State transmission line. In our opinion, State Commission had no authority to direct EMCO to LILO one of its dedicated transmission line from EMCO's power station to PGCIL's sub-station at MSETCL's sub-station.

42. In view of above Appeal is allowed and impugned order is set aside. Till the evacuation arrangement for off-take of power from the bus bar of EMCO's generating station is provided by MSEDCL. EMCO will supply power to MSEDCL through its dedicated transmission line through the inter-State transmission system. During the period of power supplied to MSEDCL through inter-State transmission system, MSEDCL shall bear the transmission charges and losses for use of inter-State transmission system. By the interim order dated 11.02.2014 this Tribunal without prejudice to the rights of the parties had permitted commencement of power supply from EMCO to MSEDCL through the inter-State transmission system. The charges for transmission system of Powergrid were to be borne by EMCO subject to the outcome of the Appeal. The charges for use of inter-State transmission system borne by EMCO as per the interim order shall be reimbursed to EMCO by MSEDCL within 30 days of passing of this judgment. Any delay beyond 30 days in reimbursement of the transmission charges for the inter-State transmission system by MSEDCL which was born by EMCO in the interim period, EMCO will be entitled to delayed payment surcharge as per the provisions of the PPA.
43. No order as to costs.
44. Pronounced in the open court on this **8th day of May, 2015.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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