

**Sub : In the matter of adjudication of disputes between MP Power Trading Co. Ltd.
and M/s Karamchand Thapar & Bros (C.S.) Ltd.**

ORDERSHEET

**(Date of hearing 19th January, 2012)
(Date of ordersheet 21st February, 2012)**

M/s M.P.Power Trading Co. Ltd., - Petitioner
Shakti Bhawan, Rampur, Jabalpur.

V/s

M/s Karamchand Thapar & Bros (C.S.) Ltd. - Respondent
“Thapar House”, 25, Brabourne Road,
Kolkata – 700001.

Shri A.B.Bajpai, CGM (Comm.) and Shri Hemant Sahay, Sr. Advocate appeared on behalf of Petitioner.

Shri Harish Malhotra, Sr. Advocate and Shri Ajay Gupta, Advocate appeared on behalf of Respondent.

2. M/s M.P. Power Trading Co. Ltd., Jabalpur (“The Petitioner”) has filed the present petition under affidavit on 16.5.2011 under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute with M/s Karamchand Thapar & Bros. (C.S.) Ltd., Kolkata (“The Respondent”).

The Brief Facts of the case are as follows:

3. The Petitioner invited tenders on 16.4.2009 for sale of power on firm basis for the period 16.07.2009 to 30.09.2009. In response to the aforesaid enquiry, an offer was made by Respondent vide letter dated 21.04.2009. Accordingly, Letter of Intent (LOI) was issued in favor of Respondent on 27.04.2009 requiring his acceptance within 3 days, failing which the Petitioner would be free to take appropriate action as deemed fit in the matter. Consequently on 30.04.2009 the Respondent sent a letter to the Petitioner assuring that on the basis of the LOI, it was making all sincere and rigorous efforts for sale of surplus power. Subsequently, the Petitioner vide letter dated 7.5.2009, requested the Respondent to explore all the possibilities for scheduling of contracted power and to initiate early action for obtaining advance booking of transmission corridor in terms of Compensation Clause 9 of LOI. In this regard, several reminders were sent to the Respondent. In pursuance to the said

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reminders, the Respondent vide letter dated 23.5.2009, intimated the Petitioner that, since there was no probable buyer available to purchase the said power, the Petitioner might look for alternative arrangements for its sale. However, the Respondent again on its own, wrote a letter dated 25.05.2009 informing the Petitioner that it was participating in a tender enquiry of Maharashtra State Electricity Distribution Company Limited (MSEDCL) and was also making sincere efforts for sale of power in pursuance of LOI dated 27.4.2009.

4. The Petitioner vide its letter dated 20.07.2009, requested the Respondent to open weekly revolving Letter of Credit (LoC). However, Respondent failed to open the same and hence the Petitioner raised an invoice dated 06.10.2009, directing the Respondent to pay a compensation of ₹ 36, 60,00,000.00, for the period from 1.8.2009 to 31.8.2009 and 1.9.2009 to 30.9.2009. However, the Respondent vide letter dated 7.10.2009 raised an objection that the compensation bill had been wrongly raised and hence was not payable. On receipt of the said letter the Petitioner issued a legal notice dated 19.1.2010 to the Respondent demanding payment of compensation amounting to ₹ 46,20,00,000.00 alongwith surcharge @ 1.25% p.m. till date of actual payment. In response to the said legal notice, the Respondent vide letter dated 06.02.2010, refused to pay the compensation on the ground that there was no concluded contract between the parties. The Respondent, in the said letter, stated that as per the tender enquiry the execution of a Power Purchase Agreement (PPA) was a pre-condition to the sale of power.

5. Aggrieved by the conduct of the Respondent, the Petitioner approached the Commission under Section 86(1) (f) for adjudication of dispute.

The Prayers of the Petitioner are as under:

- (a) To hold that Respondent is liable to pay an amount of ₹ 46,20,00,000.00 as compensation for non off-take of power during the period from 16.07.2009 to 30.09.2009 in terms of the LOI dated 27.4.2009 issued by MP Tradeco.
- (b) To direct Respondent to pay an amount of ₹ 46,20,00,000.00 along with surcharge at the rate of 1.25% per month till the date of actual payment.

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- (c) To direct Respondent to pay the costs and expenses of the present proceedings to Petitioner.

6. The matter was listed for motion hearing on 21.06.2011. During the motion hearing, the Counsel for the Petitioner submitted that the matter falls within the jurisdiction of the State Commission under Section 86(1) (f) of the Electricity Act, 2003. In support of this proposition, he cited the following judgments:

- a) **Pune Power Development Private Ltd. v. Karnataka Electricity Regulatory Commission Appeal No. 200/2009 dated 23.2.2011.**
- b) **Grid Corporation of Orissa Limited v. Gajendra Haldea and Others, (2008) 13 SCC 414.**
- c) **Gujarat Urja Vikas Nigam Limited v. Essar Power Limited, (2008) 4 SCC 755.**

7. In *Pune Development Pvt. Ltd. V/s Karnataka Electricity Regulatory Commission in Appeal No. 200/2009*, dated 23.02.2011, the Hon'ble APTEL had opined that Section 86(1) (f) of Act is very wide as it covers all disputes between licensees which relate to the regulatory jurisdiction of the State Commission. Para 23 of the said judgment reads as under:

“The clauses (a) to (d) refer to the tariff of Central generating Companies and Tariff relating to composite scheme and inter-state transmission. A reading of this Section would make it clear that the jurisdiction conferred on the Central Commission is restricted to the aspects which are specified under clauses (a) to (d) aforesaid. However, if the jurisdiction of the State Commission which conferred under Section 86(1)(f) of the Act is looked into, it would be clear that no such restrictions are placed on its jurisdiction. In other words, all disputes between the licensees which do not fall under Section 79(1)(a) to (d) are within the jurisdiction of the State Commission.”

8. Further in *Grid Corporation of Orissa Limited V/s Gajendra Haldea and others, (2008) 13 SCC 414*, the Hon'ble Supreme Court had held that when the delivery of electricity is within a State, the transaction would amount to only intra-state sale of electricity and would not amount to inter-state sale involving the territories of two or more States.

9. Relying on the above dictum, the Counsel for the Petitioner has submitted that in the present case, the dispute is between two Trading Licensees namely M/s MP Power Trading

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Co. Ltd. and M/s Karamchand Thapar & Bros. (C.S.) Ltd., Kolkata. The Petitioner is a State Government Company engaged in the business of procuring power and trading on behalf of distribution licensees in the State of M.P. and the Respondent is an inter-state Trading Licensee. The Letter of Intent was issued from Jabalpur, Madhya Pradesh. The delivery point for sale of power by MP Tradeco was within the periphery of the Madhya Pradesh and the cause of action had arisen within the jurisdiction of this Commission. Hence, the State Commission has got powers to adjudicate the dispute under Section 86(1) (f) of the Act.

10. Based on the above observations, and considering the judgment dated 23.2.2011 pronounced by the Hon. APTEL in appeal no.200 of 2009, the Commission admitted the petition and directed issue of notice to the Respondent.

11. A hearing was held on 26.12.2011. In the hearing the Counsel for the Respondent submitted that there was no concluded contract in existence between the parties and consequently there was no breach of contract. The Counsel for the Respondent contended that the LOI issued by the Petitioner on 27.4.2009 was in the nature of counter offer as the Petitioner modified the conditions offered by the Respondent vide its offer dated 21.4.2009. The said LOI specifically required the acceptance of the Respondent, which was never communicated to the Petitioner. The relevant Paragraph of the LOI is quoted below:

“Your acceptance may please be sent through fax within three days failing which M.P.Tradeco will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed.”

12. The Counsel for the Respondent contended that from the above it is evident that the LOI issued on 27.4.2009 was nothing but a counter offer which required the acceptance of the Respondent. The Counsel for the Respondent further submitted that vide letters dated 23.5.2009 followed by letter dated 25.05.2009, the Petitioner was asked to make alternate arrangements for sale of the aforesaid surplus power as no buyer was available to the Respondent. In the said situation, it cannot be alleged, under any circumstances, that any concluded bargain ever came into force between the parties. Counsel for the Respondent argued that, when there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract. As per Section 7

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of Indian Contract Act, 1872 the acceptance must be absolute and unqualified. Until there is absolute and unqualified acceptance of a proposal, the parties are still at the stage of negotiations, and no legal obligation can be attached to parties. In support of this contention the Respondent relied on the following authorities:

a) Binani Metals Ltd, Vs. Union of India as reported in 114 (2004) and Delhi Development Authority v. Bhasin Associates, reported at 79 (1999) DLT 363

“23. A valid, binding and concluded contract would come into existence only if the offer made by the tender is accepted. As acceptance of an offer is a final and unequivocal expression of an assent to the terms of an offer. The objective test of an agreement applies to an acceptance no less than to an offer. Where the offer is made in alternative terms, the acceptance must make it clear as to which set of terms the assent is directed. A communication may fail to take effect as an acceptance because it tends to vary the terms of the offer. Such a reply is not an acceptance, but it may, on the contrary, be a counter offer which the original offer can then accept or reject.”

b) D.S. Construction Ltd, Vs. RITES Ltd, & Anr., as reported in 127 (2006) Delhi Law Times 1

“.....This principle is codified in India in Section 7 of the Contract Act which, inter alia, provides that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified..... The proposal made by the defendant No. 1 to the plaintiff to extend the validity up to 30.11.2003 unconditionally was not accepted by the plaintiff. The counter-proposal made by the plaintiff was also not accepted by the defendant No. 1. As such, no agreement was reached by and between the plaintiff and the defendant No. 1 to extend the validity of the initial offer of 24.03.2003 up to 30.11.2003 unconditionally”

c) Dresser Rand S.A vs Bindal Agro Chem Ltd., AIR 2006 SC 871

“It is now well-settled that a Letter of Intent merely indicates a party's intention to enter into a contract with the other party in future. A Letter of Intent is not intended to bind either party ultimately to enter into any contract. It is no doubt true that a Letter of Intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract

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would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a Letter of Intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter”.

d) Union of India vs. Uttam Singh Duggal & Co. AIR 1972 Delhi 110.

“14.....As a matter of law, when there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract.

15. ...The execution of formal agreement was, on the facts and circumstances of this case, in my opinion, an essential term and condition precedent to the contract, the admitted non-fulfillment of which prevented its formation in law”

13. The Counsel for the Respondent submitted that in view of the aforesaid law laid down by the Hon'ble Supreme Court, it is absolutely clear that LOI issued by the Petitioner was only a counter offer given by the Petitioner and which could only take shape of a concluded agreement when acceptance was given by the Respondent. The Counsel for the Respondent alleged that it never communicated its acceptance in terms of LOI, as the LOI contained various additional conditions. Therefore; its response cannot be considered to be absolute acceptance and cannot be described as having brought about a concluded contract between the parties. Bare perusal of the said judgments clearly reveals that the offer or proposal has to be accepted in its entirety and modification of any terms and condition cannot be considered to lead to absolute acceptance.

14. Counsel for the Petitioner has argued that there was a concluded contract between parties and as the Respondent failed to fulfil its contractual obligation, it is bound to pay the compensation amount. The Counsel for the Petitioner submitted that in the instant case, the Respondent's conduct was that of the acceptance of the offer and even though the PPA was not executed between the parties, acceptance of the LOI and conduct of the Respondent to sell the surplus power is sufficient to prove the liability of the Respondent for default. The Counsel for the Petitioner has averred that from the perusal of the Respondent's correspondence dated 30.04.2009, 25.05.2009, 01.06.2009

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and 25.06.2009 it is clear that the Respondent was repeatedly making efforts to sell the contracted power based on the LOI issued by the Petitioner. Counsel for the Petitioner submitted that acceptance of the proposal can be communicated by way of an act or omission or conduct by a party. Counsel for the Petitioner argued that at various points in time, the Respondent by its conduct showed that it was acting in furtherance of the said LOI. Counsel for the Petitioner has asserted that under Section 8 of the Indian Contract Act, 1872, communication of acceptance can be established by the conduct of parties also. To substantiate his plea the Petitioner has referred to the following cases.

a) *Bhagwati Prasad Pawan Kumar V. Union of India (AIR2006SC2337)* by the Hon'ble Supreme Court the relevant portion is reproduce below:

"It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle. Each case much rest on its own facts. The courts must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the "offered" was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand if the evidence disclose that the offered had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act".

b) *Union of India through General Manager Central Railway, T. Bombay Vs. Babulal Uttamchand Bhandari (AIR 1968 Bom 294.)*

"In principle, I do not see how any other conclusion is possible. Sections 3 to 10 of the Contract Act lay down the general principles of formation of agreements and Sections 7 and 8 are particularization of the principles earlier formulated. If there is a proposal and it is accepted unconditionally, then an agreement is formed between the parties. But if the other side accepts it with a qualification then there is no accepted by the proposer there is no agreement. Section 7 clarifies this principle and provides that acceptance must be (1) absolute and unqualified and expressed in some usual and reasonable manner unless the proposer prescribes the manner in which it

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is to be accepted and that if the acceptance is not in the manner prescribed by the proposer, the proposer must within a reasonable time after receipt of the acceptance insist that his proposal should be accepted as required by him. If this is not done, the section says "he accepts the acceptance". Section 8 is a further amplification of the principle where from the conduct of a party his acceptance is inferred. This section must be read along with Section 7. In order that acceptance of the proposal be inferred the acceptance of the consideration must be unconditional. Of course, if by any action on the part of the acceptee the proposer cannot be restored to his former position, then the acceptee cannot be permitted to say that his acceptance should be treated as other than as per the original proposal. But in the absence of such estoppel being applicable the conditional acceptance cannot become absolute acceptance can become absolute acceptance when there are no such words in Section 8."

c) McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181

"..It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law..."

15. Counsel for the Petitioner has contended that from the above quoted extracts of judgments it is clear that the conduct by the parties can amount to acceptance of an offer, if it is clear that the party did the act with the intention (actual or apparent) of accepting the offer. Counsel for the Petitioner has alleged that the Respondent by its conduct affirmed the existence of a valid contract. The conduct of the Respondent shows that it was acting in furtherance to the said LOI. Counsel for the Petitioner has further submitted that the plea of non-existence of a valid contract has only been taken by the Respondent for the first time after almost four months when the first invoice was raised by the Petitioner. At no

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point earlier did the Respondent ever refute the existence of a contract and that the Respondent by a number of letters assured the Petitioner that it was participating in various bids based on the LoI issued by the Petitioner. Counsel for the Petitioner has submitted that in view of the above circumstances, it is evident that the Respondent always had the intention of purchasing the surplus power from the Petitioner hence its contention that there was no agreement is baseless and bad in law.

16. The Petitioner has relied on **Shankarlal Narayandas Mundade v New Mofussil Co Ltd (1946) 73 IA 98** to plead that formal execution of agreement is not a condition precedent for a binding contract. The relevant portion of the judgment is reproduced below as:

“In the offer and acceptance were made orally in which the parties agreed upon the price, earnest money, completion date and other usual terms to be incorporated in the agreement by the solicitors. There was a dispute regarding the terms of the draft agreement and the seller refused to perform the contract. Held : “Apart from the objection that the point was taken too late, however, the facts did not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary, there was ample evidence to prove that both parties intended to make, believed that they had made, and had made a binding oral agreement, and their desire and intention to put that agreement into formal shape did not affect its validity. It clear that unless an inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality.”

17. During the hearing held on 19.01.2012, the Petitioner and the Respondent reiterated the submission made in the Petition and in the reply, respectively. The Commission has heard the Learned Counsel for both the parties who argued at length and have given careful consideration to their strenuous submissions. The main issue involved in the present petition is whether a concluded contract, on the basis of correspondence, came into existence or not? It is a settled principle that a contract can come into existence by exchange of letters. It is not necessary that there must be a single formal document signed and executed by both the parties. **In M/S Rickmers Verwaltung Gmb H vs The Indian Oil Corporation Ltd.**

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(1999) 1 SCC 1 –the Supreme Court has held that the Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The relevant extract of the judgment is reproduced below;

“The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence...”

18. Further the Hon’ble Supreme Court in **Dresser Rand S.A. Vs. Bindal Agro Chem Ltd. & Anr. AIR 2006 SC 871** has opined that letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. The relevant extract of the judgment is reproduced below;

40. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter”.

19. The Commission has to review the correspondence exchanged between the parties to conclude whether there exists a valid/binding contract or not. In the instant case the Petitioner invited tenders on 16.4.2009 for sale of power on firm basis for the period from 16.07.2009 to 30.09.2009. In response to the aforesaid enquiry, an offer was made by the Respondent vide letter dated 21.04.2009. Accordingly, Letter of Intent

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(LOI) was issued in favor of the Respondent on 27.04.2009 seeking acceptance of the same within three days failing which the Petitioner would be free to take appropriate action as deemed fit in the matter. The relevant Para of said LOI is reproduced below:

“Your acceptance may please be sent through fax within three days failing which M.P.Tradeco will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed.”

20. In pursuance to the said LOI, the Respondent wrote a letter to the Petitioner on 30.4.2009 wherein it thanked the Petitioner for issuing LOI in their favor with compensation on both sides. The relevant extract of the Respondent's letter dated 30.4.2009 reads as under:

“We are thankful for the issue of above referred LOI in our favor for the sale of Firm power available with M.P Tradeco during the period 16th July, 2009 to 30th September, 2009 with compensation on both sides.” In this connection it is submitted as under:-

1. That sincere efforts have been made by offering this surplus power available to the following deficit State Power Utilities and Private Distribution Companies.

- a) Punjab State Electricity Board, Patiala.*
- b) Haryana Power procurement Center, Panchkula, Haryana*
- c) Maharashtra State Electricity Distribution Company Ltd., Mumbai.*
- d) Tata Power Company Limited, Mumbai.*
- e) Rajasthan Power procurement Center,jaipur.*
- f) North Delhi Power limited (NDPL), New Delhi.*
- g) BSES Rajdhani Power Limited, New Delhi.*
- h) BSES Yamuna Power Limited, New Delhi.*

2. That due to General Parliament Elections in the country, most of the Head of Departments of State Power Utilities are over busy with the Election Process and have hardly any time left for taking decisions in this regard. Further you will also appreciate that there was hardly 2 to 3 days available after the issue of above referred LOI late in the evening on 27-04-2009 for getting the required LOI / Order issued from the buyer for initiating the application for the advance reservation of transmission corridor

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by 30th April '09 for the month of July '2009 with the nodal RLDC.

3. That State Power utilities /Private Distribution Companies, who were taken into confidence before submitting the offer have tied up power procurement for the above said period from the other power producers due to the late issuance of LOI by MP Tradeco.

We are making our all sincere and rigorous efforts for the sale of the above said surplus power.

Thanking you and assuring you our best servicers at all times to come."

21. The Commission has observed that the Respondent had sent the above letter on 30.4.2009 to the Petitioner within three days as per the terms of LOI which was issued on 27.4.2009. From a perusal of the letter dated 30.4.2009, it is clear that the Respondent accepted the LOI by thanking the Petitioner for issuing LOI in its favour and also assured the Petitioner that it was making all sincere and rigorous efforts for the sale of the surplus power. Counsel for the Respondent has vehemently argued that the Petitioner had modified the conditions offered by the Respondent, hence the LOI dated 27.4.2009 can only be termed as a counter-offer and not acceptance. Further the Respondent has contended that the said LOI of the Petitioner was never accepted by the Respondent as it was a counter offer. The Commission is of the view that if there were any modification or any substantial or material variations according to the Respondent in the LOI, the Respondent ought to have pointed this out in its correspondence. However, the Respondent never pointed out the modifications in its above letter. Only objection raised by the Respondent in the above letter was on the late issuance of the LOI by the Petitioner. The Commission has observed that even when the Petitioner wrote a letter to the Respondent on 7.5.2009 vide which it thanked the Respondent for accepting the LOI, the Respondent never denied its acceptance in its subsequent letters. The letter dated 07.05.2009 clearly indicates that the Petitioner was under an impression that its LOI has been accepted by the Respondent. The relevant extract of the Petitioner's letter dated 07.05.2009 reads as follows:

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“Kindly refer this office LoI no. 811 dated 27.04.09 placed on M/s KCT for sale of surplus power by M.P. Tradeco from 16th July, 2009 to 30th September, 2009 in different time blocks. We are also thankful to you for accepting terms and conditions of LoI No.811:

“Regarding issue of LOI, it is to clear that M.P. Tradeco had placed LOI well in time within three days after opening of the i.e. on 27.04.09, therefore, the point raised by you regarding late issuance of LOI is not acceptable.”

22. Perusal of the above correspondence makes it abundantly clear that the Respondent had not raised any objection in respect to the modifications made by the Petitioner in the offer dated 21.4.2009. Instead of disputing the correctness of the Petitioner’s averment made in the aforesaid letter regarding the acceptance of LOI by the Respondent, the Respondent kept on writing letters (dated 15.5.2009 and 19.5.2009) to the Petitioner informing about the progress made in furtherance to the LOI. The Respondent’s letter dated 15.5.2009 written in reference to the Petitioner’s letter dated 7.5.2009 is reproduced below:

“Vide our letter No.PT/KCT-Mp Traseco/3004/2009-10 dated 30.04.2009, we have already submitted that as per Clause 9 of the subject cited LOI, “We are exploring all the possibilities for scheduling of surplus power from MP Tradeco for the period 16th July, 2009 to 30th September, 2009 and have sent officers immediately to various deficit State Power Utilities and Private Distribution Companies. As per details given below.

- a) Punjab State Electricity Board, Patiala.*
- b) Haryana Power procurement Center, Panchkula, Haryana*
- c) Maharashtra State Electricity Distribution Company Ltd., Mumbai.*
- d) Tata Power Company Limited, Mumbai.*
- e) Rajasthan Power procurement Center, Jaipur.*
- f) North Delhi Power limited (NDPL), New Delhi.*
- g) BSES Rajdhani Power Limited, New Delhi.*
- h) BSES Yamuna Power Limited, New Delhi.*

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It is very kindly submitted that NDPL(a Private Power Distribution Company in Delhi) and HPPC(State Power procurement Utility of Haryana) were taken into confidence before submitting our offer to MP Tradeco. During follow up with NDPL against our above mentioned offer sent to them, we have been intimated by NDPL that they tied up power procurement for the above said period with Jindal Power and there is no additional requirement for this period. We are constantly in touch with HPPC, who are in the process of deciding very shortly for the purchase of surplus power for the period May' 2009 to September'2009.As per past experience, you will very kindly also agree that the purchasers for the surplus power of above said period are mainly from Northern India only.

In view of our very long cordial business relation with MP Tradeco, we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco.

Thanking you and assuring you our best services at all times to come. “

23. The Commission has observed that in the letter dated 15.5.2009; the Respondent informed the Petitioner that it was exploring all possibilities for scheduling of surplus power from the Petitioner for the period 16th July, 2009 to 30th September, 2009 in terms of Clause 9 of the LOI. The letters dated 15.5.2009 and 19.5.2009 of the Respondent clearly show that, the Respondent was acting in furtherance of the said LOI. On 22.5.2009 the Petitioner sent a reminder letter to the Respondent asking them to initiate early action for obtaining advance booking of the transmission corridor in accordance with the CERC Regulation dated 21.1.2009 and on failure to initiate early action for reservation of corridor, compensation clause would be invoked. On receipt of this letter, the Respondent wrote another letter dated 23.5.2009, asking the Petitioner to make alternate arrangement for sale of aforesaid surplus power as no buyer was available with the Respondent.

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However on 25.5 2009 the Respondent again wrote a letter to the Petitioner informing that it is participating in MSEDCL tender enquiry for the sale of surplus power as per LOI. The Respondent vide its letters dated 1.6.2009,25.6.2009,9.7.2009 kept on informing the Petitioner that it is participating in various tender enquires for sale of surplus power in pursuance of the LOI dated 27.4.2009. The letter dated 25.6.2009 is reproduced below:

“In continuation to our above referred letter, it is very kindly submitted that Maharashtra State Electricity Distribution Company Limited (MSEDCL) have very recently issued tender enquiry for the purchase of 325 MW RTC Firm Power for the period 1st June’2009 to 31st May’2010 and the due date of opening of this tender enquiry is on 25-05-2009. We are participating in this tender enquiry for the sale of MP Surplus Power as per subject cited LOIs and shall immediately update MP Tradeco about the out come of this tender enquiry.

It is once again assured that we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco. “

24. The matter has been examined by the Commission in light of the principles laid down by the Hon’ble Supreme Court in its various judgments and submissions made by the parties. From a perusal of the correspondence it is observed that the Respondent conveyed its acceptance to the Petitioner by sending a letter dated 30.4.2009 within the stipulated time mentioned in the LOI dated 27.4.2009. In furtherance to this acceptance the Respondent kept on updating the Petitioner about the development made at its end. Referring to Section 7 of the Indian Contract Act, 1872 the Respondent has submitted that a valid, binding and concluded contract would come into existence only if the offer is accepted in absolute and unqualified terms. The Respondent has alleged that LOI dated 27.4.2009 was a counter proposal which required the acceptance of the Respondent and as the Respondent never sent its acceptance there cannot be a binding contract. On the other hand, Counsel for the Petitioner has submitted that at various instances, the Respondent by its conduct showed that it was acting in furtherance the said LOI.

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Counsel for the Petitioner has asserted that under Section 8 of the Indian Contract Act 1872 communication of acceptance can be established by the conduct of parties also.

25. To appreciate the arguments of the learned counsel for the parties, it is necessary to quote the provisions of Sections 7, and 8 of the Indian Contract Act, which are as under :-

Section 7. Acceptance must be absolute:

“In order to convert a proposal into a promise the acceptance must -

(1) Be absolute and unqualified.

(2) Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted; and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.”

Section 8: Acceptance by performing conditions, or receiving consideration:

“Performance of the conditions of proposal, for the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal”

26. Admittedly, acceptance under Section 7 of the Indian Contract Act 1872 must be absolute and unconditional. However, acceptance need not always be expressed, it may also be implied or inferred from the conduct of parties as per Section 8 of the Indian Contract Act 1872. In **Bhagwati Prasad Pawan Kumar v. Union of India 2006 (V) SCC 311**, (supra) the Hon'ble Supreme Court has also observed as under:

"19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. Each case must rest on its own facts.

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27. Coming to the facts of this case, the Respondent by its very conduct had accepted the terms and conditions of the LOI dated 27.4.2009 without protesting against modification made in the LOI issued on 27.4.2009 and such acceptance by conduct is recognized in the Contract Act as valid acceptance. Hence, the argument of the Respondent that there is no concluded contract between the parties in absence of acceptance in terms of LOI stands dismissed.
28. Counsel for the Respondent has further contended that correspondence to the Petitioner by the Respondent was solely made for the purpose of maintaining cordial relations with the Petitioner. According to Counsel for the Respondent, the matter was inchoate and only at the stage of negotiations. However, the Commission is of the view that from the language of the correspondence it is clear that the Respondent did not write letters to the Petitioner just for maintaining cordial relations with the Petitioner but was making sincere efforts for selling surplus power in terms of the LOI. In view of these facts and circumstances, the Commission is of the view that the Respondent had accepted the LOI and was constantly making efforts in pursuance to the said LOI. From the correspondence of the Respondent, it is observed that on the basis of the LOI issued by the Petitioner, the Respondent participated in the tender inquiry of the MSEDCL and TNEB and was taking advantage of the same. It is also observed that the Respondent never raised any objections regarding the modification made by the Petitioner in the LOI or existence of a valid contract till the first invoice was raised by the Petitioner. At no point did the Respondent ever refute the existence of a contract. Hence the contention of the Respondent that there was no agreement is not tenable.
29. On the basis of the documents and the correspondence available on record, the Commission is of the view that in the instant case the execution of the PPA was not a condition precedent but a mere formality. Hence, the Commission concludes that a legally enforceable contract in terms of the relevant provisions of the Contract has already come into existence when the LOI dated 30.4.2009 was issued, received and accepted by the Respondent.

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30. Next issue before the Commission is to determine whether the Respondent is liable for the breach of contract or not and if there is breach of contract, the quantum of damages, if any, that are payable to the Petitioner. The Commission has decided to take up these issues in the next hearing.
31. The next date of hearing is fixed on 06.03.2012.

(Rakesh Sahni)
(Chairman)

DISSENT VIEWS OF MEMBER

- i. In the instant case the Petitioner invited tenders on 16.4.2009 for sale of power on firm basis for the period from 16.07.2009 to 30.09.2009. In response to the aforesaid enquiry, an offer was made by Respondent vide letter dated 21.04.2009. Accordingly, Letter of Intent (LOI) was issued in favor of Respondent on 27.04.2009 seeking acceptance of the same within 3 days failing which the Petitioner will be free to take appropriate action as deemed fit in the matter. The relevant Para of said LOI is reproduced:

“Your acceptance may please be sent through fax within three days failing which M.P.Tradeco will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed.”

- ii. In pursuance to the said LOI, the Respondent wrote a letter to the Petitioner on 30.4.2009. The relevant extract of the Respondent’s letter dated 30.4.2009 addressed to the Petitioner is reproduced as under:

“We are thankful for the issue of above referred LOI in our favor for the sale of Firm power available with M.P Tradeco during the period 16th July, 2009 to 30th September, 2009 with compensation on both sides.” In this connection it is submitted as under:-

1. That sincere efforts have been made by offering this surplus power available to the following deficit State Power Utilities and Private Distribution Companies.

- a) Punjab State Electricity Board, Patiala.*
- b) Haryana Power procurement Center, Panchkula, Haryana*
- c) Maharashtra State Electricity Distribution Company Ltd., Mumbai.*
- d) Tata Power Company Limited, Mumbai.*
- e) Rajasthan Power procurement Center, jaipur.*

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- f) *North Delhi Power limited (NDPL), New Delhi.*
- g) *BSES Rajdhani Power Limited, New Delhi.*
- h) *BSES Yamuna Power Limited, New Delhi.*

2. *That due to General Parliament Elections in the country, most of the Head of Departments of State Power Utilities are over busy with the Election Process and have hardly any time left for taking decisions in this regard. Further you will also appreciate that there was hardly 2 to 3 days available after the issue of above referred LOI late in the evening on 27-04-2009 for getting the required LOI / Order issued from the buyer for initiating the application for the advance reservation of transmission corridor by 30th April '09 for the month of July '2009 with the nodal RLDC.*
3. *That State Power utilities /Private Distribution Companies, who were taken into confidence before submitting the offer have tied up power procurement for the above said period from the other power producers due to the late issuance of LOI by MP Tradeco.*

We are making our all sincere and rigorous efforts for the sale of the above said surplus power.

Thanking you and assuring you our best servicers at all times to come.

The Respondent has submitted that a valid, binding and concluded contract would come into existence only if the offer is accepted in absolute and unqualified terms. The Respondent has contended that LOI dated 27.4.2009 was a counter proposal which required the acceptance of the Respondent and as the Respondent never sent its acceptance there cannot be a binding contract. On the other hand the Counsel for the Petitioner has submitted that at various instances, the Respondent by its conducts showed that it was acting in furtherance the said LOI. The Counsel for the Petitioner has asserted that under Section 8 of the Indian Contract Act 1872 communication of acceptance can be established by the conduct of parties also. To appreciate the arguments of the learned counsel for the parties, it is necessary to quote the provisions as contained in Sections 7, and 8 of the Indian Contract Act, which are as under :

Section 7. Acceptance must be absolute:

“In order to convert a proposal into a promise the acceptance must -

- (1) Be absolute and unqualified.*
- (2) Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal*

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prescribes a manner in which it is to be accepted; and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but; if he fails to do so, he accepts the acceptance."

Section 8: Acceptance by performing conditions, or receiving consideration:

"Performance of the conditions of proposal, for the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal"

iii. Admittedly, acceptance under Section 7 of the Indian Contract Act 1872 must be absolute and unconditional. However, acceptance need not always be expressed, it may also be implied or inferred from the conduct of the parties as per Section 8 of the Indian Contract Act 1872. In **Bhagwati Prasad Pawan Kumar v. Union of India 2006 (V) SCC 311**, (supra) the Hon'ble Supreme Court has also observed as under:

"19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. Each case must rest on its own facts.

iv. The Counsel of the Respondent has further contended that correspondences written to the Petitioner by the Respondent were solely made for the purpose of maintaining cordial relationship with the Petitioner. According to the Counsel of the Respondent the matter was inchoate and only at the stage of negotiations..

v. After considering the rival contentions of the parties and examining the contents of the correspondence between the parties on record, the Commission would frame following two issues for consideration:

- (a) Whether the letter of intent dated 27/04/2009 can be considered as acceptance of offer submitted by the Respondent.
- (b) If (a) is answered in negative, then, whether the communication dated 30th April 2009 of the Respondent can be taken as acceptance of the offer made vide LOI 27/04/2009 of the Petitioner and/or whether subsequent correspondence of the Respondent can be construed as acceptance of offer by conduct.

vi. On the first issue, the Petitioner has stated that there were material variations viz-a-viz his offer, in respect of terms of letter of credit which was to be accepted as payment security and also addition of right of termination of contract in event of payment default

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which was not in his offer. It has also been mentioned that the wording of the letter of intent (LOI) as follows also makes it crystal clear that it was a counter offer :

‘Your acceptance may please be sent through fax within three days failing which M.P. Tradeco. will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed.’

vii. On the other hand the Petitioner has relied on Hon’ble Supreme Court judgement in Dresser Rand S.A Vs. Bindal Agro Chem Ltd., AIR 2006 SC 871 and Shankarlal Narayandas Mundade Vs. New Mofussil Co. Ltd. (1946) 73 IA 98 and similar other judgments. The Commission has given careful consideration to the rival contentions however, as the text of the LOI itself requires the respondent to accept it and the material deviations mentioned by the respondents are a matter of record, it is held that the LOI was not an acceptance of the offer of the Respondent but a counter offer.

viii. Now we will take up the second issue as the first issue has been answered in negative. On this issue the main contention of the Petitioner was that the letter dated 30th April 2009 was an acceptance letter. The petitioners have also contended that even if this is not so, the subsequent conduct of respondents makes it amply clear that they had accepted the offer made by LOI dated 27/05/2009 and have acted in furtherance of that LOI. On the other hand, the respondents have contended that acceptance cannot be read into their communications and that it is a well settled law that the acceptance must be absolute and unqualified as envisaged under section 7 of the Indian Contract Act 1872. Both the parties have cited various rulings of the higher courts to buttress their contentions. Let us first examine the communication dated 30th April 2009 mentioned earlier in para 20. The Respondents while thanking the petitioner for issue of LOI mentioned 8 utilities to whom surplus power was offered and stated that these utilities have since tied up the power procurement due to late issue of LOI and that they are making sincere efforts for sale of above said surplus power. It is difficult to read an absolute and unqualified acceptance in the above text as required under section 7 of the Indian Contract Act 1872. At best, it can be seen as a ploy for keeping the offer open in hope of roping in a buyer(s) subsequently. We therefore hold that this communication cannot be construed as an absolute and unqualified acceptance resulting into a binding contract.

ix. Now let us examine the contention of acceptance by conduct taken by the Petitioner. The Petitioner has contended that the Respondent continued to convey to them that they have made offer of this surplus power to various utilities against the tender floated by them. To this the Respondent mentioned that they were only assisting the Petitioner in view of their long standing business relationship in disposal of the surplus power. The

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sale of power was scheduled to commence from 15th July 2009. It has been mentioned that after the letter dated 30th April 2009 various other letters dated 15.05.2009 and 19.05.2009 were written by the Respondent mentioning that they are exploring all possibilities of selling the surplus power of the Petitioner. On 22nd May 2009, the Petitioner sent a communication to the Respondent saying that failure to initiate early action for reservation of corridor will result in invocation of compensation clause. On 23rd May 2009, the Respondent conveyed to the petitioner that they may make alternative arrangement for sale of surplus power as they have no buyers. However, further on 25/05/2009, 01/06/2009, 25/06/2009 and 09/07/2009 respondents informed the Respondent that it is participating in various tender for sale of surplus power. It has been contended by the Petitioner that the respondents were all along acting in furtherance of the LOI placed on them and that thus they have accepted the LOI by their conduct. It is seen that in the first communication itself, the Respondent has mentioned 8 power utilities to whom this power was offered. It was further mentioned that because of the late issue of LOI, the said utilities have tied up their power requirement elsewhere. Inescapable inference is that the Respondent was making offers even before issue of LOI. The Respondent is an electricity trader and hence keeps on making offers for both purchase and sale of power. It cannot be construed that they were only selling this power. A trader has to have a seller and a buyer of power and acts merely as a bridge between the two. In their making offers to various utilities, acceptance by conduct cannot be read. Based on the above analysis, the Commission concludes that the LOI placed by the Petitioner was neither accepted vide letter dated 30th April 2004 in a manner which is absolute and unqualified as required under section 7 of the Indian Contract Act nor the correspondence on record establish acceptance by conduct as contended by the Petitioner. As such, no concluded contract had emerged. The petition for adjudication of dispute under section 86(1) (f) of the Electricity Act 2003 is not sustainable, hence dismissed.

(C.S.Sharma)
(Member)

ORDER OF THE COMMISSION

In terms of section 92 (3) of the Electricity Act, 2003 (36 of 2003), the view of Shri Rakesh Sahni, Chairman will be the order of the Commission. The next date of hearing is fixed on 06.03.2012.

(C.S.Sharma)
(Member)

(Rakesh Sahni)
(Chairman)