

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400 005**  
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**Case No. 91 of 2010**

**In the matter of**

**Petition for adjudication of disputes between The Tata Power Trading  
Company Ltd. and Maharashtra State Electricity Distribution Company Ltd.**

**Shri V.P. Raja, Chairman**  
**Shri. Vijay L. Sonavane**

The Tata Power Trading Company Limited, .....Petitioner  
Tata Power Mahalaxmi Receiving Station,  
Senapati Bapat Marg, Lower Parel,  
Mumbai- 400013.

Vs

Maharashtra State Electricity Distribution Co.Ltd. ....Respondent  
Prakashgad, 5<sup>th</sup> Floor, Bandra (East),  
Mumbai- 400051.

**Present during the hearings:**

For the Petitioner : Shri. J.D. Kulkarni  
Ms. Deepa Chawan

For the Respondents: Shri. A.S. Chavan  
Shri. K. B. Bhosale

## ORDER

**Dated: June 15, 2012**

The Tata Power Trading Company Ltd. (TPTCL) submitted a Petition under affidavit on December 6, 2010 under Section 86 sub-section (1) clauses (b) and (f), of the Electricity Act, 2003 (EA, 2003), for adjudication of dispute with Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) on the ground of unilateral action of the Respondent in failing to off-take the electricity from the Petitioner and to pay compensation in terms of the Agreement between the parties for such failure to off-take electricity.

2. The prayers in the petition are as under:

“

- 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.*
- b) Direct the Respondent to compensate the petitioner for the losses suffered on account of the action of the Respondent as mentioned in para 26 above, including delayed payment charges and trading margin.*
- c) Direct the Respondents to pay interest at the rate of 15% per annum on the compensation payable with effect from 29.07.2010 as per the terms of the Agreement.*
- d) Direct the respondents to pay the costs and expenses of the present proceedings to the petitioner.”*

3. The Petitioner in its Petition submitted as under:

- (a) The Petitioner is engaged in the business of trading in electricity in India and has been granted an Inter-State trading license by the Central Electricity Regulatory Commission to undertake purchase and re-sale of electricity.
- (b) The issue in the present petition arises out of the agreement in the form of Letter of Intent (LoI) dated March 22, 2010 issued by MSEDCL for procurement of power from TPTCL during the period from June 1, 2010 to June 20, 2010.
- (c) The Respondent is a Distribution Licensee in the State of Maharashtra and all procurement of power by the Respondent from any source, namely, generators, licensees or other sources is regulated by the Commission under Section 86 (1) (b) of the EA, 2003.
- (d) The Respondent had issued a tender on February 18, 2010 for procurement of power on Round The Clock (RTC) basis through Competitive bidding for the period of June 1, 2010 to June 30, 2010. In terms of the above, bids were invited in the prescribed format from Licensees, Power Traders, State Electricity Boards, Independent Power Producers, Merchant Power Plants, etc. for supply of electricity to the Respondent during the period of June 1, 2010 to June 30, 2010.
- (e) In response to the tender, the Petitioner placed its bid offering to supply electricity on March 8, 2010 wherein the various sources from which power will be procured and supplied to the Respondent, was specified. In the bid, the Petitioner also stated that the Petitioner shall have an option to supply from an alternate source at the same landed cost to the Respondent.

- (f) In reply to the bid, the Respondent sought clarifications on March 12, 2010 on the firm quantum of power offered to be supplied by the Petitioner. The Petitioner gave clarifications to the Respondent on March 15, 2010.
- (g) The Respondent issued LoI on March 22, 2010 for procurement of 99 MW of power from the Petitioner. The LoI inter-alia provided source, delivery point, quantum and tariff for procurement of power by the Respondent at the delivery point. The LoI provided that in case a separate Power Purchase Agreement (PPA) was not signed between the parties, the terms and condition as provided in the LoI shall be applicable.
- (h) The Petitioner and the Respondent did not enter into a separate PPA and therefore the terms and condition as provided in the LoI were applicable.
- (i) As per the applicable terms and conditions, there was no restriction on the Petitioner to source power from 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. The relevant Clause 3(c) of LoI is as under:

*“ In case of failure of the generator(s) at the source of supply, then 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.”*

- (j) As per the LoI, the Petitioner could not source the 39 MW of power from the State of Karnataka and West Bengal due to the 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 EA, 2003.
- (k) In order to fulfill the obligations to supply electricity to the Respondent, the Petitioner arranged an alternate source of supply of 39 MW from Gujarat Urja Vikas Nigam Limited (GUVNL). GUVNL issued LoI for supplying the 39 MW of power on RTC basis to the Petitioner with “Take or Pay Liability” wherein the Petitioner agreed to pay compensation to GUVNL for fulfillment of the Respondent’s requirement as per the terms and conditions of LoI in to order meet its obligation to supply power to the Respondent.
- (l) The Petitioner by its letter dated May 24, 2010 informed the Respondent about the change in the source along with the details of the tariff. The landed cost of the electricity from the alternate source was not more than the sources indentified earlier and as such the condition of supplying electricity from alternate source as per the agreement was duly satisfied. The Petitioner further on May 26, 2010 applied for and procured Open Access for transmission of power to the periphery of the Respondent.
- (m) The Respondent by its letter dated May 31, 2010 stated to the Petitioner that it does not wish to avail power from alternate sources and to this extent the LoI dated March 22, 2010 stands amended and the Respondent shall only procure the balance power under the LoI.
- (n) The Petitioner submitted that as per the terms and conditions of LoI, it is for the Petitioner to supply the contracted power at the landed tariff even if the source of supply is changed. The Petitioner further submitted

that no permission or approval was required from the Respondent and therefore this action of Respondent refusing the power from alternate source was illegal and arbitrary since it is contrary to and in breach of the terms of agreement between the parties.

- (o) The Petitioner further submitted that the unilateral action of the Respondent has lead it to a loss as it could not off take the power from GUVNL and therefore incurred financial loss on account of claim by GUVNL for compensation. In terms of the agreement between the Petitioner and the Respondent, for any shortfall to off-take power to the extent of below 80% of the approved open access capacity and the contracted power, the Respondent is liable to pay compensation to the Petitioner to the extent of Rs. 2 per Unit for power not purchased. In terms of the above, the Respondent is liable to pay compensation for a total of Rs. 44,92,8000/- for the failure to off take electricity.
- (p) The Petitioner was under a corresponding obligation to pay compensation to GUVNL for shortfall in the off take of power. Upon the failure of the Respondent to perform the contract, the Petitioner immediately took the action to mitigate the loss by supplying power to third parties at the best available tariff and has thus reduced the loss from Rs.44928000 to Rs.20348000. This is also the amount of loss claimed by GUVNL from the Petitioner.
- (q) The Petitioner sent a notice to the Respondent by letter dated July 19, 2010 claiming compensation to the extent of Rs.20348000 for the loss caused to the Petitioner on account of the illegal action of the Respondent within the prescribed time frame as per the agreement, failing which the late payment surcharge would be applicable.
- (r) The Respondent vide its letter dated July 28, 2010 denied the claim of the Petitioner for compensation and stated that as per the agreement any

change in source could be effected only with the prior consent of the Respondent.

- (s) The Petitioner submitted that in terms of the Agreement, there was no requirement of the Petitioner to take any prior approval of the Respondent for any change in the source of power and only requirement was that the landed cost of power at the periphery of MSEDCL ought not to be higher on account of the change in source.
- (t) It has further been stated that there is a revision in the schedule and this as per the terms and conditions require approval of both the parties and further requires to be submitted to the WRLDC/SLDC.
- (u) The Petitioner submitted that the Respondent is deliberately and in a malafide manner using the change in the source of supply as a ground for rescinding the binding legal agreement entered into between the parties. The Petitioner further submitted that the tariff for supply of power by the Petitioner from the alternate source was expected to be slightly less than the supply from the source originally intended. The Petitioner stated that the issue of revision in schedule in the present case does not arise or apply. The change in the source of supply is much prior to the scheduling of power and there can be no question of revision in schedule.
- (v) The Petitioner submitted that it 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. The Petitioner is also entitled to delay payment surcharge as provided in the agreement at the rate of 15% per annum from July 29, 2010, namely, after 10 days from the date of demand of compensation by the Petitioner from the Respondent. In addition to the above, on account of illegal and arbitrary repudiation of the Agreement,

the Petitioner is also entitled to the trading margin applicable on the trading transaction entered between the parties.

4. The Commission vide its Notice dated December 13, 2010 scheduled a hearing in the matter on January 5, 2011 at 11.00 hrs. In the presence of authorised Consumer Representatives under Section 94 (3) of the EA 2003.

5. During the hearing held on January 5, 2011, Shri. A.S. Chavan , C.E. (Power Purchase), Advocate Pravin Dhage were present on behalf of MSEDCL and Shri. J.D. Kulkarni, C.O.O appeared on the behalf of TPTCL. Consumer Representatives, Shri. S.L. Patil and Shri. Ashok Pendse on behalf of Thane Belapur Industries Association (TBIA) and Shri. R.B. Goenka on behalf of Vidarbha Industries Association were present for the hearing.

6. During the hearing, MSEDCL contended that as per terms and conditions applicable, there was no restriction on the Petitioner to source electricity from a different source. In case of failure of generator, the trader /seller could make power available from alternate source/s. MSEDCL submitted that whenever, the Petitioner applied for alternate sources, it has not submitted the documentary evidence for failure of generator. Further, MSEDCL requested extension of time for submission of their reply to the present Petition.

7. The Commission vide its Notice dated January 5, 2011 scheduled a hearing in the matter on January 19, 2011 at 11.00 hrs in the presence of Authorised Consumer Representatives under Section 94 (3) of the EA 2003.

8. C.E. (Power Purchase), MSEDCL vide letter dated January 17, 2011 submitted that the petition as against the Respondents is malafide, misconceived, not maintainable and therefore liable to be and should be dismissed. MSEDCL further submitted that on February 18, 2010, MSEDCL had issued a tender for procurement of 500 MW electricity through Competitive Bidding on Round The-



Clocks during June 01,2010 to June 30,2010 and in response to the tender the Petitioner had offered to supply electricity.

9. MSEDCL submitted that on March 22, 2010 MSEDCL had issued the Letter of Intent (LoI) for procurement of 99 MW of electricity from the Petitioner. The Letter of Intent inter-alia provided for the source, delivery point, quantum and the tariff for the procurement of electricity and the Terms and Conditions applicable for the said power procurement. The said Letter of Intent also provided that in case a separate power purchase agreement was not signed between the parties, then the terms and conditions in the LoI shall be applicable.

10. The terms and conditions of the Clause 3 (c ) and Clause (d) of LoI dated March 22, 2010, reads as under:-

**Clause 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 rate quoted above. All the terms and condition shall remain unchanged”*

**Clause 3 (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 the WRDCL/SLDC. The application fee and the rescheduling charges shall be paid by the applicant but shall be borne/reimbursed by the party seeking the revision.”*

11. MSEDCL submitted that the Petitioner has not taken consent from the Respondent prior to entering into a contract for supply of electricity from the alternate source viz. Gujarat Urja Vikas Nigam Limited (GUVNL) as per the above-mentioned provisions of the LoI. MSEDCL further submitted that the Petitioner failed to comply with the provisions of the Letter of Intent dated March 22, 2010. Therefore, the Petitioner is not entitled to get any relief from the Commission.

12. MSEDCL submitted that the Petitioner in their Petition has contended that there was no restriction on them to source electricity from a different source and supply the same to the Respondent provided that the landed cost to the Respondent does not increase. The Petitioner has taken recourse to the Clause 3 (c) quoted above which provides that they can arrange the agreed quantum of power from an alternate source. MSEDCL submitted that the Petitioner is not conferred with unconditional rights to supply power from an alternate source. The Clause 3(c) of the LoI provides that the Petitioner can supply from an alternate source provided there is a failure of the generator at the source of supply. MSEDCL further reiterated that the provisions of the LoI requires the Petitioner to book the corridor after receipt of consent from MSEDCL regarding requirement of power and therefore before booking the corridor for supplying power from an alternate source, the Petitioner should have obtained the consent of the Respondent.

13. MSEDCL submitted that contracts initially entered into by the Petitioner with the Sources indicated in the LoI should also have “Pay or Take” provisions to compensate the Petitioner in case they are unable to supply the contracted power. MSEDCL further submitted that there is a provision in the LoI in terms whereof the Petitioner required to obtain the consent of MSEDCL regarding the requirement of power before booking the corridor. MSEDCL further submitted that MSEDCL is in no way concerned with their terms and conditions of the contract between TPTCL and GUVNL.

14. MSEDCL submitted that the Petitioner informed MSEDCL vide letter dated May 24, 2010 about the change in the source of power supply. On receipt of the said letter dated May 24, 2010 on May 28, 2010, the Respondent informed the Petitioner by letter dated May 31, 2010 that MSEDCL do not wish to avail power from an alternate source and that the Letter of Intent dated March 22, 2010 shall stand amended to this extent.

15. MSEDCL submitted that the Petitioner has applied for and procured Open Access for transmission of electricity to the periphery of the Respondent. MSEDCL submitted that the Petitioner has erred in applying for and procuring the Open access for the supply of power from the alternate source when the Letter of Intent dated March 22, 2010 specifically stipulates that the Petitioner has to book the corridor on receipt of consent from the Respondent for alternative source for fulfilling the requirement of power of MSEDCL. 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 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.

16. MSEDCL has not committed any unilateral, arbitrary or illegal action in declining to take power from the alternate source which is well within the rights of the MSEDCL as per the provisions of the LoI dated March 22, 2010, which required the Petitioner to obtain consent from MSEDCL before booking the Open Access corridor. MSEDCL submitted that it is clear from the said provisions of the

LoI that the contention of the Petitioner that “*No permission for approval for change of source is required from the Respondent*” is incorrect.

17. MSEDCL submitted that the alleged agreement/contract for purchasing 39 MW electricity from GUVNL is between Gujarat Urja Vikas Nigam Limited (GUVNL) and the Petitioner, and the same is not binding upon the Respondent as it is not done by taking the Respondent into confidence. The Respondent is not party to the said alleged contract for supply of electricity. MSEDCL further submitted that it is neither aware of the terms and condition of the contract entered into between the Petitioner and GUVNL nor could the said terms and conditions bind the Respondent. Therefore, MSEDCL is not liable to pay any compensation to the Petitioner.

18. In view of the provisions of the LoI dated March 22, 2010 issued by MSEDCL, the Petitioner was not conferred with any rights to supply power from alternate source without the consent of the Respondent. The provisions of the said LoI are to be read together and not in a piecemeal fashion as is purportedly done by the Petitioner. The scheduling of power involves the quantum of power to be transferred from a specific source to a specific destination and to that extent any change in source essentially amounts to revision of schedule for which mutual consent is required as per the provisions of Clause 3 (d) of the LoI. The said provisions at the Clause 3 (d) and the provisions in the main body of the LoI were provided with the specific intention to grant the Respondent a choice to accept/reject power from an alternate source.

19. The Respondent is not liable to pay any compensation to the Petitioner and hence the question of payment of delayed payment charges does not arise. MSEDCL submitted that the claim of the Petitioner for payment of trading margin on the energy which has not been traded is infructuous. MSEDCL further submitted that Respondent has not acted in violation of the Terms and Conditions applicable for the transactions with the Petitioner as per the LoI dated March 22, 2010 and

hence is not liable for payment of any compensation, delayed payment charges or trading margin to the Petitioner and that the Petition is liable to be dismissed.

20. MSEDCL denied that it was under the alleged corresponding obligation to pay compensation to GUVNL for short fall in taking electricity less than 80% of the approved Open Access power equivalent to the contracted power.

21. The Commission vide its Notice dated January 5, 2011 scheduled a hearing in the matter on January 19, 2011 at 11.00 hrs. in the presence of authorised Consumer Representatives.

22. Shri. J. D. Kulkarni and Ms. Deepa Chawan, Advocate appeared on behalf of TPTCL, and Shri. A.S. Chavan and Shri. K. B. Bhosale, Advocate appeared on behalf of MSEDCL. During the hearing on January 19, 2011, Ms. Deepa Chawan briefly reiterated the submissions made in the Petition. Further, Ms. Deepa Chawan emphasised on Clause 3(b) and Clause 3(c) of the Terms and Conditions of LoI dated March 22, 2010. She submitted that as per Clause 3(b) and Clause 3(c) of the Terms and Conditions of the said LoI, the Petitioner was not required to take the consent from the Respondent (MSEDCL) for the change in the source of power. She further stated that the Respondent (MSEDCL) has not provided any reasons for refusal of the power supply from the Petitioner.

23. Ms. Deepa Chawan submitted that the Clause 3 (c) provides them the liberty to make available the power from any other alternate sources only on the terms that the landed cost of the alternate source remained the same.

24. The Commission further enquired whether scheduling of power requires only time slot or also the location of power procurement. In this regard, Shri J. D. Kulkarni submitted that time slot as well as the location of power procurement is required for scheduling of power.

25. Shri. K. B. Bhosale submitted that MSEDCL is in agreement with the Terms and Conditions of the LoI dated March 22, 2010. He further stated that it is necessary to read all the Clauses in all the documents harmoniously and as per the LoI, it was necessary to book the Transmission Corridor only after receipt of consent from the Respondent regarding the requirement of power.

26. The Commission enquired about the rationale behind refusing the power when State of Maharashtra was in shortage of the power. The Respondent sought time for replying to the query. Shri. Chavan, MSEDCL submitted that the Penalty Clause does not apply to the Respondent since it will be applicable only after taking consent from MSEDCL for booking of the Transmission Corridor.

27. Shri. J. D. Kulkarni submitted that for getting the Transmission Open Access approval, the consent from MSEDCL was also requested, however, it have been refused by MSEDCL.

28. The Commission directed the Respondent to submit the data related to the usage of power procured from TPTCL for ZLS and provide rationale behind refusing the power from TPTCL. The Commission further directed the Petitioner to submit the documents related to the refusal of sourcing power from West Bengal and Karnataka.

29. The Commission vide its Notice dated January 19, 2011 scheduled a hearing in the matter on February 9, 2011 at 11.00 hrs in the presence of Authorised Consumer Representatives under Section 94 (3) of the EA 2003.

30. MSEDCL vide letter dated February 4, 2011 submitted that Respondent anticipated crash in demand in the month on June 2010 due to early onset of monsoon in the third week of May 2010. MSEDCL further submitted the demand of electricity in June 2010 was less than that of May 2010 and system frequency was better than the last week of May 2010 and June 2010 as compared to the first three weeks of May 2010.

31. MSEDCL submitted that the market rates were falling in the last week of May 2010 and remained low all through June 2010, and the requirement for zero load shedding was completely met in the month of June 2010.

32. MSEDCL further submitted that the 39 MW power from TPTCL against the LoI dated March 22, 2010 was intended to be used by MSEDCL to meet its demand.

33. Ms. Deepa Chawan, Advocate appeared on behalf of TPTCL, and Shri Pravin Dhage, Advocate and Shri. A.S. Chavhan appeared on behalf of MSEDCL. During the hearing on February 9, 2011, Advocate for MSEDCL submitted the reasons for refusal of power purchase from TPTCL. The Commission directed MSEDCL to submit a copy of relevant noting under which the decision regarding not to purchase power from TPTCL has been taken, even though the State of Maharashtra had shortage of power in that period.

34. MSEDCL vide letter dated February 21, 2011 submitted that as per Clause 4 (a) of the Terms & Conditions of the LoI dated March 22, 2010, Penalty is payable by MSEDCL if it fails to avail 80% of the approved Open Access capacity. Thus, the penalty will become applicable after corridor is booked with the consent of MSEDCL. In the present case, the Open Access has not been granted. Therefore, TPTCL's claim for penalty from MSEDCL is not as per the Terms & Conditions of the LoI. Further, the refusal of MSEDCL to take the 39 MW Power from the alternate source offered by TPTCL has not resulted in any hardships to the consumers of MSEDCL. MSEDCL had taken 50 MW power from GMRETL (LoI dated May 31, 2010) on RTC basis from June 1, 2010 to June 30, 2010 at the landed cost of Rs.4.45/kWh (quoted rate was Rs.3.62/kWh at the Inter connection point with OPTCL STU in E.R.) as against the landed cost of Rs. 6.32/kWh of the TPTCL power. Thus, while ensuring that the consumers are not deprived by the

refusal to take TPTCL power MSEDCL has in fact reduced the financial burden on its consumers.

35. MSEDCL vide letter dated March 21, 2011 submitted that the Commission during the hearing held on February 9, 2011 directed MSEDCL to clarify the reasons for not availing power from TPTCL and also directed MSEDCL to submit a copy of the relevant noting under which the decision regarding not to purchase power from TPTCL has been taken. MSEDCL submitted that the management was apprised of the TPTCL's offer to supply 39 MW power from alternate source and of the GMRETL offer to supply 50 MW power at a cheaper rate. The management considered the issue and took a conscious decision in the interests of the consumers of MSEDCL in not to accept the offer of TPTCL to Supply power from alternate source but to accept the GMRETL offer.

36. The Commission vide its Notice dated July 29, 2011 scheduled a hearing in the matter on August 12, 2011 at 11.00 hrs in the presence of Authorised Consumer Representatives under Section 94 (3) of the EA 2003.

37. During the hearing held on August 12, 2011, Ms. Deepa Chawan, Advocate appeared on behalf of the Petitioner and Shri. A.S. Chavan, CE (PP), MSEDCL appeared on behalf of the Respondent.

38. During the hearing, the Commission directed the Petitioner and the Respondent to submit their respective written arguments within two weeks time and to serve a copy to each other and four authorised consumer representatives.

39. The Commission directed MSEDCL to bring the file and show it to the Commission having the relevant notings under which the decision regarding not to purchase power from TPTCL has been taken, even though the State of Maharashtra had shortage of power in that period.

The hearing stood over to September 16, 2011, at 11.00 hrs.



40. The Commission vide its Notice dated August 16, 2011 scheduled a hearing in the matter on September 16, 2011 at 11.00 hrs.

41. MSEDCL vide its letter dated September 5, 2011 submitted that the refusal of MSEDCL to take the 39 MW power from the alternate source offered by TPTCL has not resulted in any hardships to the consumers of MSEDCL. MSEDCL has taken 50 MW power from GMRETL on RTC basis from June 1, 2010 to June 30, 2010 at the landed cost of Rs. 4.45/kWh as against the landed cost of Rs. 6.32/kWh of the TPTCL power.

42. The management was apprised of the TPTCL's offer to supply 39 MW power from alternate source and of the GMRETL offer to supply 50 MW power at a cheaper rate. The management considered the issue and took a conscious decision in the interest of the consumers of MSEDCL, not to accept the offer of TPTCL to supply power from alternate source but to accept the GMRETL offer.

43. MSEDCL also submitted that as per Clause 4 (a) of the Terms and Conditions of the LoI dated March 22, 2010, Penalty is payable by MSETCL if it fails to avail 80% of the approved Open Access capacity. Thus, penalty will become applicable only after corridor is booked with the consent of MSEDCL, and in this case, the Open Access has not been granted. Therefore, the TPTCL claim for penalty from MSEDCL is not as per the Terms & Conditions of the LoI and therefore MSEDCL is liable neither to pay the compensation claimed by TPTCL nor the delayed payment charges or trading margin and the cost and expenses of the present proceedings as claimed by TPTCL.

44. TPTCL vide letter dated September 12, 2011 reiterated the facts as submitted in the Petition. TPTCL further submitted that the LoI dated March 22, 2010 provided for the source, delivery point, quantum and tariff for procurement of electricity by the Respondent at the delivery point. The LoI contained the "*Terms and Conditions*" applicable for the transaction.

45. TPTCL through its letter dated March 15, 2010 specified the various sources from which power would be procured by the Petitioner. The Petitioner has also stated that it will have an option to supply power from alternate source at the same landed cost to the Respondent.

46. The Bid document for purchase of 500 MW is RTC power on firm basis during June 1, 2010 to June 20, 2010. The Clause 11 (v) reads as under:

*“The bidder should preferably supply quantum of power from one source (generator) only. If the quantum of power is supplied from the different sources, it should be indicated clearly”*

*Clause (vii) read as under :*

*“... 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. Even if Bidder supplies contracted quantum through source/corridor different from that referred 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., “*

47. There was no separate Power Purchase Agreement between the Petitioner and the Respondent and the terms and conditions provided at Annexure 1 to the letter of Intent dated March 22, 20010 were applicable. The Clauses 3 (c) & (d) of the terms and conditions provided in Annexure 1 to the letter of Intent dated March 22, 2010 is as under:

*“ 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 way that the cost of power to MSEDCL at the MSETCL periphery shall be the same as the*

*landed cost of MSEDCL at the MSETCL periphery at the rates quoted above. All the other terms and conditions shall remain unchanged.*

*3(d) Revision of Schedule*

*In case of revision of schedule, a consolidated request indicating the reason and mutual consent to the WRLDC/SLDC. The application fee and rescheduling charges shall be paid by the applicant but shall be borne/reimbursed by the party seeking the revision.”*

*Thus, Annexure I prevails over any other documents relating to the transaction. In case of any inconsistency between the LoI and any earlier documents, indubitably, the LoI along with the Annexure I will prevail.”*

TPTCL submitted that TPTCL through its letter dated May 24, 2010 informed the Respondents the alternate source for purchase of 15 MW power from CPP in West Bengal and 24 MW from CPP in Karnataka to GUVNL at the same landed cost as per the Letter of Intent. Due to the notification under Section 11 of EA, 2003 issued by the State of Karnataka, the sourcing of 24 MW of electricity from the State of Karnataka could not be affected by the Petitioner. The 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.

48. The Petitioner arranged the alternate source of supply, i.e., from GUVNL for supply of 39 MW of electricity for onward sale to the Respondent. GUVNL issued the letter of Intent to the Petitioner to supply 39 MW of power on round the clock basis with “Take or Pay liability”.

49. The Respondents unilateral action in rejecting the supply of power by the Petitioner is arbitrary and illegal. In order to supply contracted power at the landed tariff, even if the source of the supply is changed, no permission for approval for change of source was required from the Respondents. Hence, the action of the Respondent of not availing power from alternate source is arbitrary and contrary to the terms of the LoI and Annexure I between the Respondent and the Petitioner.

50. TPTCL submitted that without prejudice to its contention that prior consent/sanction of MSEDCL for change of source for power procurement was not contemplated by the LoI read with the Annexure I, it is submitted that assuming for the sake of argument that a sanction was contemplated, the same cannot be an essential condition of the transaction entered into between the parties. Contracts/transactions are normally made up of various terms, differing in character and importance. The parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. Where a term is broken, the approach of the Courts has been to discover, from the tenor of the contract, the express intention of the parties, or the consequence of the breach, whether it was vital to the contract or not. A condition may be defined as a statement of fact, or a promise, which forms an essential term of the contract. Whether a particular clause in a contract/transaction shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at the end, or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case from the terms of the agreement itself, and from the subject matter to which it relates.

51. In this case, the intention of the Parties, i.e., the Petitioner TPTCL and MSEDCL to this contract/transaction sufficiently appears to have been supply of power by the Petitioner, TPTCL to the Respondent MSEDCL and in event of change of source by TPTCL, the price change cannot be passed on to MSEDCL. The condition of prior sanction if any, cannot be relied upon by MSEDCL to wriggle out of the transaction by projecting the reason of prior consent. It is denied that prior sanction of MSEDCL was a condition which required adherence by TPTCL. TPTCL submitted that it will be seen that the development of the law has been marked by a broadening approach to the concept of loss and thus in its ability to protect the claimant's interest on the performance by the other party of contractual obligations.

52. TPTCL submitted that the MSEDCL has raised this bogey of prior sanction/consent for change of source for procurement of power by the Petitioner. This is clear because in the reply filed on the record MSEDCL had clearly reiterated in the Affidavit dated January 17, 2011 its contention relating to its consent not being taken for change of source. However, in its Additional affidavit dated February 3, 2011, MSEDCL made its plea that MSEDCL “ *anticipated demand crash in the month of June 2010 due to early onset of monsoon in the third week of May 2010*” and also contended in the Additional Affidavit that “ *the demand of electricity in June 2010 was less than that of May 2010*”. Thus, the reason given by MSEDCL in support of its contention that prior consent was required was merely a bogey raised by MSEDCL.

53. TPTCL submitted that MSEDCL in its additional affidavit dated February 3, 2011 stated that “ *market rates for electricity had remained low through June 2010*”. Thus, the actions of MSEDCL in terms of not off-taking power in accordance with the transaction between the parties were dictated by early onset of monsoon which resulted in reduction of demand and the system frequency being good and also the fact that market rates were low in the month of June 2010.

54. TPTCL submitted that during the subject period, i.e., 1.06.2010 to 30.06.2010, MSEDCL vide its Letter of Intent issued on May 31, 2010 procured power from alternative source. Thus, the actions of MSEDCL in refusing to off-take power from TPTCL were based on reasons other than prior sanction.

55. TPTCL submitted that it has suffered losses from the breach of obligations by the Respondent. The Petitioner however took reasonable steps that were available to mitigate the extent of the damage caused by the breach. These actions of the Petitioner were dictated by a policy of the desirability of avoiding waste. Thus, the Petitioner adopted a very reasonable approach by mitigating the adverse

consequences arising out of the breach of obligations by the Respondent. The document in respect thereof have been placed on the record of the Commission. TPTCL submitted that due to the failure of the Respondent to perform the contract as a consequence TPTCL took action to mitigate the loss by supplying electricity to third parties at the best available tariff and accordingly reduced the loss from Rs. 4,49,28,000/- to Rs.2,03,48,000/- .

56. During the hearing held on September 16, 2011, Ms. Deepa Chawan, Advocate appeared on behalf of the Petitioner and Shri. Laxman R. Shahapur, Advocate appeared on behalf of the Respondent.

57. Advocate of the Respondent sought few days time to clarify orally their written arguments. The Commission decided to hear the matter further on September 28, 2011.

58. During the hearing held on September 28, 2011, Ms. Deepa Chawan, Advocate appeared on behalf of Tata Power Trading Company Limited (TPTCL), and Shri A.S. Chavan, C.E. (PP) along with Advocate Shri Laxman R. Shahpur and Adovocate Shri. Karan Bhosale appeared on behalf of MSEDCL.

59. MSEDCL submitted that TPTCL vide letter dated May 15, 2010 informed MSEDCL the details of power purchase from different sources, and MSEDCL vide letter dated May 31, 2010 have rejected the offer stating that MSEDCL do not wish to avail power from alternate sources as offered by TPTCL and supply of 30 MW from SKS Ispat will only avail.

60. MSEDCL stated that TPTCL is supposed to supply power for which TPTCL has to book the corridor and the procedure for booking corridor is that they have to make an application to MSEDCL, and it is the decision of MSEDCL whether to accept the offer or reject it. TPTCL is supposed to come with the application and submit the same to WRLDC, which is the authority to book the corridor. MSEDCL also stated that the application is not signed by MSEDCL for

booking the corridor. TPTCL has booked the corridor first and approached MSEDCL for approval where they have not followed the procedure.

61. MSEDCL stated that TPTCL vide letter dated May 24, 2010 received on May 28, 2010 wrote to MSEDCL that TPTCL will be supplying power from an alternate source, and MSEDCL vide letter dated May 31, 2010 informed them that they did not wish to avail power from alternative source.

62. MSEDCL stated that regarding compensation referred in Clause 4 a and 4b states

“ .....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.2.00 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.”*

*(emphasis added)*

MSEDCL stated that the word approved, means that TPTCL was supposed to approach MSEDCL to take its consent, and after that they could book the corridor. Therefore, there is no question of compensation as the contract has not been concluded.

63. TPTCL vide its letter dated October 12, 2011 submitted that the respondent, MSEDCL at the hearing held on September 24, 2011 contended that the letter dated May 24, 2010 addressed by the Petitioner, TPTCL intimating a change of source amounted to a counter offer and therefore being a counter offer, MSEDCL had a right to accept or reject the same.

64. The Petitioner denies the aforesaid conditions and stated that the Letter of Intent dated March 22, 2010 along with Annexure “1” is a binding contract between the parties and the reference to the execution of Agreements has to be ignored due to the followings express words in the said letter of intent:

*“The terms and conditions applicable for this transaction are enclosed as Annexure “I”. Please call on us for signing for the above transaction falling which the Terms and Conditions as per Annexure “I” shall be applicable.”*

The Respondent in the present proceeding has not disputed this position. The Respondent has in fact under the very same LoI received electricity without any demur or dispute to the extent of 60 MW with the source being CPP in ER. Thus, the parties recognized that there is a formal contract for supply of power on the basis of the LoI between the parties.

65. In the light of this, Clause 3 (c) of annexure “I” specifically confers the right on the Petitioner, TPTCL as trader/seller to make available the agreed quantum of power in case of failure of the generator at the source of supply, from



any alternate sources with the only conditions being that the cost of power to MSEDCL at the MSETCL periphery shall be same as the landed cost to MSEDCL at the rates quoted by the Petitioner. In fact it was obligatory for TPTCL to arrange power from alternate sources and if TPTCL would not have made power available to MSEDCL then MSEDCL could have raised compensation bill at the agreed rate on TPTCL for non supply of power during this period.

66. The supply of power from an alternate source does not amount to a revision of scheduled since the schedule is firmed up only after an application for supply is approved by RLDC/SLDC. If all elements constituting a schedule in case of revision needed a prior approval or consent of parties then Clause 3(c) of Annexure "I" to the letter of intent of March 22, 2010 becomes redundant. The intention of the parties was absolutely clear. In case of revision of schedule consolidated request and mutual consent of both parties for revision was to be submitted to the RLDC/SLDC. The Clause 3 (c) was specially agreed between the parties only with the intent to carve out an exception to consent if any required, from both the parties. The intention of the parties in respect of sourcing the agreed quantum of power upon failure of the original generator from an alternate source is therefore borne out by Clause 3 (c).

67. In view of the clear representation made by the MSEDCL in respect of failure of the generator for sourcing power and the authority conferred on the Petitioner to obtain power from the alternate sources (s), the Petitioner TPTCL altered its position and worked to meet its obligations for sourcing 39 MW of power at RTC basis. The respondent, MSEDCL cannot therefore consider the transaction oblivious of Clause 3 (c) of annexure "I", the said Clause 3 (c) being part and parcel of the Agreement between the parties, the MSEDCL cannot contend that the change of source intimated by the Petitioner in accordance with Clause 3 (c) amounts to a counter or new offer made by the TPTCL when this eventuality was very much contemplated by the parties and an agreement reached on the said issue.

68. TPTCL submitted that MSEDCL had contended that it has consented to the booking of corridor by the Petitioner and as such with the WRLDC not acting on application, the claim of the compensation is baseless.

69. It is denied by TPTCL that scheduling is confined only to the physical modality or infrastructure or operational issues related to actual evacuation of power, from source to destination, as sought to be mischievously contended.

70. TPTCL submitted that the term “*scheduling*” encompasses various elements and not merely evacuation of power from source to destination. “*Scheduling*” includes source, period, time period, delivery point, quantum. The revision of schedule contemplated by Clause 3 (d) refers to the modality of informing WRLDC about evacuation of power. It thus deals with the element of the physical and technical evacuation of power. It does not bring within its ambit the change of source separately provided under Clause 3 (c). To that extent alteration in the source of supply being already permitted does not require separate consent of the parties under Clause 3 (d). It needs to be pointed out that the claim of Petitioner is based on the decision of MSEDCL not to off take power from the Petitioner on the ground of requirement of purported consent of MSEDCL for change of source. The claim for compensation made by TPTCL cannot therefore be narrowly perused on the aspect concerning physical evaluation of power alone. Further, a without prejudice submission has also been advanced on behalf of the Petitioner, that assuming for the sake of argument the consent was a pre-requisite, the Commission will have to consider whether it was an essential condition and whether MSEDCL had withheld consent if any for bonafide reasons.

71. The Petitioner, TPTCL respectfully submitted that in the instant case, the Open Access was required to be approved by the WRLDC and not by MSEDCL.

72. The Petitioner, TPTCL submitted that the very sanctity of the Agreement contemplated under the Competitive Bidding Process would be completely diluted if the entire process was held subject to the level of demand or requirement of a

distribution company; prices quoted by the third Parties at different time periods and as in this case the earlier onset of monsoon. The conditional Competitive Bidding Process is not contemplated under the Act and Regulations.

73. It is pertinent to note that as revealed from the record prior to the filing of the case; MSEDCL had contended that the power would not be taken from the Petitioner in view of change of source. The elements of shortage of demand due to early onset of monsoon (without accepting its veracity) and low cost electricity from third source were admitted not reason at the relevant time which dictated that the decision of MSEDCL on record. It seems that commercial considerations were the reasons for the breach of the obligation on the part of MSEDCL to off take 39 MW of power. These aspects came to the fore only during the present proceeding. These actions/inactions on the part of MSEDCL speak volumes of the transparency and accountability on the part of public authority. The contentions raised by MSEDCL relating to Section 42 and Load shedding Protocol were of a confusing nature and beyond the comprehension of the Petitioner. These do not merit any consideration and ought to be rejected in limine.

### **DECISION WITH REASONS**

74. Having heard both the Parties and the Intervener and after considering the materials placed on record, the Commission is of the view that for addressing the issues before the Commission in the present case, it will be essential to, at the outset, recognize that in the absence of a formally signed PPA, as agreed between the parties the LOI becomes a valid contract for the short term power purchase. Therefore, the broad documents that have to be relied upon to address the factual/legal questions are the Bid Documents viz. Bid/Tender issued by MSEDCL dated 18<sup>th</sup> February 2010, Bid Document submitted by TPTCL dated 8<sup>th</sup> March 2010 and LOI dated 22<sup>nd</sup> March 2010 signed by both parties and then thereafter the communication in form of letter exchanged between parties, Letter seeking approval for Open Access from WRLDC/SLDC etc .

## **Issues before the Commission:**

**Issue No. 1 :-** Did the Bid Document dated 18<sup>th</sup> February 2010 contemplate prior permission of MSEDCL in the event TPTCL required to supply power from alternate source owing to the non-availability of corridor ?

### **Finding:**

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

#### **Clause 11 – Other Terms and Conditions**

**Subclause (v)** reads as follows :-

“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”

**Subclause (vii)** reads as follows:-

“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 daily 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”.

- b. Thereafter, no deviations were sought by TPTCL in its bid document dated 8<sup>th</sup> 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 18<sup>th</sup> February 2010 was an invitation to make an offer, thereafter the action of TPTCL in submitting the bid document dated 8<sup>th</sup> March 2010 was an offer made by it, which was accepted by MSEDCL by the signing of an LOI dated 22<sup>nd</sup> 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.

TPTCL has submitted that the 15 MW power from CPP in West Bengal was not available as the SLDC did not give the necessary open access clearance for the same. Hence, corridor was not available. If TPTCL desired to supply the contracted quantum of power through other source/corridor, then TPTCL should have obtained prior permission of MSEDCL. This is clearly provided in the Bid Document as below:

*“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.”*

**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<sup>th</sup> 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.

**Issue No. 3:-** Does the LOI stipulate prior written consent for procurement of power from alternate source ? If so, was Open Access also subject to prior consent?

**Finding:**

- a. Nowhere in the LOI dated 22/03/2010 issued by MSEDCL it is stated in clear/express terms that prior written consent for procurement of power from alternate source needs to be obtained by TPTCL from MSEDCL.

Notwithstanding what has been stated above, it is pertinent to note that in MSEDCL's LOI letter dated 22/03/2010 it had requested that the corridor be booked after the receipt of consent from MSEDCL regarding the requirement of power.

Furthermore on a perusal of the LOI terms and conditions with reference to Scheduling, the following need to be noted:-

**Clause 3 (b) reads as follows:**

*“Trader/Seller should schedule power as per the consent given by MSEDCL/CE(LD) Kalva. The power shall be procured uniformly as per the Open Access granted. Revision of Schedules shall not be done without the consent of MSEDCL/ CE(LD) Kalva.”*

**Clause 3 (c) read as follows:**

*“ 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.”*

**Clause 3 (d):- REVISION OF SCHEDULE read as follows**

*“ 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 the WRDCL/SLDC. The*

*application fee and the rescheduling charges shall be paid by the applicant but shall be borne/reimbursed by the party seeking the revision.”*

The conjoint reading of these clauses indicates that :-

- a) Firstly the LOI does not stipulate prior written consent for procurement of power from alternate source.
- b) Secondly, the revision of schedule includes change in quantum, change in period, location (which means Transmission Open Access) and source (generator). So as per the aforesaid clauses in the LOI any change in these aspects required mutual consent of the parties which means that prior to the TPTCL application dated 26/05/2010 to SLDC/RLDC for booking of Open Access in order to source power from GUVNL, a consent from MSEDCL was needed for the said contract with GUVNL and subsequently also for seeking of Open Access approval from RLDC/SLDC. This consent appears as implied condition in the aforesaid clauses in the LOI though expressly not stated therein.
- c) Thirdly, Clause 3(c) under the heading ‘Scheduling’ in the LOI was not a blanket permission to TPTCL to source power from any other source. It provides liberty only to the extent that the power can be sourced from any party provided the landed cost as agreed between TPTCL and MSEDCL is not on the higher side.
- 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 was 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 alternative 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 GUVNL.

**Issue No. 4:-** Is TPTCL entitled to recover compensation from MSEDCL? If so, at what rate?

**Finding:-**

In view of what has been stated in the aforesaid paragraphs, no compensation is payable to TPTCL.

**Issue No. 5:-** Is TPTCL entitled to recover from MSEDCL delayed payment charges ? If so, at what rate ?

**Finding:**

When the compensation itself is not payable as stated above the question of payment of “delayed payment charges” by MSEDCL @ 15% for delay in payment of compensation after completion of 10 days from the date of Invoice for Compensation, does not arise at all.

**Issue No. 6:-** Was any quantum of power injected by GUVNL & off-taken by MSEDCL?

**Finding:-**

Since, power procured from GUVNL was traded to third party to mitigate the loss suffered by TPTCL and for the balance short fall to off-take the power from GUVNL, compensation of Rs 2,03,48,000/- was payable by TPTCL vide GUVNL Invoice dated 01.07.2010, therefore, the question of injection of power by GUVNL to be consumed by MSEDCL does not arise. Furthermore, from TPTCL's Compensation Bill dated 19/07/2010 it appears that there was no energy off-take by MSEDCL which was shown as 'NIL'

**Issue No. 7:-** Is TPTCL entitled to claim trading margin from MSEDCL ? If so, how much ?

**Finding:-**

This issue is rendered in fructuous because no quantum of power was sold to MSEDCL.

In view of the above, the present petition stands dismissed.

Sd/-  
(Vijay L. Sonavane)  
Member

Sd/-  
(V. P. Raja)  
Chairman