Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.192 of 2012

Dated:03rd July, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER

In the Matter of:

Tata Power Trading Company Limited.,
Tata Power Mahalaxmi Receiving Station,
Bapat Marg, Lower Parel,
Mumbai-400 013

…Appellant

Versus

1. **Maharashtra State Electricity Distribution Co. Ltd.,**
   Prakashgad, 5th Floor,
   Bandra (East),
   Mumbai-400 051

2. **Maharashtra Electricity Regulatory Commission,**
   World Trade Centre No.1,
   13th Floor, Cuffe Parade,
   Colaba, Mumbai-400 001

…… Respondent

Counsel for the Appellant(s) : Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo

Counsel for the Respondent(s): Ms. Madhavi Divan,
Mr. Ramni Taneja
Mr. Kiran Gandhi for R-1
Mr.Buddy A Ranganadhan for R-2,
Ms. Richa Bhardwaja for R-2

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Tata Power Trading Company Limited is the Appellant herein.

2. The Appellant filed a Petition before the Maharashtra Electricity Commission(State Commission) claiming for the liquidated damages from the Maharashtra State Electricity Distribution Company Limited (MSEDCL) for the breach of contract by refusing to take delivery of electricity from the Appellant.

3. The Maharashtra State Commission dismissed the said Petition by the impugned order dated 15.6.2012.

4. Aggrieved by the same, the Appellant has filed this Appeal.

5. The short facts leading to the filing of this Appeal are as follows:

(a) The Appellant is a Power Trading Company having its office at Mumbai. The Central Commission granted inter-state trading licence to the Appellant to undertake trading of electricity throughout the territory of India.

(b) Maharashtra State Electricity Distribution Company Limited (MSEDCL), is the First Respondent. It is a Distribution Licensee in the State of Maharashtra. It procures electricity from various sources for Distribution in the State of Maharashtra.

(c) The Distribution Licensee (R-1) issued a tender on 18.2.2010 for procurement of electricity through competitive bidding by inviting bids from various persons including Generators, Trading Licensees etc., for the supply of electricity in the month of June, 2010 for the quantum of 500 MW.

(d) In response to the said tender, the Appellant on 8.3.2010 submitted its bid offering to supply electricity.

(e) In the tender issued by the Distribution Licensee on 18.2.2010, a specific condition was imposed to the effect that the bidder shall identify the source of supply of electricity and in case, the bidder decides to supply electricity through some source other than the identified source, then the bidder should obtain prior permission of the Distribution Licensee for supply of electricity from such other source. However, the Appellant in the bid offer dated 8.3.2010 suggested a different condition in the foot note to Annexure that the Appellant shall have the option to supply electricity from an alternate source

provided that the landed cost of the electricity supply to the Distribution Licensee was the same.

(f) The Appellant in the bid offer specified the sources also from whom the power will be procured and supplied to the Distribution Licensee (R-1) and also the delivery points.

(g) The offer bid submitted on 8.3.2011, by the Appellant also provided for the "Take or Pay" compensation to be paid by the party in case of default by the other party.

(h) After receipt of the said bid, certain clarifications were sought for by the Distribution Licensee (R-1) from the Appellant. Accordingly, the same were furnished by the Appellant. Thereafter, by communication dated 22.3.2010, the Distribution Licensee (R-1) accepted the bid offer of the Appellant and issued the Letter of Intent for procurement of 99 MW electricity from the Appellant which included 15 MW from CPP in West Bengal and 24 MW from CPP in Karnataka being the identified source.

(i) The Letter of Intent dated 22.3.2010, also provided that in case a separate Power Purchase Agreement was not signed between the parties, the terms and conditions as provided in the Letter of Intent

dated 22.3.2010, including the liquidated damage clause would apply.

(j) The Appellant and the Distribution Licensee did not enter into a separate Power Purchase Agreement and as such the terms and conditions provided in the Letter of Intent became effective agreement between the parties.

(k) The Appellant sent a letter to the Distribution Licensee (R-1) on 24.5.2010 informing it regarding the change of source of supply by which the Appellant offered to supply 39 MW of electricity from an alternate source namely from Gujarat Urja Vikas Nigam Limited for the entire month of June, 2010 by specifically mentioning that the expected landed cost from the alternate source would not be more than the expected landed cost for the power from sources identified earlier.

(l) The Distribution Licensee (R-1) sent a reply on 31.5.2010 to the Appellant that it did not wish to avail power from the alternate source as offered and that the Letter of Intent shall remain amended to that extent. In the meantime, the Appellant made an application for Open Access on 26.5.2010. On this Application, permission was said to be granted by the Western

Regional Load Despatch Centre and by the Maharashtra State Load Despatch Centre for transmission of electricity from Gujarat Urja Vikas Nigam Limited., the seller of the electricity to the Distribution Licensee.

(m) In view of the breach of the terms by refusing to receive the supply, the Appellant by the communication dated 19.7.2010, sent a notice to the Distribution Licensee (R-1) claiming compensation of Rs.2,03,48,000/- (Two Crore Three Lacs and Forty Eight Thousand) for the failure of the Distribution Licensee (R-1) to off take the electricity from the Appellant as per the agreement between the parties.

(n) Denying this claim, the Distribution Licensee (R-1) sent a reply on 28.7.2010 informing the Appellant that Distribution licensee was not liable to pay the compensation since the Appellant had not taken prior permission for supply of power through the alternate source before making such arrangements.

(o) Under those circumstances, the Appellant approached the State Commission on 6.12.2010 and filed a Petition in case No.91/2010 praying for adjudication and payment of compensation from the

Distribution Licensee in terms of the agreement between the parties.

(p) The State Commission after hearing the parties, dismissed the Petition by the impugned order dated 15.6.2012, holding that the Appellant is not entitled to get the liquidated damages.

(q) The Appellant, being aggrieved by this impugned order, has filed this Appeal.

6. The learned Counsel for the Appellant has assailed the impugned order on the following grounds:

(a) The contract between the parties i.e. Appellant and the Distribution Licensee was reached in terms of the bid offer submitted by the Appellant and the Letter of Intent issued by the Distribution Licensee (R-1) accepting such a bid. According to the terms of Letter of Intent, in case a separate Power Purchase Agreement was not signed between the parties, the terms and conditions as provided in the Letter of Intent shall apply to both the parties. Thus, the Letter of Intent would prevail over any other document relating to the transactions. As such, the State Commission should not have relied upon the tender document wherein it was stipulated that prior permission of the

Distribution Licensee was required for sourcing electricity from alternate source.

(b) The offer bid submitted by the Appellant and the Letter of Intent issued by the Distribution Licensee clearly provided that it was open to the Appellant to get the electricity from the alternate source provided that the landed cost at MSEDCL of the electricity supplied to the Distribution Licensee from the alternate source remains the same. Therefore, it was not open to the State Commission to rely upon the tender document stipulating the prior permission of the Distribution Licensee and the condition mentioned in the Letter of Intent dated 22.3.2010 that the Appellant will have the option to supply from an alternate source at the same landed cost, would alone prevail.

(c) The State Commission has gone wrong in relying upon Clause 11 of the Tender Document for obtaining prior permission of the Distribution Licensee to supply electricity through an alternate source. The provisions of the Tender Document are not applicable to the present case since the Distribution Licensee in its Letter of Intent expressly accepted the stipulation made by the Appellant in its bid that the Appellant would have the option of supplying power from an alternate source at the same landed cost.

(d) The State Commission was only concerned with the supply of electricity by the Appellant and the contracted price for which the electricity is to be supplied to the Distribution Licensee. So long as the Appellant is supplying the agreed quantum at the agreed price to the Distribution Licensee, there can be no legal objection whatsoever to the source of supply.

(e) The State Commission has given a wrong finding that no Open Access was granted to the Appellant for supply of electricity to the Distribution Licensee from Gujarat Urja Vikas Nigam Limited. In fact, the Open Access was obtained by the Appellant for sourcing electricity from Gujarat Urja Vikas Nigam Limited and on the basis of the said Open Access, the Appellant actually supplied some quantum of electricity from Gujarat Urja Vikas Nigam Limited to the third party to mitigate the loss during the month of June, 2010. Despite the above factual position, the State Commission erred in coming to the conclusion that no Open Access was granted.

(f) The State Commission failed to appreciate the inconsistent stand taken by the Distribution Licensee. The original stand taken by the Distribution Licensee was that there was no restriction whatsoever on the Appellant to source the electricity from a different

source and that only the proof of failure of the generator i.e. identified source, was not made available to the Distribution Licensee. However, the Distribution Licensee subsequently changed its stand by pleading that prior permission of the Distribution Licensee was required for sourcing electricity from alternate source. Therefore, the State Commission failed to take note of this while passing the impugned order.

7. Elaborating these grounds, the learned Counsel for the Appellant has advanced detailed arguments and prayed for setting aside the impugned order and for consequential directions to the Distribution Licensee for payment of liquidated damages.

8. The learned Counsel for the Distribution Licensee (R-1) would make the following reply:

(a) Both the tender conditions as well as the Letter of Intent conditions require the grounds to be established for a change of source of power. The tender condition permitted a change of source of power only when the corridor is not available. Only in that case, the bidder could approach the Distribution Licensee and obtain prior permission for change of source. This clause was unequivocally accepted by the Appellant as it was not mentioned in the deviation schedule attached with the

Letter of Offer dated 8.3.2010 submitted by the Appellant.

(b) The Letter of Intent conditions requires that the Appellant has to make out a case of failure of the Generator at the source of supply. Any revision of schedule requires the mutual consent of the parties. This condition has not been complied with by the Appellant.

(c) Even assuming that the Letter of Conditions alone should be relied upon and not the conditions in the tender notice, the Appellant failed to make out a case of failure of the generator at the source of supply as per the conditions of Letter of Indent. In fact, no mention of alleged failure to get supply from the identified source was made in the Letter dated 24.5.2010 sent by the Appellant while informing the arrangements for alternative source to the Distribution Licensee. Even though there was a slight reference made in the subsequent letter dated 19.7.2010 sent to the Distribution Licensee about the alleged failure of the Generator at the source of supply, no other materials were produced before the State Commission to establish the same.

(d) The main prayer claiming the liquidated damages was on the basis that Open Access approval was obtained from the authorities. The factual finding of the State Commission in the impugned order was that no such Open Access approval was obtained by the Appellant as no proof was produced to establish the same before the State Commission. Therefore, this finding cannot be said to be wrong.

(e) In the absence of the grant of Open Access approved no claim for liquidated damages could be made under Clause 4(a) of the Letter of Intent.

9. On the basis of this reply, the learned Counsel for the Distribution Licensee (R-1) prayed for the dismissal of this Appeal.

10. In the light of the above submissions, the following questions would arise for consideration:

(a) Whether the State Commission was justified in relying upon Clause 11 (V) and (VII) of the Tender Document, while Clause 3 (c) of the Letter of Intent provides that prior permission is not required in the event of supply of power from alternate source at the same landed cost ?

(b) Whether the State Commission was correct in giving the finding that it was not established that there was a failure of the Generator at the source of supply.

(c) Whether the State Commission was right in rejecting the claim of the Appellant for compensation under Clause 4 (a) of the Letter of Intent on the ground that Open Access was not granted to the Appellant when it is claimed by the Appellant that Open Access in fact had been granted?

11. Before dealing with this question let us now refer to the crux of the findings rendered by the State Commission in the impugned order:

(a) The bid document i.e. tender document dated 18.2.2010 issued by the Distribution Licensee would provide that in case, the corridor is not available from the identified source and the bidder decides to supply electricity through the alternate source, then the bidder should obtain prior permission of the Distribution Licensee. Responding to the tender notice, the Tata Company in the Petition sent the offer on 8.3.2010 in accepting the said conditions. No deviation in this respect was sought for by the Petitioner through its bid documents. So, the bid document dated 18.2.2010, which was an invitation to make an offer was accepted

by the Petitioner, Tata Power Company in submitting their bid documents dated 8.3.2010 giving the offer. This was accepted by the Distribution Licensee by issuing Letter of Intent dated 22.3.2010. The Terms and Conditions in the Bid Document and Letter of Intent, in the absence of formal PPA, shall be binding on the parties.

(b) Therefore, the conjoint reading of all these conditions mentioned in all these three documents namely tender document, bid offer and Letter of Intent would indicate that prior permission of the Distribution Licensee should be taken in the event Petitioner decided to supply power from alternate source due to non availability of the corridor from the identified source. According to Petitioner, the Corridor was not available from the identified source and therefore, the Petitioner offered to supply to the Distribution Licensee through the alternate source. If it is so, the Petitioner as per the conditions in the tender document, should have obtained prior permission of the Distribution Licensee. Admittedly, this was not obtained by the Petitioner.

(c) It is true that in the Letter of Intent, there was no condition that prior permission for procurement of power from alternate source requires to be obtained

from the Distribution Licensee. But, in the Letter of Intent dated 22.3.2010 issued by the Distribution Licensee required the Tata Power Company to book the corridor after the receipt of the consent from the Distribution Licensee.

(d) The reading of the Letter of Intent in entirety would indicate that prior to the application filed by the Tata Power Company to the State Load Despatch Centre for obtaining Open Access in order to get the power from alternate source namely Gujarat Urja Vikas Nigam Limited, the Petitioner has to obtain the prior permission from the Distribution Licensee since it is the implied condition mentioned in the Letter of Intent. Further scheduling as referred to in the Letter of Intent was not a blanket right given to the Petitioner to secure power from any other source. As such, the Tata's leeway to procure power from alternate source was not unbridled right.

(e) On the other hand, the Petitioner has to establish the aspect of the failure of the Generator i.e. identified source at the source of supply and consequently the corridor was not available. This aspect has not been proved. The Petitioner was duty bound to explain to the Distribution Licensee about the reasons as to why no corridor was available from the identified sources

namely West Bengal and Karnataka and to seek consent for scheduling of power from alternate source. In the absence of the proof for the same, the Petitioner is not entitled to claim compensation.

(f) From the documents submitted by the Petitioner, it is noticed that the application dated 26.5.2010 was made by Petitioner to the Load Despatch Centre to seek Open Access approval. But, there was no material to show that the Open Access was granted by the Load Despatch Centre and consent letter was obtained from the Distribution Licensee prior to the filing of said application. Thus, it is clear that no Open Access was granted to the Petitioner.

(g) The condition of Letter of Intent provides that the Distribution Licensee shall be liable to pay compensation to the Petitioner only when the Distribution Licensee fails to avail 80% of the approved Open Access capacity supplied by the Petitioner. In this case, the question of the distribution licensee compensating the Tata Power Company would not arise since Open Access mentioning the Capacity was not obtained.

12. Bearing the above findings in mind, we shall now analyse the questions framed above one by one.

13. Let us deal with the **first issue** relating to the **prior permission to be obtained from the Distribution Licensee for supply of electricity from alternate source.**

14. In an integrated electrical grid, the electricity follows the laws of physics i.e. it follows least impedance path and electricity generated is delivered to its beneficiary by way of displacement. In the present case, electricity generated by Generators in West Bengal and Karnataka would have been consumed in the Eastern or Southern Regions and Distribution Licensee (R-1) would have received electricity generated in Gujarat, MP or AP. Under such factual situation the question arises as to what was the necessity of putting condition of prior permission of Distribution Licensee in the event of change of source as it was not expected to receive electricity from identified sources in the integrated system.

15. The answer to this question lies in clause related to open access charges in the offer of the Appellant as well as in Clause 2 of the LOI dated 22.3.2010. Both these clauses stipulate that the Open Access charges i.e. Transmission Charges, Operating Charges, Energy Losses etc beyond delivery point shall be borne by the Distribution Licensee (R-1). The Appellant in its offer dated 8.3.2010 had indicated delivery point as interconnection point between CPP and DTL in West Bengal and interconnection point

between CPP and KPTCL in Karnataka. Thus, the Distribution Licensee was required to bear all the Open Access charges beyond these delivery points and, therefore, required to know any change in source of supply because it would involve change in corridor and consequently Open Access charges including Transmission losses.

16. On this issue, the case of the Appellant is as follows:

> "As per the applicable terms and conditions contained in the Letter of Intent, there is restriction on the Appellant to source the power from alternate source and supply the same to the Distribution Licensee only when the landed cost of the supply between the Distribution Licensee did not increase as a result of the change of source. In this case, the landed cost was not more. Therefore, refusal to avail power from alternate source by the Distribution Licensee was illegal in breach of the terms of the agreement. The State Commission cannot hold that the tender notice dated 18.2.2010 should form a part of the Agreement between the parties and then by implication, an additional condition should be read into agreement that the prior permission of the Distribution Licensee was required for the Appellant to supply electricity through the alternate source. Therefore, the conclusion by the State Commission on the basis of the Tender Notice

dated 18.2.2010 with regard to the prior permission is totally wrong."

17. Let us quote the said relevant findings of the State Commission in the impugned order:

> ***"b.*** *Thereafter, no deviations were sought by TPTCL in its bid document dated 8th March 2010 in respect of the aforesaid terms and conditions in clause 11 as mentioned in the MSEDCL's Bid document, when it submitted the same to MSEDCL. So in effect it means that firstly* ***MSEDCL's bid document dated 18th February 2010 was an invitation to make an offer, thereafter the action of TPTCL in submitting the bid document dated 8th March 2010 was an offer made by it, which was accepted by MSEDCL by the signing of an LOI dated 22nd March 2010.*** *The Terms and conditions of the LOI mentioned that in absence of a formal PPA the said Terms and conditions shall be binding, so in effect TPTCL had submitted its offer after having regard to the aforesaid terms and conditions in the Initial Bid Document issued by MSEDCL for which no deviation were sought in the subsequent bid document (offer) submitted by it.*
>
> *Therefore the conjoint reading of all these indicate that the Bid Document contemplated that a prior permission of MSEDCL should be taken in the event TPTCL required to supply power from alternate source is owing to the non-availability of corridor".*

18. According to the Appellant, the conditions provided in the Letter of Intent dated 22.3.2010 on the basis of the offer made by the Appellant on 8.3.2010 would prevail over the earlier tender notice dated 18.2.2010 issued by the

Distribution Licensee but the State Commission has wrongly held in the impugned order that as per the Letter of Intent in the absence of any separate power Purchase Agreement, the terms and conditions mentioned in all the three documents including the Tender Notice, shall be applicable.

19. Let us refer to those conditions referred to and provided in all these three documents:

1St Document is dated 18.2.2010: (Tender notice)

Relevant Condition is as follows:

"a. Initial Bid/Tender Document dated 18 February 2010 was issued by MSEDCL provides inter alia as under:-

Clause 11 Other Terms and Conditions

(V) The bidder should preferably supply the quantum of power from one source(Generator)only. If the quantum of power is supplied from different sources, it should be indicated clearly".

(VII) The bidder should book the corridor for the shortest route once the order is issued for supply of power. MSEDCL will not bear the extra Open Access charges due to change in corridor for power supply on Account of delay in obtaining Open Access approval. In case the corridor is not available and the Bidder desires to supply the contracted quantum of power through other source/corridor, then Bidder should obtain prior permission of MSEDCL. Even if Bidder supplies contracted quantum through source/corridor different from that referred to in order, then Bidder himself will be responsible for the charges over and above the agreed charges as per the order towards

the change in rate, Open Access charges, Transmission loss and scheduling charges etc.,".

(XV) *After receipt of Letter of Award or Order for supply of power, the bidder should immediately book the corridor for contracted quantum for the period of supply and acknowledge the same,* ***otherwise it will be treated as order is accepted and all terms and conditions of the order placed by MSEDCL and this tender shall be applicable."***

(XVI) Daily schedule will be intimated 24 hrs in advance and <u>any revision in Schedule shall be implemented only with mutual consent</u> and the party seeking the revision shall lease the application fees, rescheduling charges etc.,"{Emphasis Supplied}.

20. The condition put in the tender notice referred to above, would reveal that the bidder should supply to the Distribution Licensee from the identified source and in case the Corridor is not available from the said source, then bidder should obtain prior permission of Distribution Licensee for supply through the alternate source. Further, in case the bidder failed to acknowledge the acceptance of offer it will be treated that the offer has been accepted and terms and conditions of the tender document and offer shall be applicable.

21. Now let us see the 2nd Document namely the offer of the Appellant dated 08.3.2010 given in the bid documents submitted by the Appellant.

"*This has reference to the Notice inviting Tender No.CE(PP)T-2/2010 for Purchase of power for 500 MW*

RTC power on Firm Basis during 1st June 2010 to 30th June 2010. We are pleased to submit herewith our power trading bid. We have carefully perused the above tender specifications and agree to abide by the same subject to the deviations indicated in the Deviation Schedule enclosed herewith."

22. According to the Appellant, when the offer dated 8.3.2010 was made by the Appellant, the offer was made with a different clause in regard to change of source and supply from alternate source of supply. The offer of the Appellant was that the Appellant shall have the option to supply electricity from alternate source provided that the landed cost of the supply to the Distribution Licensee at the same landed cost. The said portion of the offer referred to is in the form of Note and Annexure A in the document dated 8.3.2010 and read as follows:

"*TPTCL shall have an option to supply from an alternate source at the same landed cost mentioned above."*

23. It is to be noted that there is no landed cost mentioned in the Annexure-A and the Appellant had only indicated Rate ex-bus at delivery point in the Annexure to its offer dated 08.3.2010. As pointed out in para-15 above, the landed cost to Distribution licensee would be sum of Rate of supply at delivery point and open access charges, etc, from the delivery point to MSETCL periphery. Thus, the landed cost could be determined after booking of corridor and cannot be finalised at the tender stage.

24. According to the Appellant, there is a different provision in regard to change of source of supply in variation to the condition of the prior permission mentioned in the tender notice dated 18.2.2010. However, since it is in the form of Note in Annexure having no mention of landed cost in the offer, this provision is of no consequence.

25. The offer made by the Appellant in the above document also provided for "Take or Pay" compensation to be paid by either party in case of default by the other party. In case, the Appellant failed to supply minimum quantum of electricity to the Distribution Licensee, the Appellant was required to pay a specific compensation to the Distribution Licensee. Similarly, in case, the Distribution Licensee failed to off-take the specified quantum of electricity from the Appellant, the Distribution Licensee was required to pay the liquidated damages to the Appellant. The said offer of the Appellant in 8.3.2010 reads as under:

> *"Without prejudice to the provision of force Majeure, if TPTCL fails to supply 80% of the power as per Open Access granted by RLDC/SLDC, TPTCL shall pay a compensation @ Rs. 2.00 (Rupees Two) per Kwh to MSEDCL for the quantum of power that falls short of 80% of the power as per Open Access granted by RLDC/SLDC on a monthly basis.*
>
> *On the other hand if MSEDCL fails to draw 80% of the power as per Open Access granted by RLDC/SLDC, MSEDCL shall pay compensation @ Rs. 2.00 (Rupees Two) per Kwh to TPTCL for the quantum of*

off take that fall short of 80% of power as per Open Access granted by RLDC/SLDC on a monthly basis."

26. Accepting this offer, the Distribution Licensee by the communication dated 22.3.2010, issued a Letter of Intent. As per the Letter of Intent, the total quantum of electricity to be procured by the Distribution Licensee from the Appellant was 99 MW which included 15 MW from West Bengal and 24 MW from Karnataka. It has also been specifically mentioned in the Letter of Intent that the detailed terms and conditions contained in the Letter of Intent are applicable in the absence of any separate agreement entered into between the parties.

27. Admittedly, the Appellant and the Distribution Licensee did not enter into any separate Agreement. Consequently, the terms and conditions provided for in the Letter of Intent dated 22.3.2010 were applicable including the compensation clause.

28. Letter of Intent dated 22.3.2010 provides as under:

*"3) **Scheduling***

(b)Trader/Seller should schedule power as per consent given by MSEDCL/CE(LD) Kalwa. The power shall be scheduled informally as per the Open Access granted Revision of Schedule shall not be done without consent of MSEDCL/CE(LD) Kalwa.

*(c) In case of failure of the generator(s) at the source of supply, **the Trader/Seller can make available the***

agreed quantum of power as quoted above from any other alternate source(s) in such a way that the cost of power to MSEDCL at the MSETCL periphery shall be the same as the landed cost to MSEDCL at the MSETCL periphery at the rates quoted above*. All other Terms and Conditions shall remain unchanged."*

(d) ***Revision of Schedule***

In case of revision of schedule, a consolidated request indicating the reason and mutual consent of both the parties for revision shall be submitted to WRLDC/SLDC. The Application fee and the scheduling charges shall be paid by the Applicant but shall be borne by the party seeking the revision.

29. The liquidated damages was provided in the Letter of Intent in Clause 4 (a) which is as follows:

"4) ***Compensation:***

a. Compensation payable by MSEDCL

In case MSEDCL fails to avail 80% of approved Open Access capacity during above period from Trader/Seller, then MSEDCL shall pay compensation @ 2.00 per kwh for each unit that fall short of 80% of approved Open Access.

30. From the conjoint reading of these documents, following propositions would emerge:

(a) As per Clause 11 (xv) of the Tender document dated 18.2.2010 the terms and conditions specified in the tender document and Letter of Intent would be applicable to the transaction.

(b) In terms of Clause 11 (vii) of the Tender document, the Appellant was required to book the shortest route immediately upon getting order of supply of power. In case corridor was not available and Appellant desired to supply power from other source/corridor, the Appellant was required to obtain prior permission of the Distribution Licensee.

(c) Thus, once the order for supply is placed on the Appellant, the Appellant could change the source of supply only on non-availability of corridor and with prior permission of the Distribution Licensee.

(d) Clause 3 of the Letter of Intent dated 22.3.2010 read with Clause 11 (viii) of the Tender Document deals only with day head scheduling and has nothing to do with change of source of supply ab-initio. It would come into play only in case, the identified generator fails to supply on a particular day or days. On such occasions, the Appellant had option to supply power from any other sources provided the landed cost to Distribution Licensee remains the same.

(e) The Appellant vide its offer dated 8.3.2010, had accepted the terms and conditions of the Tender Document subject to some deviations indicated in the deviation schedule enclosed with the offer. Deviation

Schedule did not indicate any change in clause 11 (vii)- requiring prior permission of Distribution Licensee for change of source. Accordingly, this Clause becomes binding on the Appellant.

(f) Annexure-A to the offer dated 8.3.2010 specified only the rate of power at Ex-bus at delivery point and not the landed cost. Note to Annexure mentions that the Appellant shall have an option from an alternate source **at the same landed cost as mentioned above**. However, there has not been any mention of the landed cost in the Annexure A.

(g) The offer dated 8.3.2010 made by the Appellant was subject to the confirmation by the Appellant after issuance of LoI by the Distribution Licensee.

(h) There is nothing on record to show that the Appellant had confirmed or accepted the LoI. Thus, the contract can be considered to be concluded contract only by virtue of clause 11(XV) of Tender Document.

31. It is clear from the above analysis that prior permission of the Distribution Licensee was required to be taken by the Appellant for effecting any change of source.

32. Reliance placed by the Appellant on Clause 3 (c) of the Letter of Intent dated 22.3.2010 is misplaced. Clause 3 of the Letter of Intent deals with scheduling and is not

applicable on change of source ab-initio. It would be applicable only in case the identified generator fails on a particular day, due to any reason, to deliver scheduled power then the Appellant may supply power from any other source.

33. As brought in Para 15 above, the distribution licensee was liable to pay Open Access Charges including transmission charges and energy losses beyond delivery point and it had right to know any change in corridor resulting into change in its liability towards Open Access Charges.

34. To support its argument, the Appellant has quoted the judgment of Hon'ble Supreme Court in the case of DDA Vs Joint Action Committee of SFS Flats (2008) 2 SCC 672.

35. This authority has laid down the principle that once a valid contract has been entered into, one party cannot unilaterally change the terms of contract. The ratio of this judgment would not apply to the present case as Clause 11 (xv) of the Tender Document provides that Terms and Conditions in Tender Document along with Terms and Conditions specified in the Letter of Intent would be applicable. Clause 11 (vii) provides for prior permission of the Distribution Licensee for any change of source due to non-availability of corridor. Thus, the Distribution Licensee has not changed any condition unilaterally. The State Commission has

correctly held that tender Document dated 18.2.2010 also forms part of the Agreement between the parties and as such the conditions specified in the Tender Document also should be read in to the Agreement.

36. The learned Counsel for the Appellant submitted that it is settled law that a contract during its subsistence is binding on the parties. It is not open to one party to unilaterally amend the terms of the contract. This settled proposition of law has been laid down by the Hon'ble Supreme Court in the case of Delhi Development Authority V Joint Action Committee, Allottee of SFS Flats, (2008) 2 SCC 672 which is as under:

> ***"62.*** *It is well-known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout.* ***A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject-matter of a public notice.*** *Apart from the fact that the parties rightly or wrongly proceeded on the basis that the demand by way of fifth instalment was a part of the original Scheme, DDA in its counter-affidavit either before the High Court or before us did not raise any contra plea. Submissions of Mr Jaitley in this behalf*

could have been taken into consideration only if they were pleaded in the counter-affidavit filed by DDA before the High Court.

……..

***66.** The stand taken by DDA itself is that the relationship between the parties arises out of the contract. **The terms and conditions therefor were, therefore, required to be complied with by both the parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract-making process. The parties thereto must be ad idem so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allottee. Having not done so, it, relying on or on the basis of the purported office orders which are not backed by any statute, new terms of contract could (sic not be) thrust upon the other party to the contract.** The said purported policy is, therefore, not beyond the pale of judicial review. In fact, being in the realm of contract, it cannot be stated to be a policy decision as such."*

37. According to the Appellant, so long as this condition of landed cost not being higher was fulfilled, there cannot be any other condition imposed upon the Appellant merely because the said condition was prescribed in the Tender Document. The offer dated 8.3.2010 and the letter of Intent dated 22.3.2010 accepting the said offer alone could be

considered to be an agreement. Once an agreement based on the offer and acceptance comes into force, the prior document including the tender notice issued by the Distribution Licensee have no relevance and no additional conditions can be read into the agreement based thereon. In order to substantiate this point, the learned Counsel for the Appellant has cited the judgment of Hon'ble Supreme Court reported in (2007) 13 SCC 236 Security Printing and Mining Corporation v. Gandhi Industrial Corporation as under:

> *"16. After hearing the counsel for the parties and perusing the record we are of the opinion that the view taken by the arbitrator and affirmed by the learned Single Judge and the Division Bench of the High Court cannot be sustained. Firstly, when the terms and conditions have been reduced (sic to writing) in the supply order dated 31-5-1995, therein the condition of MODVAT credit was incorporated and it was accepted by the claimant. The contract had come into existence and the supply had been started on the basis of that supply order. Though the claimant had protested with regard to this clause but the Appellant did not accede to the request of the respondent for deleting that clause and the Appellant had informed the claimant on 30-12-1995 that there was no change in the conditions of the supply order still claimant continued to supply the goods as per the order. Therefore, on the face of this condition there is no going back from that. In case the claimant was not inclined to accept this clause he could have very well withdrawn from the contract. But it did not do so and continued with the contract. Therefore, on the basis of the clear term of the contract, the claimant is bound by it and it has to*

restore whatever MODVAT credit received by it to the Appellant security press. The view taken by the arbitrator that since it was not the condition when the tender was floated is not correct as after the complete contract having come into existence, there is no purpose to refer to the terms of tender. What is binding is the completed contract and not the terms of offer of the advertisement. Whatever may be the offers in the advertisement, once the completed contract has come into existence, this is binding. There are no two opinions in the matter in the present case that the terms and conditions of the supply order dated 31-5-1995 were complete. Therefore, what is binding is the terms of the contract and not the terms in the offer of advertisement. Therefore, under these circumstances the view taken by the arbitrator as well as the learned Single Judge and the Division Bench of the High Court is ex facie illegal. It is true that normally the courts are very slow in interfering with the findings and interpretation given by the arbitrator. So far as the principle of law is concerned, there are no two opinions and it has to be accepted. But the fact remains that if any perverse order is passed, then the courts are not powerless to interfere with the matter. As pointed out above, once the concluded contract has come into existence, then in that case the offer of advertisement cannot override the terms and conditions of the completed contract. Therefore, in our opinion, the view taken by the arbitrator, as affirmed by the learned Single Judge and the Division Bench of the High Court on the face of it is illegal and against the law."

38. The gist of the ratio laid down by the Hon'ble Supreme Court is as follows:

(a) What is binding on the parties is the complete contract and not the terms of the offer of the advertisement. Whatever may be the offer in the advertisements, once the complete contract has come in to existence, the condition in the completed contract alone is binding and not the terms in the offer of advertisement.

(b) Once the complete contract has come into force, then in that case, the offer of advertisements cannot over ride the terms and conditions of the complete contract.

39. The ratio of the case would also not be applicable to the present case for the reason that the Tender Document dated 18.2.2010 was not a mere advertisement but was a complete document specifying detailed terms and conditions for supply of power. The Appellant in its offer dated 8.3.2010 has clearly mentioned that it had carefully perused the tender specification and agreed to abide by the same subject to deviation schedule. The deviation schedule in the offer did not mention the requirement of prior permission in case of change of sources. Thus, the Appellant had agreed to the conditions of prior permission. Clause 11 (xv) specifically provides that the terms and conditions in the tender document and in the order would be applicable since

the Appellant did not propose any deviation in this Clause and has, therefore, accepted the same.

40. As brought out in Para-21 above, the offer dated 8.3.2010 clearly mentioned that the offer is subjected to acceptance of Letter of Intent issued by the Distribution Licencee. There is nothing on record placed before this Tribunal to show that the Appellant had accepted the Letter of Intent. Thus, the contract cannot be considered to be a concluded contract but for clause 11(xv) of the Tender Document which provides that the bidder shall accept the offer failing which it shall be considered that the offer has been accepted. Thus, the Tender Document forms integral part of the contract, otherwise, there was no binding contract at all.

41. In view of the above, we find that the conclusion arrived at by the State Commission to the effect that the condition in the Tender Notice dated 18.2.2010 providing for the prior permission of the Distribution Licensee for the supply of electricity from alternate source also must be read into the agreement between the parties is correct and no interference is warranted by this Tribunal. So, the first issue is decided against the Appellant.

42. Let us now discuss about the **2nd Question** regarding the failure to establish that there was a failure to get supply from

the Generators at the source of the Supply, the identified source.

43. As the 1st issue had been decided against the Appellant holding that the conditions in the tender document would also apply, this issue has become in-fructuous. However, we would like to decide this question on its merits for the sake of completion.

44. Now, according to the Respondent with reference to the 2nd issue even assuming that the Letter of Intent conditions can alone be considered, de-horse the tender conditions, the Appellant altogether failed to make out the case that there was failure of the Generator at the source of supply under Clause 3 (c) of the Letter of Intent conditions to supply electricity and therefore, the Appellant resorted to the option of getting supply from the alternate source.

45. It is further contended by the Respondent that there was no mention of the said failure of the identified generators in the letter dated 24.5.2010 sent by the Appellant to the Respondent Distribution Licensee informing about the arrangements of alternate source and in the absence of the proof of the same, by producing materials before the State Commission, the Appellant would not be entitled to claim the compensation.

46. Let us now go into this aspect and refer to Clause 3 (c) of the Letter of Intent:

> ***"3)(c):*** *In case of failure of the generator(s) at the source of supply, the Trader/Seller can make available the agreed quantum of power as quoted above from any other alternate source(s) in such a way that the cost of power to MSEDCL at the MSETCL periphery shall be the same as the landed cost to MSEDCL at the MSETCL periphery at the rates quoted above. All other Terms and Conditions shall remain unchanged."*

47. According to the Appellant, the sourcing of 39 MW of electricity by the Appellant from the State of West Bengal and Karnataka could not be effected on account of factors beyond the control of the Appellant due to the fact that the Karnataka State Government gave directions u/s 11 of the Act, 2003 and corridor from West Bengal was not available and, therefore, they informed this to the Distribution Licensee and made arrangements for getting power from the alternate source as per the conditions referred to in Clause 3 (c) of the Letter of Intent.

48. Let us refer to the findings on this issue given by the State Commission which is as under:

> *"(d) From the documents placed on record it is clear on plain reading that the Petitioner's leeway to procure power from alternate sources was not an unbridled right, it was subject to conditions viz.,*
>
> > *(i) Clause 3 (c) in Annexure 1 to the letter of Intent dated March 22, 2010 provides that "3 (c)*

In case of failure of the generator(s) at the source of supply, the trader/seller can make available the agreed quantum of power as quoted above from any other alternate source(s)…."

(ii) Clause (vii) of the Bid document for purchase of 500 MW is RTC power on firm basis during June 1, 2010 to June 20, 2010 states "….. In case the corridor is not available and Bidder desires to supply the contracted quantum of power through other source/ corridor, then Bidder should obtain prior permission of MSEDCL".

Admittedly, none of the above conditions could be proved by documentary evidence viz failure of the generator(s) at the source of supply. The Commission is of the view that if due to Section 11 directions by State Governments the generators could not supply outside their State periphery then TPTCL should have submitted documentary evidence to MSEDCL about the same and ought to have taken up the matter at some level of conclusion or mitigation. However, nothing of the sort took place and simpliciter a contract was entered into with an alternate party viz GUVNL. Some meaning has to be given to the words " In case of failure of the generator(s) at the source of supply". Whether the generator failed or not is to be recognized by MSEDCL as well as TPTCL and not only by TPTCL. However, TPTCL went ahead on the basis that the generator failed and did not bother to seek the buy in of MSEDCL on the issue of failure due to Section 11 directions of the State Government. These would point out to one sided actions by TPTCL. There were no joint discussions between the parties on the aspect of "failure of the generator(s) at the source of supply".

Hence, the Commission is of the view that the condition required for triggering the right of TPTCL to

supply from alternate source/s has to be said not to have occurred. Hence, how can TPTCL claim any compensation to meet its liability with the third party (alternate source) from which it contracted to procure power when TPTCL itself did not have the right at that point in time to procure from alternate sources. Therefore, TPTCL's claim is not sustainable.

If the generator has failed to supply to TPTCL due to Section 11 directions TPTCL should proceed against the generator and claim damages. It should thereafter compensate GUVNL from the monetary damages it receives from the generator which failed to supply.

The Commission notes that the failure to supply 15 MW by the CPP in West Bengal is not due to Section 11 directions of the State Government. If 15 MW power from CPP in West Bengal was not available due to the SLDC not giving necessary Open Access clearance then TPTCL was duty bound to inform MSEDCL with reasons and seek mutual consent for scheduling of the power from alternate source. Why the generator failed to supply to TPTCL was required to be discussed by TPTCL with MSEDCL and their buy in sought. TPTCL could not have moved on its own to contract out 15 MW (being part of 39 MW) from GUVN".

49. The gist of the findings is as follows:

(a) When the Appellant was unable to get supply from the Generators in WB and Karnataka, the Appellant should have submitted documentary evidence to the Distribution Licensee about the inability and ought to have come to some level conclusion through mutual discussion. The wordings

in Clause 3 (c) "in case of failure of the Generator(s) at the source of supply" should not mean that the Tata Power Company could go ahead for arranging alternate source on the basis that the Generator failed without having discussion with the Distribution Licensee on the issue of failure of the Generator at the source of supply due to unavoidable situation. This is one sided action of the Tata Power. Admittedly, there was no joint discussions between the parties on the aspect of failure of the generator(s) at the source of supply.

(b) The reason for the failure to get supply from WB and Karnataka should have been informed to the Distribution Licensee and sought mutual consent for scheduling of the power from the alternate source. This was not done. Therefore, the condition contained in Clause 3 (c) of the Letter of Intent cannot be said to be fulfilled.

50. In the light of the said findings, let us discuss the issue now.

51. It is not in dispute that there is a specific condition mentioned in Clause 3 (c) of the Letter of Intent with regard to the failure of the identified Generators at Karnataka and West Bengal as the source of supply in order to resort to the option of getting supply from alternate source. The first

information which was conveyed by the Appellant to the Distribution Licensee with regard to their option for getting supply from alternate source was through the letter dated 24.5.2010. The letter dated 24.5.2010 is reproduced below:

"TPTCL/MSEDCL/KK/FY11/523

24th May, 2010

Chief Engineer (Power Purchase)
Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, 5th Floor,
Mumbai 400051
Fax: 022-26580645

Dear Sir,

Sub: Sale of power to MSEDCL for the month of June 2010

This has reference to your LOI No. MSEDCL/PP/TPTCL/8750 Dated 22.03.2010. We would Like to inform you that TPTCL has received LOI from MSEDCL for purchase of 15 MW power from CPP in West Bengal and 24 MW from CPP in Karnataka for the month of June 2010. We would be in a position to supply this quantum of power from a single alternate source, GUVNL, at the landed cost same as that of CPP in West Bengal and CPP in Karnataka as per your LOI. The Details are as follows:

S.No.	Source	Duration	Quantum as per LOI	Revised Quantum	Estimated Landed Cost (Rs./Kwh)
1.	CPP in West Bengal	1st -30th June 2010	15MW	NIL	6.45
2.	CPP in Karnataka	1st -30th June 2010	24MW	NIL	6.45

This shortfall in 39MW quantum of power of shall be supplied from source mentioned below:

S.No.	Source	Duration	Quantum as per LOI	Rate at Delivery point(Rs./Kwh)	Estimated Landed Cost (Rs./Kwh)
1.	GUVNL	1st -30th June 2010	39MW	5.87	6.32

` All other terms and condition will remain same as per above mentioned LOI:

Thanking you

Yours sincerely

Sd/-
(J D Kuklarni)
Chief Operating Officer

CC: CLD (Kalwa)"

52. In this letter, there is no reference about the failure of generators at West Bengal and Karnataka at the source of supply and no reasons have been given for the failure to get the supply as mandated in Clause 3 (c) of the Letter of Intent.

53. On receipt of this letter, the Distribution Company sent a reply on 31.5.2010 which is quoted as under:

"Sir,

TPTCL has offered vide the letter cited at reference (2) above to supply 30MW from SKS Ispat and 18 MW from two different alternate sources at the same landed cost as that of SKS Ispat as per the LOI dated 19.12.2009 as per which 50MW was to be supplied

from SKS Ispat during 1st to 30th June 2010. MSEDCL do not wish to avail power from the alternate sources as offered and the 30 MW available at SKS Ispat only will be avail. The LOI dated 19.12.2009 will stand amended to this extent.

Through the letter cited at reference (4) above, TPTCL has offered to supply 39Mw from GUVNL against the 15MW to be supplied from CPP in West Bengal and 24 MW to be supplied from CPP in Karnataka as per the LOI dated 22.03.2010. MSEDCL do not wish to avail power from the alternate source as offered and the LOI dated 22.03.2010 shall remain amended to this extent.

The Open Access Consent/approval for the month June 2010 may accordingly be obtain only as per the aforesaid modification to the respective LOIs:

All other terms and conditions as per the respective LOIs will remain the same and applicable in both the above cases.

Yours faithfully,

Sd/-
Director (operations)
MSEDCL"

54. The prompt reply made by the Distribution Licensee on 31.5.2010 would show that the Distribution Company did not wish to avail power from the alternate source as offered. It is true that they have not given the reasons for refusal to accept the supply on the ground that the details in the letter dated 24.5.2010 did not reflect the failure to get supply from

West Bengal and Karnataka. They simply stated in the reply dated 31.5.2010 that they did not wish to avail power from the alternate source.

55. But this reply letter dated 31.5.2010 should not be taken to mean that the Appellant has informed the Distribution Licensee about the failure of the Generators at West Bengal and Karnataka to supply contracted power due to the reasons beyond its control. The fact remains, the Appellant did not inform about its inability to get supply before it resorted to arrangements for getting supply from alternate source. But, as pointed out by the Appellant, this has been informed to the Distribution Licensee in the subsequent letter dated 19.7.2010, while claiming compensation. The relevant portion of the letter is reproduced below:

> *"Pursuant thereto, CPP in Karnataka informed TPTCL that due to the imposition of Section 11 in Karnataka, they were not in a position to supply 24 MW of power to TPTCL which in turn was supposed to be supplied to MSEDCL. Further, 15 MW power from CPP in West Bengal was also not available as the SLDC did not give the necessary Open Access clearance for the same.*
>
> *In an effort to fulfil the commitment to MSEDCL, TPTCL put a lot of effort to arrange the power from alternate sources of supply. Accordingly, TPTCL participated in GUVNL tender to supply of 39 MW power to MSEDCL at the same landed rate and under same compensation terms. TPTCL had won the*

tender and GUVNL issued an Order dated May 24, 2010 for supplying 39 MW of power to TPTCL with compensation. It was provided in the GUVNL order that in case TPTCL fails to off take 80% of the contracted capacity, TPTCL shall pay to GUVNL, a compensation @ Rs.2/-per unit for shortfall in off take.

After securing the power from GUVNL for supply to MSEDCL, TPTCL sent a letter dated May 24, 2010 to MSEDCL intimating that instead of supplying 15 MW of power from CPP in West Bengal and 24 MW of power from CPP in Karnataka, TPTCL desires to supply 39 MW of power from alternate source viz. GUVNL at the same landed cost as that of CPPs in Karnataka and West Bengal as provide din the Annexure I of Order dated March 22, 2010.

TPTCL applied to SLDC for booking corridor for the supply of power from GUVNL to MSEDCL. However, to TPCL's surprise, MSEDCL vide its letter dated May 31, 2010 just one day prior to the supply of power, unilaterally declined TPTCL's request for change in the source of power and refused to off-take 39 MW power from GUVNL without giving any reason, whatsoever.

…….

We request you to kindly arrange to pay the above compensation bill amount to Rs.2,03,48,000/- on or before the due date i.e. 29.7.2010 failing which late payment surcharge at the rate of 15% per annum will be applicable".

56. This letter would show that there is a reference about their inability to get supply from its Generators in Karnataka and West Bengal at the source of supply. The very same

reference has been made in the Petition also filed on 16.11.2010 before the State Commission which is as under:

> *"11. As per the terms and conditions applicable, there was no restriction on the Petitioner to source electricity from a different source and supply the same to the Respondent, provided that the landed cost of supply at the Respondent's periphery did not increase as a result of the change of the source. Clause 3 (c) of Annexure 1 to the Letter of Intent provides as under:*
>
> > *"In case of failure of the generator(s) at the source of supply,* ***the Trader/Seller can make available the agreed quantum of power as quoted above from any other alternate source(s) in such a way that the cost of power to MSEDCL at the MSETCL periphery shall be the same as the landed cost to MSEDCL at the MSETCL periphery at the rates quoted above****. All other Terms and Conditions shall remain unchanged."*
>
> *12. The Petitioner states that the sourcing of 39 MW of electricity by the Petitioner from the State of Karnataka and West Bengal could not be effected on account of factors beyond the control of the Petitioner including by reasons of imposition of notification by the Government of Karnataka in the State purporting to be under Section 11 of the Electricity Act, 2003."*

57. So, the above Petition filed by the Appellant before the State Commission with reference to Clause 3 (c) of the Letter of Intent, the Appellant has stated that the sourcing of 39 MW of electricity from the State of WB and Karnataka could not be effected on account of the factors beyond the control of the Appellant.

58. According to the Respondent, even though this reference has been made in the last letter dated 19.7.2010 and the Petition dated 16.11.2010, they failed to mention the same in their first letter dated 24.5.2010 which led to the refusal to get the supply from the alternate source through its reply dated 31.5.2010.

59. It is true that in the earlier letter dated 24.5.2010, the Appellant failed to mention the fulfilment of the essential conditions referred to in Clause 3 (c) of the Letter of Intent with reference to their failure to get supply, but the fact remains that this has been mentioned in the subsequent letter claiming the compensation on 19.7.2010 and their Petition dated 16.11.2010 filed before the State Commission.

60. Now, the question is whether such a plea which was made by the Tata Power Company in the Petition before the State Commission had been established by the Petitioner by producing documentary evidence before the State Commission with regard to the failure to get supply from the identified sources to enable the State Commission to come to the conclusion with reference to the fulfilment of the main ingredients of the Letter of Intent. Admittedly, those materials were not produced before the State Commission. The State Commission, after going through the Letter of Intent conditions and also having regard to the fact that this

aspect had not been informed and discussed by the Appellant with the Distribution Licensee before resorting to the alternate source has correctly decided that the Appellant has failed to establish the element of the "failure of the Generator(s) to supply at the source of supply".

61. This finding, in our view, is perfectly justified. Thus, 2nd question is decided against the Appellant.

62. The next question relates to **Open Access** which is said to have been obtained to satisfy the condition in Clause No.4 (a) of the Letter of Intent.

63. According to the Appellant, despite the fact that application for Open Access had been filed and the same had been obtained by the Appellant, the State Commission wrongly held that Open Access was not obtained and consequently, the compensation was not payable.

64. Refuting this contention of the Appellant, the Respondent submitted that the Distribution Licensee has not obtained the Open Access for supply of electricity from Gujarat Urja Vikas Nigam and therefore, the question of compensation would not arise at all. So, the question raised is whether the claim for compensation for failure to "off take" the electricity requires Open Access approval under the provisions of the Agreement and if so, whether such approval was obtained by the Appellant.

65. On this issue, the State Commission has held that grant of Open Access is essential to satisfy the condition as specified in Clause 4 (a) of the Letter of Intent to claim the compensation.

66. Let us now refer to the discussions and findings of the State Commission on this issue:

> *"**Issue No. 2**:- Was Open Access obtained for supply by TPTCL from GUVNL?*
>
> ***Finding:***
>
> *Amongst the documents submitted by TPTCL it was found that an application dated 26.05.2010 was made by TPTCL to obtain Open Access approval from WRLDC/SLDC (Gujarat & Maharashtra), however there was no document to show that such an approval was granted by the said SLDC/RLDC nor a consent letter was obtained from MSEDCL prior to the application for booking of an Open Access as required in LOI letter.*
>
> *Hence, no Open Access was obtained by TPTCL. In other words Open Access permission was yet to be granted to it by the SLDC/RLDC for the 39 MW of power which was to be procured from GUVNL (as per TPTCL letter dated 24 May 2010 to MSEDCL). On the other hand, the Terms and Conditions at Annexure 1 to the Letter of Intent dated March 22, 2010 states that MSEDCL shall be liable to pay Compensation "In case MSEDCL fails to avail 80% of approved Open Access capacity during the above period from Trader/Seller , then MSEDCL shall pay compensation @RS.2.00/KWH for each unit that fall short of 80% of the approved Open Access ". MSEDCL submitted that the question of MSEDCL compensating the Petitioner for a transaction for which Open Access has*

not been approved does not arise. The Commission sustains the contention of MSEDCL. TPTCL cannot demand MSEDCL to pay compensation @RS.2.00/KWH for each unit because Open Access was not granted and because the entire basis of the provision of compensation @RS.2.00/KWH for each unit for fall short of 80% is when the procurer fails to avail the power for which Open Access has been granted. Hence, the claim of TPTCL is not sustainable."

67. The perusal of the findings in the impugned order would reveal that even though the Appellant filed an application on 26.5.2010, to obtain Open Access approval from Regional Load Despatch Centre and State Load Despatch Centre, there was no document produced by the Appellant before the State Commission to show that such an approval was granted and therefore, the State Commission has held that no Open Access was obtained by the Tata Power Company and hence the claim for compensation by the Appellant is not sustainable.

68. The relevant condition for obtaining Open Access is mentioned in Clause 4 (a) to (b) of the Letter of Intent. Clause 4 (a) and (b) is quoted below:

"*4) Compensation*

a) ***Compensation Payable by MSEDCL***

In case MSEDCL fails to avail 80% of approved Open Access capacity during above period from Traders/Seller, then MSEDCL shall pay compensation

@ Rs.2.00 per kWh for each unit that fall short of 80% of approved Open Access.

b) ***Compensation Payable to MSEDCL***

Trader/Seller will book the Corridor for the full order quantum as above and if the supply is less than 80% of approved Open Access capacity, then the shortfall shall be settled @ Rs.200 per kWh for each unit that fall short of the 80% of the approved Open Access.

For any compensation payable by MSEDCL/Trader as above, invoice shall be raised by respective party or as the case may be and payment shall be raised by respective party or as the case may be and payment shall be made within 10 days, in payment, surcharge will be payable on day to day basis for the period of delay at 15% per annum.

The Trader shall produce the compensation claim of the Seller/Generator."

69. The reading of the above clause would reveal that there is a specific condition in the Letter of Intent dated 22.3.2010 that in case, the Distribution Licensee fails to avail 80% of the approved Open Access capacity during the fixed up period from the seller, then the Distribution Licensee shall pay the compensation at the rate of Rs.2.00 per kWh for each unit that falls short of 80% of the approved Open Access. This shows that to claim compensation, the Appellant has to necessarily obtain Open Access in order to show to the State Commission that Distribution Licensee has failed to "off take" the delivery falling short of 80% of the approved Open Access capacity.

70. According to the Appellant, the Application for Open Access was in fact filed before the Load Despatch Centre and the same has been obtained and on that basis they approached the State Commission claiming the compensation and despite that, the State Commission has given a wrong finding. This is the consistent stand taken by the Appellant before the State Commission as well as before this Tribunal.

71. Let us quote the relevant plea made by the Appellant before the State Commission as well as before this Tribunal taking the above stand.

72. Firstly let us refer to the Petition filed before the State Commission on 16.11.2010 filed by the Appellant. In Para 15, 24 and 28 of the Petition, the Appellant has stated as follows:

> *"15. Based on the above, the Petitioner also applied for and procured Open Access for transmission of electricity to the periphery of the Respondent. A copy of the Open Access application filed by the Petitioner is attached hereto and marked as Annexure 'G'.*
>
> *……..*
>
> *24……The Open Access was sought for and approved for the above quantum of power to reach the Maharashtra periphery. In view of the above, the Respondent was required under the Agreement to off-take the power contracted for or pay compensation for any failure to do so below 80% of the contracted power for which Open Access was approved.".*

…….

28. It is submitted that in view of the above, the Petitioner is entitled to recover the compensation amount at the rate of Rs.2/- per unit of the electricity not off taken by the Respondent below 80% of the contracted capacity for which Open Access was approved."

73. On the basis of the above statements, the Petitioner has made the following prayer before the State Commission:

Prayed to:

"*29 (a) Hold that the Respondent has acted in violation of the Agreement between the parties in not off-taking the electricity offered by the Petitioner in the month of June, 2010 to the extent of 80% of the* ***contracted capacity for which Open Access was approved****."*

74. So, the specific stand taken by the Appellant before the State Commission was that it obtained the Open Access approval and 80% of the capacity for which the Open Access was approved was not taken delivery by the Distribution Licensee in violation of the Agreement and that therefore, the Appellant/Petitioner would be entitled to compensation.

75. Let us now refer to the very same plea made before this Tribunal. In Synopsis "A", the Appellant has made the following statement:

"…….*Further, State Commission has come to a factually incorrect finding contrary to the admitted*

position that Open Access was not obtained by the Appellant…….".

76. From this statement, it is clear that the Appellant has pleaded that the State Commission came to incorrect conclusion that Open Access was not obtained even though it is admitted position that the Open Access was obtained.

77. In the list of dates, the Appellant has made the following reference relating to the date **26.5.2010**:

> *"26.05.2010: The Appellant made an application for Open Access and permission was granted by the Western Regional Load Dispatch Centre (WRLDC) and by the Maharashtra State Load Dispatch Centre (MSLDC) for transmission of electricity from GUVNL to Respondent No.1.* ***The Open Access was obtained by the Appellant."***

78. In the '**Facts'** given in the Appeal in **paragraph-M**, the Appellant has stated as follows:

> *"M. On 26.5.2010, the Appellant made an application for Open Access and permission was granted by the Western Regional Load Dispatch Centre (WRLDC) and by the Maharashtra State Load Dispatch Centre (MSLDC) for transmission of electricity from GUVNL to Respondent No.1.* ***A copy of the Application for Open Access and the Open Access being granted to the Appellant is attached hereto and marked as Annexure F."***

79. In the question of law at **Page 8 of the Appeal**, the Appellant raised the following question for consideration by this Tribunal:

> ***"A.*** *Whether the State Commission is correct in rejecting the claim of the Appellant for compensation under Clause 4 (a) of the letter of intent on the purported ground that Open Access was not granted to the Appellant* ***when Open Access in fact and admittedly had been granted****" ?*

80. Through this question, framed in the Appeal, the Appellant has made a categorical statement that the Open Access was, in fact, had been granted to the Appellant and the same is an admitted fact.

81. In **ground I and J,** the Appellant has raised the following:

> *"I. The State Commission has erred in holding that no Open Access was granted to the Appellant for supply of electricity from GUVNL. The State Commission has failed to appreciate that the said issue did not even arise before the State Commission for adjudication as it was an admitted position between the parties that the Open Access was available. Once the Respondent No.1 had admitted the position, there is no further evidence to be led and it was not open to the State Commission to still hold that there was no evidence of Open Access being granted. The State Commission was dealing with adjudication of disputes that had arisen between the Appellant and Respondent No.1 and in such proceedings when a factual position is admitted between the parties, there is no need to produce evidence to prove the same.*
>
> *J. The State Commission failed to appreciate that Open Access was obtained by the Appellant for sourcing electricity from GUVNL. Based on the Open Access granted to the Appellant, the Appellant actually supplied some quantum of electricity from GUVNL to the Respondent No.1 during the month of*

June, 2010. Despite the above position, the State Commission erred in coming to the conclusion that no Open Access was granted. The State Commission erred in going on technicalities that a copy of the Open Access approval was not available on record when in fact the Open Access being procured by the Appellant was admitted by the Respondent No.1".

82. The reading of the **grounds I and J,** in the Appeal would clearly indicate that the Appellant pleaded that both the parties before the State Commission accepted that the Open Access was available and despite that, it was not open to the State Commission to hold that there was no evidence of Open Access being granted. It is also noticed from the Ground No. J that the Appellant obtained Open Access and based on the said Open Access, the Appellant actually supplied some quantum of electricity from Gujarat Urja to the Distribution Licensees during the month of June, 2010 and this fact was also admitted by the Distribution Licensee.

83. The above factors would reveal that both in the Petition filed before the State Commission and the Appeal grounds taken before this Tribunal, the Appellant has specifically stated that the Appellant obtained Open Access which is not disputed by the Distribution Licensee and on the basis of the said Access, some powers had been injected to the Distribution Licensee which would entitle the Appellant to

claim compensation as per Clause 4 (a) of the Letter of Intent dated 22.3.2010 and that therefore State Commission's finding against the Appellant is totally wrong.

84. On these pleadings, we have heard the learned Counsel for both the parties who argued at length. After the hearing was over, we directed both the parties to file their written submissions. Accordingly they filed the Written Submissions. Even in the written submissions, the Appellant has categorically mentioned that the Appellant applied for the Open Access and obtained the Open Access for supply of electricity from Gujarat Urja to Distribution Licensee. The following is the relevant reference :

> *"15. The Appellant also applied for and obtained Open Access for supply of electricity from Gujarat to the Respondent No. 1.*
>
> *……*
>
> *22. The State Commission has also incidentally held that though the Open Access was obtained (which was also admitted by the Respondent No.1), the Open Access approval was not placed on record".*

85. So, these portions of the statements made by the Appellant both in the Appeal as well as in the written submission would make it clear that the Appellant took up a specific stand that it obtained the Open Access thereby fulfilling the condition of Clause 4 (a) of the Letter of Intent and despite

that the State Commission refused to order for compensation.

86. Let us now see as to whether the stand taken by the Appellant is on the basis of the actual facts in the light of the materials available on record.

87. According to the Distribution Licensee, it has specifically taken a stand before the State Commission that no such Open Access was granted by the Load Despatch Centre and the stand of the Respondent had been recorded in the impugned order. The same is as follows:

> "*15……MSEDCL further submitted that the Petitioner has not annexed copy of the Open Access approval procured. MSEDCL also submitted that as per the Clause 4 (a) of the Terms and Conditions at Annexure 1 to the Letter of Intent dated March 22, 2010 MSEDCL shall be liable to pay Compensation "In case MSEDCL fails to avail 80% of approved Open Access capacity during the above period from Trader/Seller , then MSEDCL shall pay compensation @RS.2.00/KWH for each unit that fall short of 80% of the . MSEDCL submitted that the question of MSEDCL compensating the Petitioner for a transaction for which* ***Open Access has not been approved does not arise."***

88. From this, it is clear that the Distribution Licensee had taken a clear stand before the State Commission that Open Access was not granted to the Appellant and that in the absence of the Open Access being granted, the question of the Distribution Licensee compensating the Appellant for a

transaction for which the Open Access has not been approved, does not arise.

89. When such was the stand taken by the Distribution Licensee before the State Commission, it is surprised to see that the Appellant has pleaded before this Tribunal that the State Commission wrongly concluded that Open Access was not granted even though both parties admitted that the same had been granted to the Appellant.

90. As mentioned earlier, though the Appellant has pleaded in the Appeal grounds as well as in the Written Submissions that Open Access was in fact granted, no document has been produced before this Tribunal to substantiate the same.

91. That apart, it cannot be disputed that the Open Access cannot be granted by SLDC in the absence of the no objection certificate issued by the Distribution Licensee. It is the specific stand taken by the Distribution Licensee that even though it has applied for "No Objection Certificate" for Open Access, the Distribution Licensee did not issue the no objection certificate as they did not incline to take delivery of the supply of electricity through its alternate source and consequently Open Access had not been granted by the Load Despatch Centre.

92. When such being the case, how could the Appellant as mentioned in the Ground No.J of the Appeal that the Open Access was in fact, obtained by the Appellant and based on the said Open Access, the Appellant had actually supplied some quantum of electricity from Gujarat Urja to the Distribution Licensee during the month of June, 2010? There is no answer for this question.

93. Thus, we find from the beginning to the end that the Appellant has taken an incorrect stand that it obtained Open Access and 80% of the capacity for which the Open Access was granted but it was not taken delivery by the Respondent and that therefore, they would be entitled for compensation for the said 80% or the Open Access capacity.

94. As mentioned earlier, the Appellant based its claim on the basis of the Clause 4 (a) of the Letter of Intent conditions which are set out in the earlier paragraphs.

95. In fact, prayer (a) of the claim by the Appellant in their Petitions is in terms of Clause 4 (a) of the Letter of Intent. The said prayer is as follows:

> *"(a) hold that the Respondent has acted in violation of the Agreement between the parties in not off-taking the electricity offered by the Petitioner in the month of June, 2010 to the extent of 80% of the contracted capacity for which Open Access was approved."*

96. From the reading of the clause 4 (a) of the Letter of Intent conditions and prayer (a) of the claim it is obvious that admittedly obtaining the Open Access approval is an essential condition and fulfilment of the said condition is sin qua non for claiming the compensation.

97. Now, we have to refer to the findings of the State Commission that the Open Access was not in fact actually granted and therefore, consequent prayer (a) of the Petitioner was not maintainable. The said findings in the impugned order are given below:

> "*Amongst the documents submitted by TPTCL it was found that an application dated 26.05.2010 was made by TPTCL to obtain Open Access approval from WRLDC/SLDC (Gujarat & Maharashtra), however there was no document to show that such an approval was granted by the said SLDC/RLDC nor a consent letter was obtained from MSEDCL prior to the application for booking of an Open Access as required in LOI letter.*
>
> *Hence, no Open Access was obtained by TPTCL. In other words Open Access permission was yet to be granted to it by the SLDC/RLDC for the 39 MW of power which was to be procured from GUVNL (as per TPTCL letter dated 24 May 2010 to MSEDCL). On the other hand, the Terms and Conditions at Annexure 1 to the Letter of Intent dated March 22, 2010 states that MSEDCL shall be liable to pay Compensation "In case MSEDCL fails to avail 80% of approved Open Access capacity during the above period from Trader/Seller , then MSEDCL shall pay compensation @RS.2.00/KWH for each unit that fall short of 80% of*

the approved Open Access.". MSEDCL submitted that the question of MSEDCL compensating the Petitioner for a transaction for which Open Access has not been approved does not arise. The Commission sustains the contention of MSEDCL. TPTCL cannot demand MSEDCL to pay compensation @RS.2.00/KWH for each unit because Open Access was not granted and because the entire basis of the provision of compensation @RS.2.00/KWH for each unit fall short of 80% is when the procurer fails to avail the power for which Open Access has been granted. Hence, the claim of TPTCL is not sustainable".

98. As indicated above, both the parties were directed to file the Written Submissions and we have gone through the written submissions of both the parties.

99. On going through the Written Submissions of the Distribution Licensee, we find that the Respondent took a consistent stand that Open Access was not granted as pleaded before the State Commission. Therefore, we asked the Appellant seeking clarification of the stand that Open Access was in fact obtained but even then, the compensation was refused on wrong finding that Open Access was not obtained. Then, learned Counsel took some time to get instructions on this aspect from the Appellant. Accordingly, time was granted. Thereupon, the Appellant filed Additional written submissions on 10.4.2013, taking a complete contrary stand admitting that Open Access was not obtained by narrating some circumstances. The relevant portion of the

submissions made by the Appellant in the additional Written Submissions are as follows:

> "4. Apart *from the above, the Respondent No. 1 has mainly relied on Clause 4 (a) of the LOI which uses the words 'for which Open Access has been obtained'. The contention of the Respondent No. 1 is that since the open access was actually not obtained despite the application being made by the Appellant, no compensation is payable.*
>
> *5. It is respectfully submitted that the Appellant had written to the Respondent No. 1 vide letter dated 24.5.2010 about replacement of power source namely GUVNL.*
>
> *6. The Respondent No. 1 by its letter dated 31.5.2010 stated they do not need power. This letter dated 31.5.2010 was pertaining to the supply of power to begin from 1.6.2010 and for which the Appellant had already entered into contract with GUVNL.*
>
> *7. In the meantime, the Appellant had sent application for Open Access to the SLDC with application for No Objection from the Respondent No. 1. However, the no objection was not given since the Respondent No. 1 had declined to take the power itself. Though this was not given in writing but specifically pleaded before the State Commission.*
>
> *…….*
>
> *Shri. J. D. Kulkarni submitted that for getting the Transmission Open Access approval, the consent from MSEDCL was also requested, which it has however refused to provide."*
>
> *8. It is submitted that for Intra-state Open Access, endorsement is required from purchaser and only then can the application be made to any State SLDC.*

9. Since the Respondent No. 1 did not provide approval / endorsement and in fact refused to take the power, the Appellant could not apply for intra-state Open Access to Maharashtra SLDC.

10. For Inter-state transactions (GUVNL to MSEDCL) approval is required from seller and buyer state's SLDC for making an application to RLDC. Hence the same could not be obtained."

……..

13. Therefore, it is not open to the Respondent No.1 to rely on Clause 4.1 (a) when the Open Access was being held back due to the acts of the Respondent No.1 itself."

100. The above statement made by the Appellant in its additional Written Submissions would clearly indicate that it has taken a different stand before this Tribunal to the effect that Open Access was not obtained due to the fact that Distribution Licensee did not provide endorsement. On that basis, it is now argued by the Appellant that Clause 4 (1) (a) of the Letter of Intent conditions cannot be relied upon by the Respondent, when the Open Access was being held back due to the attitude of the Distribution Licensee.

101. We are not able to appreciate this stand which is completely contrary to the earlier stand taken by the Appellant.

102. As discussed above, the main prayer in the Petition filed before the State Commission was that the Appellant was

entitled for compensation as per Clause 4 (a) of the Letter of Intent since the Distribution Licensee failed to avail 80% of the approved Open Access capacity and therefore, the Distribution Licensee should be directed to pay the compensation.

103. In order to seek for the said relief as per the prayer (a), in the petition, the the Appellant has categorically mentioned that the Appellant had already obtained Open Access and as such the compensation as per Clause 4 (a) is payable to the Appellant. Rejecting this prayer, the State Commission dismissed the said application on the ground that Open Access which would attract Clause 4(a) was not obtained.

104. This cannot be challenged by the Appellant by merely stating that the State Commission decided the said aspect only as the main issue relating to the option of the Appellant to supply electricity from the alternate source on the basis of the Letter of Intent above and not on the basis of the tender notice. This contention is not tenable..

105. The State Commission is not only concerned with the issue with reference to the interpretation of the conditions in the offer bid submitted by the Appellant as well as the Letter of Intent de-horse the tender notice but also with reference to the entitlement of the Appellant to claim the compensation on the basis of the fulfilment of the essential condition

namely grant of Open Access as referred to in Clause 4 (a) of the Letter of Intent.

106. Now, through the additional written submissions, the Appellant has admitted that no Open Access was obtained, hence, the prayer made by the Appellant seeking for the compensation as per Clause 4 (a) of the Letter of Intent is not maintainable as correctly held by the State Commission.

107. <u>Summary of Our Findings</u>

(a) **Prior permission of the Distribution Licensee was required for any change of source for supply of contracted power.**

(b) **Appellant did not demonstrate that change of source of supply of contracted power was due to failure of identified generators.**

(c) **Admittedly, Appellant did not obtain Open Access from WRIDC/MSLDC for transfer of power. As such, it is not entitled for compensation.**

108. In view of the above summary of findings, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

(V J TALWAR) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated: 03rd July, 2013

√REPORTABLE/~~NON-REPORTABALE~~