

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

**ORDER**

**(Date of hearing: 24<sup>th</sup> August, 2013)**

**(Date of order: 7<sup>th</sup> September, 2013)**

M.P. Power Management Co. Ltd. - Petitioner  
(Formerly M.P.Power Trading Co. Ltd.)  
Shakti Bhawan, Rampur, Jabalpur,

V/s

M/s NTPC Vidyut Vyapar Nigam Ltd., - Respondent  
7<sup>th</sup> Floor, Core-3, Scope Complex,  
7 Institutional Area, Lodhi Road.  
New Delhi – 110003.

Shri Manoj Dubey, Advisor (Law) appeared on behalf of the petitioner.  
Shri M.G. Ramachandran, Advocate and Shri Kumar Mihir, Advocate appeared on behalf of the respondent.  
Shri A.B.Bajpai, Member of the Commission recused himself from the proceedings of this case on the request of the respondent.

2. The petitioner, M.P. Power Management Co. Ltd., Jabalpur has filed the present petition on 30.03.2012 under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute with M/s NTPC Vidyut Vyapar Nigam Limited, New Delhi.

3. **Facts of the case:**

(i) The petitioner had issued a short term tender enquiry on 03.05.2011 for sale of power on the following basis for the period from 01.07.2011 to 31.10.2011:

- (a) As and when available day ahead
- (b) Firm (Not round the clock)

(ii) In response to the aforesaid enquiry, an offer was made by the respondent vide letter dated 11.05.2011 on round the clock basis. The date of submission was extended to 18.05.2011. By letter dated 18.05.2011 withdrawing the earlier offer, the respondent submitted its revised offer on firm basis (on the basis of duration of hours).

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

- (iii) By letter dated 26.05.2011, the petitioner placed Letter of Intent (LOI) for sale of power. The LOI provided that subsequently an agreement for sale of power shall be executed.
- (iv) By letter dated 09.06.2011, the petitioner requested the respondent to establish Letter of Credit and explore all possibilities for evacuating full quantum of power for full duration as mentioned in the LOI. Also, the petitioner forwarded a draft Power Sale Agreement to the respondent, but the respondent did not revert to execute it.
- (v) By letter dated 14.06.2011, the respondent informed the petitioner that in absence of night power in the LOI (which was not in line with the tender conditions and its offer dated 18.05.2011), they were facing difficulty in tying up day and peak power with the buyers. Nevertheless they were putting in their best efforts to get the power scheduled. They also informed that they were trying to tie up the power on best efforts basis and shall intimate to MP Tradeco (Now MP Power Management Co. Ltd.) as soon as any firm tie up was made with the buyer(s).
- (vi) By letters dated 20.06.2011 and 28.06.2011, the petitioner again requested the respondent to execute the agreement as per the provisions of LOI, but the agreement was not executed between the parties. Meanwhile, by letter dated 24.06.2011, the respondent informed the petitioner that it is in constant touch with the prospective buyers and is putting in its best efforts to get the power scheduled. By another letter dated 28.06.2011, the petitioner requested the respondent to open weekly revolving Letter of Credit.
- (vii) By letter dated 29.06.2011, the respondent informed the petitioner that it is exploring all possibilities to schedule the power and it will not be in a position to open Letter of Credit even in the event of power scheduling. By letter dated 01.07.2011, the respondent expressed difficulties to tie-up power with buyers and raised the issue of injection charges and losses and

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

asked confirmation from the petitioner so that it could proceed further for tie up and scheduling. This letter was received by the petitioner on 18.07.2011. Meanwhile, by letter no. 04.07.2011, the petitioner again requested the respondent to open the Letter of Credit, explore all possibilities for evacuating full quantum of power for full duration as mentioned in the contract and for execution of agreement. By letter dated 08.07.2011, the respondent informed the petitioner that it will not be in a position to open Letter of Credit in favour of the petitioner and also requested the former to revise the LOI based on its offer for Round the Clock (RTC) power.

(viii) Since the respondent was not scheduling the said power, the petitioner issued tender on 11.07.2011 on as and when available and day ahead basis. The LOI No. 1286 dated 13.07.2011 was issued to Andhra Pradesh Power Coordination Committee for the period from 15.07.2011 to 31.07.2011 for sale of 100 MW power during 00.00 hrs. to 06.00 hrs. and 23.00 hrs. to 24.00 hrs. @ Rs. 2.90 per kWh and from 17.00 hrs. to 23.00 hrs. @ Rs. 5.30 per kWh. Another LOI No. 1287 dated 13.07.2011 was issued to M/s Knowledge Infrastructure Systems Pvt. Limited. However, they could not schedule any power. There was no compensation clause in the aforesaid LOIs dated 13.07.2011. The power which could not be scheduled as above i.e. 238.60 MU was sold on Power Exchanges @ Rs. 2.59 per kWh. The petitioner could recover lesser price than the price contracted with the respondent. This put the petitioner to loss.

(ix) By letter dated 14.07.2011, the petitioner replied to the respondent that RTC power cannot be insisted upon by the respondent as there was no condition mentioned in the respondent's offer dated 18.05.2011. The petitioner also requested the respondent to ensure scheduling of power failing which compensation shall be payable as per provisions of LOI dated 26.05.2011.

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

(x) By letter dated 19.07.2011, the petitioner replied to the respondent's letter dated 01.07.2011 (received on 18.07.2011) requesting the latter to open the Letter of Credit, execute the agreement and explore all possibilities for evacuating full quantum of power as mentioned in the contract failing which compensation shall be payable as per the provisions of LOI dated 26.05.2011.

(xi) By invoices dated 01.08.2011 and 01.09.2011, the petitioner raised the bill on the respondent for compensation charges of Rs. 5,05,92,000 for the period from 01.07.2011 to 31.07.2011 and Rs. 15,17,76,000 for the period from 01.08.2011 to 31.08.2011 respectively.

(xii) On 23.08.2011, the respondent proposed to the petitioner that it shall avail RTC power in lieu of scheduling the power under LOI dated 26.05.2011 for the months of September, 2011 and October, 2011. The petitioner accepted the said proposal of the respondent since the rates so proposed were slightly higher than those in LOI dated 26.05.2011. Accordingly, a fresh LOI no. 1564 dated 26.08.2011 was issued to the respondent. The petitioner scheduled full quantum of power for the month of September, 2011. However, due to grim position, the power could not be fully scheduled in October, 2011 and the petitioner had paid agreed compensation to the respondent to the extent of Rs. 9.15 Crores on account of default on its part to the satisfaction of the respondent.

(xiii) By letter dated 02.09.2011, the respondent submitted to the petitioner that during the discussions with the petitioner on 23.08.2011 and 24.08.2011, it was agreed that since there was no valid contract between the respondent and the petitioner, no contractual obligation arose for scheduling of power. The petitioner was also requested to withdraw the claims of compensation.

4. Aggrieved by the conduct of the respondent, the petitioner filed this petition for

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

adjudication of the dispute under the LOI dated 26.05.2011 pertaining to the enforceable period only i.e for the months of July, 2011 and August, 2011. In its petition, the petitioner has submitted that it is a trading licensee in the state of Madhya Pradesh and the Letter of Intent, which is a contract, was issued from Jabalpur, Madhya Pradesh. The delivery point for sale of power by the petitioner is within the periphery of Madhya Pradesh. Therefore, the cause of action has arisen within the jurisdiction of the Commission under Section 86(1)(f) of the Electricity Act, 2003. In support of this proposition, it cited the following judgments/order:

- (a) Passed by Hon'ble APTEL on 23.02.2011 in appeal no. 200/2009 –case of M/s Pune Power Development Private Ltd. Vs Karnataka Electricity Regulatory Commission
- (b) Passed by Hon'ble Supreme Court on 13.08.2008 in Civil Appeal no. 5722/2006 –case of M/s Grid Corporation of Orissa Ltd. Vs Gajendra Haldea and Ors.
- (c) Passed by Hon'ble Supreme Court in Civil Appeal no. 1940/2008 –case of M/s Gujarat Urja Vikas Nigam Ltd. Vs Essar Power Ltd.
- (d) Order passed by the Commission in the matter of M.P.Tradeco Vs National Energy Trading & Services Ltd.

5. The petitioner has prayed to the Commission as under:

- (a) To hold that the respondent is liable to pay an amount of Rs. 20,23,68,000 as compensation for non off-take of power during the period from July'11 to Aug.'11 in terms of the LOI dated 26.05.2011 issued by the petitioner.
- (b) To direct the respondent to pay an amount of Rs. 20,23,68,000 along with surcharge at the rate of 1.25% per month till the date of actual payment.
- (c) To direct the respondent to pay the costs and expenses of the present proceedings to the petitioner.
- (d) To pass such other order(s) as it may deem just in the facts of the present case.

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

6. The petitioner and the respondent have filed written submissions. The matter was listed for hearing on 24.08.2012. During the hearing, Counsel for the petitioner reiterated the contents of the petition. During the hearing, Counsel for the respondent did not object to the jurisdiction of the Commission. Hence, the hearing was held on the merits of the case.

7. During the hearing, Counsel for the petitioner submitted that the conduct of the respondent amounts to acceptance of the Letter of Intent even though the PPA was not executed between the parties. By letters dated 14.06.2011 and 24.06.2011, the respondent by its conduct, showed that it was acting in furtherance to the Letter of Intent dated 26.05.2011. Also, under Section 8 of the Indian Contract Act, 1872 communication of acceptance can be established by the conduct of the parties and the same has been done in the present case also. It was also submitted that the present petition was filed for adjudication of the dispute for the months of July, 2011 and August, 2011 only.

8. During the hearing, Counsel for the respondent submitted that by letter dated 14.06.2011, the respondent objected to the revision in the Letter of Intent dated 26.05.2011. Also, there was no concluded contract between the petitioner and the respondent. It was also submitted that as per clause 7 of the Indian Contract Act, 1872 the acceptance must be absolute. Since the Letter of Intent dated 26.05.2011 was not based on the bid dated 18.05.2011, it was a fresh offer. The agreement was also not executed with the petitioner. The compensation clause as appearing in the Letter of Intent dated 26.05.2011 was at variance with the compensation clause appearing in the respondent's offer dated 18.05.2011. The petitioner was required to accept the offer unconditionally and without any deviation.

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

9. In its written submission, the petitioner has submitted as under:-

(a) By letter dated 14.06.2011, the respondent had not rejected the Letter of Intent.

It had merely expressed its difficulty in absence of night power and confirmed that inspite of all difficulties it was moving ahead with the Letter of Intent and was trying to tie up the power with the utilities. The said letter ran in the spirit of the respondent's letter dated 24.06.2011 which had been filed by the petitioner. The intention of the petitioner has been bonafide throughout. It has approached the Commission with most clean hands.

(b) (i) The absence of night power in the Letter of Intent would not lead the Letter of Intent to be at variance with the respondent's revised offer. In view of clear terms of tender enquiry, the respondent knew that the petitioner could issue Letter of Intent either for firm power for all durations in full as mentioned in the offer or for any part(s) thereof. The Letter of Intent was issued for the duration slots 06.00 to 17.00 hrs. and 17.00 to 23.00 hours only on firm basis. Therefore, to this extent the Letter of Intent was not at variance with the respondent's offer dated 18.05.2011. Therefore, being aware of clause 3 of the Tender Enquiry, even after expressing the difficulties faced by it in the absence of night power, the respondent had accepted the Letter of Intent by expressing in its letter dated 14.06.2011 that it was putting in its best efforts to get the power scheduled. Otherwise, at this stage itself the respondent was free to expressly reject the Letter of Intent because it was at variance with its offer. Therefore, conduct of the petitioner as can be gathered from its letter dated 14.06.2011 clearly establishes that it had accepted the Letter of Intent and the contract came to be concluded between the parties.

(ii) The compensation clause as appearing in the Letter of Intent was not at variance with the compensation clause appearing in the respondent's offer dated 18.05.2011. A careful perusal of the compensation clauses appearing in tender enquiry dated 03.05.2011, respondent's offer dated 18.05.2011 and

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

Letter of Intent dated 26.05.2011 makes it clear that the spirit of all the three was the same and the Letter of Intent took care of the rates of compensation as was offered by the respondent. However, in compensation clause of the respondent's offer dated 18.05.2011, there also appeared an expression "the above clause shall be applicable on back to back basis with Buyers". The absence of the said expression in the Letter of Intent does not make any change in the case. This arrangement was to ensure passing of compensation to the petitioner in the event of breach of contract between the respondent and its subsequent buyers. The presence or absence of the said expression did not absolve the respondent in case of breach of contract on the part of the respondent. Even otherwise, the respondent had not been able to arrange for a buyer. Therefore, invoking the said expression makes no difference to the compensation claimed by the petitioner. The respondent's offer dated 18.05.2011 and the Letter of Intent dated 26.05.2011 nowhere contained a condition or a pre-condition that the contract would be subject to availability of buyer(s) at the respondent's end. The respondent could not insist on Round the Clock or night power. It was made clear to the respondent under clause 3 of the tender enquiry dated 03.05.2011 that its offer could be accepted in full or in part. Accordingly, the Letter of Intent dated 26.05.2011 was issued for the duration 06.00 to 17.00 and 17.00 to 23.00 hours. These durations were offered by the respondent amongst various other durations in offer dated 18.05.2011. By letter dated 19.07.2011, this position along with other issues was also made clear to the respondent. Therefore, the Letter of Intent dated 26.05.2011 was not at variance with the respondent's offer dated 18.05.2011.

- (iii) The conduct of the respondent suggests that it had accepted the Letter of Intent dated 26.05.2011 on 'Best Efforts Basis'. The respondent had not rejected but accepted the same. The respondent had only expressed difficulties. The terms of offer dated 18.05.2011 and the Letter of Intent dated



**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

26.05.2011 were not subject to 'Best Efforts Basis'. The respondent did not even apply for open access, did not tie up power with any buyer(s) and did not open the required LC. The respondent at no point of time rejected the Letter of Intent and on the contrary, kept the petitioner under the impression that it was trying to tie-up the power in pursuance of the Letter of Intent. From the above factual matrix, it is clear that a contract came to be concluded between the parties and the same has been breached by the respondent. Therefore, the petitioner is entitled to compensation from the respondent at the rate mentioned in the contract.

- (iv) The respondent has not disputed the reasonability and rate of compensation at any point of time. The rate of compensation @ Rs. 0.96 / kWh is only 22.5% of the weighted average contract price of power to be scheduled by the respondent. The compensation claimed is in the nature of liquidated damages provided in the agreement between the parties. There is no necessity to provide any proof of loss suffered by the petitioner as the parties agreed for a predetermined quantum of compensation payable and in such cases, the compensation was also termed as liquidated damages and is to be enforced. The respondent has not suggested any other sum/rate for compensation which may be accepted as reasonable.
- (v) The arguments of the respondent that the Commission should take into account all the factors in exercise of the power under section 86(1)(f) of the Electricity Act, 2003 which is adjudicating power and while exercising such powers can override contracts, are misconceived.
- (vi) The petitioner relies on the following judgments in support of its arguments:
- (i) (2003) 5 SCC 705 (ONGC Ltd. V/s. Saw Pipes Limited)
  - (ii) (1980) 4 SCC 636 (M. Lachia Setty V/s. Coffee Board Bangalore)
  - (iii) AIR 1969 Bombay 373 (K.G. Hiranandani V/s. Bharat Barrel and Drum Manufactures)

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

- (iv) (1960) 2 SCC, 793 (Alopi Prasad V/s. Union of India)
  - (v) (1988) 3 SCC 82 (Continental Construction Co. Ltd. V/s. State of Madhya Pradesh)
  - (vi) (1999) 9 SCC 283 (Rajasthan State Mines & Minerals Limited V/s. Eastern Engg. Enterprises)
  - (vii) (2004) 13 SCC 44 (Travancore Devasworn Board V/s. Thanth International)
  - (viii) AIR 2006 SC 2337 (Bhagwati Prasad Pawan Kumar V/s. Union of India)
  - (ix) (2006) 11 SCC 181 (McDermott Int. Inc. V/s. Burn Standard Company Ltd.)
  - (x) AIR 1968 Bombay 294 (Union of India V/s. Babulal Uttamchand Bhandari)
  - (xi) Judgement dated 11<sup>th</sup> October 2012 passed by Hon'ble Appellate Tribunal for Electricity, New Delhi in Appeal No. 46 of 2012 (M/s. Karamchand Thapar & Bros. (CS) Ltd. V/s. M/s. MP Power Trading Co. Ltd.
  - (xii) Order dated 07-02-2013 passed by Gujarat Electricity Regulatory Commission in Petition No. 1076/2011 in the matter of GUVNL V/s. M/s. PTC India Pvt.Ltd.
- c) (i) The compensation clause as appearing in the Letter of Intent dated 26.05.2011 recognized that the petitioner and the respondent had predetermined the liquidated damages on pre-estimated basis and payable by the petitioner and the respondent in case of failure to off-take or supply of 80% of the contracted capacity of the power by the respondent or the petitioner. Once the respondent agreed to the compensation amount on pre-estimation basis, it is not permissible to claim that the compensation amount be evaluated on the basis of action

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

taken for mitigation of loss by the petitioner and with any other consideration.

(ii) Section 73 of the Indian Contract Act, 1872 provides that when a contract has been broken, the party which suffers by such breach is entitled to receive compensation for any loss caused to it which the parties know when they made the contract, to be likely as a result of breach of contract. Section 74 deals with the situation where penalty is stipulated in the contract, and, inter-alia, provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. The section further provides that the party complaining of the breach is entitled to compensation named in the agreement. In case of *ONGC V/s. Saw Pipes Ltd.*, (2003) 5 SCC 705, the Court held as under:

- (a) Terms of the Contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.
- (b) If the terms are clear and unambiguous stipulating the liquidated damages in case of that breach of contract, unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in section 73 of the Indian Contract Act, 1872.
- (c) Section 74 is to be read along with section 73 and therefore, in every case of breach of contract, the person aggrieved by breach is not required to prove the actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

- (d) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is a genuine pre-estimate by the parties as a measure of reasonable compensation.

In the above decision, the Hon'ble Supreme Court has recognized that the predetermined liquidated damages, if any, decided by the parties to the contract with some consideration is required to be given effect to by the court as valid compensation.

- d) That, the petitioner has not claimed anything: more so, it has not claimed any penalty, in excess of the sum named as damages in the contract. Therefore, there does not arise any occasion for determining any reasonable compensation which is in excess of the sum named in the contract. The petitioner is entitled to compensation @ Rs. 0.96/kwh and accordingly the amount Rs. 20,23,68,000 plus surcharge @ 1.25% on the said compensation amount from the date of respective invoices as claimed in the present petition.

11. In its written submission, the respondent has submitted that:

- (a) The petitioner has not approached the Commission with clean hands.
- i. The Petitioner herein has suppressed material documents from the Commission in making the claim of Rs. 20,23,68,000 along with surcharge @ 1.25 % per month on the basis of the Letter of Intent dated 26.05.2011 issued by it. This letter did not constitute an unconditional acceptance of the offer made by the respondent and was at best a counter/revised offer which was to be accepted unconditionally by the respondent to bring about a

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

concluded contract. The counter / revised offer was never accepted by the respondent.

- ii. The respondent vide its letter dated 14.06.2011 had objected to the revision in the bid dated 18.05.2011 submitted by it through the letter of intent dated 26.05.2011 issued by the petitioner and thereby, had rejected the revised offer given by the petitioner vide Letter of Intent dated 26.05.2011. The petitioner, however has deliberately suppressed and sought to mislead the Commission to accept its contention that there was a concluded contract between the parties and therefore, the respondent is liable to pay the compensation as claimed by the petitioner herein.
- iii. The respondent vide its letters dated 03.08.2011 and 02.09.2011 had brought to the notice of the petitioner that there exists no valid and concluded contract and no obligation on the respondent as claimed by the petitioner arises. Accordingly, the respondent vide the said letter requested the petitioner to withdraw its claim and during discussions with the officials of the petitioner, the said position was accepted and accordingly, the petitioner issued a letter dated 27.03.2012 confirming that as on 31.12.2011, no dues were pending on the part of the respondent herein. However, the petitioner filed the instant appeal on the very next day i.e. on 28.03.2012 before the Commission completely reversing its stand and in order to suppress the fact that the entire claim raised therein was an afterthought, the petitioner deliberately did not file the said letter dated 27.03.2012 on record.
- iv. In view of the above, it is evident that the instant petition suffers from the vice of “suppressio veri suggestio falsi” and as the petitioner has not approached the Commission with clean hands, the instant petition is liable to be dismissed.

(b) There was no concluded contract between the parties and therefore, the claim as made in the petition does not arise.

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

- i. That clause 22 of the tender stipulated that the parties shall execute an agreement subsequent to the issuance of the Letter of Intent.
- ii. Pursuant to the revised bid dated 18.05.2011 of the respondent, the petitioner herein issued a Letter of Intent on 26.05.2011 wherein it gave a counter/ revised offer reducing the Round the Clock (RTC) power as mentioned in the tender.
- iii. The petitioner further vide its letter dated 09.06.2011 asked the respondent to open the letter of credit in its favour.
- iv. The respondent, however, raised its objections to the Letter of Intent dated 26.05.2011 vide its letter dated 14.06.2011 and opposed the revision in the terms of the tender and the bid submitted by it. However, due to the business relations the respondent had with the petitioner and purely as a good will gesture, the respondent stated that it will make efforts in regard to sale of power. It is also relevant to note here that contents of the said letter make it manifestly clear that there was/ is no concluded contract between the parties as the respondent had never given its absolute, unqualified and unambiguous acceptance as required under Section 7 of the Contract Act, 1872.
- v. The petitioner vide its letters dated 20.06.2011, 28.06.2011, 04.07.2011, 14.07.2011 and 19.07.2011 did not even consider the objections raised by the respondent and instead, insisted upon the respondent inter alia to open letter of credit in favour of the petitioner. The respondent duly replied to the aforesaid letters vide its letters dated 24.06.2011, 29.06.2011, 01.07.2011 & 08.07.2011 and repeatedly raised its objections to the revised offer made vide the letter of intent dated 26.05.2011 and expressed its inability to open the letter of credit in favour of the petitioner.
- vi. However, the petitioner specifically raised invoices dated 01.08.2007 and 01.09.2011 claiming compensation to the tune of Rs. 20,23,68,000 on the baseless and illegal premise that the issuance of the Letter of Intent dated

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

26.05.2011 concluded the contract between the parties and therefore, the respondent was liable to pay compensation in terms of the compensation clause under the Letter of Intent dated 26.05.2011. In response to the aforesaid invoices dated 01.08.2007 and 01.09.2011, the respondent sent letters dated 03.08.2011 and 02.09.2011 stating that there was no concluded contract between the parties and therefore, it is not liable to pay any compensation as claimed.

(c) The aforesaid factual background will clearly establish that there is no concluded contract between the parties and therefore, the instant petition is liable to be rejected.

(d) The acceptance must be absolute, unqualified and without conditions as per Section 7 of the Contract Act, 1872. The Hon'ble Supreme Court in the case of Haridwar Singh vs. Bagun Sumbrui & Ors (AIR 172 SC 1242) has held that a conditional acceptance cannot in itself make a binding contract and to have an enforceable contract, there must be an offer and an unconditional acceptance. Further, in a similar case of Zodiac Electricals Pvt. Ltd. vs. Union of India (1986(3) SCC 522), the Hon'ble Supreme Court held that:

*“2..... It is, therefore, obvious that though in the opening part of this letter dt. 13.08.1979 the DGS&D appeared to accept the offer contained in the tender of the appellants, they did not unconditionally accept this offer, because they insisted that the appellants should deposit by 15.09.1979 a sum of Rs. 75,000/- as security deposit. The DGS&D thus added a condition which was contrary to the stipulation made in the offer of the appellants. This letter dt. 13.08.1979 could not possibly, therefore, be regarded as unconditional acceptance of the offer of the appellants and in the circumstances it could not be possibly contended that a concluded contract had been arrived at between the parties by reason of this letter dt. 13.08.1979. This letter dt. 13.08.1979 was really in the nature of a counter-offer made by the DGS&D to the appellants. The question is whether this counteroffer was accepted by the appellants.*

*3..... It is undoubtedly true that in the first place of the telegram the appellants used the expression, “we accept your advance order”, but in the context of the second part of the telegram this expression can only*

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

*mean that the appellants were acknowledging receipt of the advance order which contained the counter-offer. The telegram could not therefore be construed as amounting to unconditional acceptance of the counter-offer made by the DGS&D.*

(e) Further, in case of Mohamed Yusuf Ismail vs. Secretary of State (AIR 1921 Bom 200), the Hon'ble Bombay High Court has held that in reply to a counter offer, the statement of "I am making the necessary arrangements" will not amount to acceptance. Further it has been held in Chhotey Lal vs. Union of India (AIR 1987 ALL 329) that :

*"14.... S.7 of the Contract Act 1872 provides that in order to convert a proposal into promise, the acceptance must be absolute and unqualified. If this is not done and certain new conditions are added, no valid contract comes into existence.*

(f) It is also no longer res integra that issuance of the Letter of Intent itself will not establish acceptance of the offer and existence of a concluded contract and the facts of each case will determine the same. (Dresser Rand SA vs. Bindal Agro Chem AIR 2006 SC 871; Union of India vs. Uttam Singh Duggal & Co. AIR 1972 Del 110).

(g) It is also relevant to mention herein that clause 22 of the tender made it clear that the parties had agreed to execute a further agreement after issuance of the Letter of Intent. Accordingly, assuming though not admitting that the contentions of the petitioner about the existence of a concluded contract is correct, the said contract at best is an agreement to enter into another agreement which is not binding under law. (Speech and Software Technologies (India) Pvt. Ltd. v. Neos Interactive Limited, 2009(1) SCC 475). In view of the same, the Letter of Intent dated 26.05.2011 is not binding upon the parties and the instant petition is liable to be dismissed.

(h) In view of the above, it is stated that there is no merit in the case and therefore, the Commission may be pleased to dismiss the same with costs.



**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

12. The Commission has heard the Learned Counsel for both the parties who argued at length. The main issue involved in the present petition is whether a concluded contract, on the basis of correspondence, came into existence or not? To review the arguments between the learned counsel for the parties, it would be appropriate to quote the provisions of Sections 7 and 8 of the Indian Contract Act, 1872, which are as under :-

**“ 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.*

**8. Acceptance by performing condition, 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.”*

13. The Commission has reviewed the correspondence exchanged between the parties for sale of power during the months of July, 2011 and August, 2011 only because in its written submissions, the petitioner has mentioned that the present petition was instituted for the period of two months of July and August 2011 only from the total period of four months i.e. from July to October 2011 because the dispute was related only to the first two months. In the instant case, the petitioner invited tenders on 03.05.2011 for sale of power as and when available day ahead basis/ Firm basis for the period from 01.07.2011 to 31.10.2011. In response to the aforesaid enquiry, an offer was made by the respondent vide letter dated 11.05.2011. The date of submission was extended to 18.05.2011. By letter dated 18.05.2011 withdrawing the earlier offer, the

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

respondent made its revised offer. The letter of Intent (LOI) was placed by the petitioner on 26.05.2011 which provided that subsequently an agreement shall be executed. But, the same was not executed. As such, there was not a binding contract.

Secondly, the compensation clause as appearing in the LOI was at variance with the compensation clause appearing in the respondent's offer dated 18.05.2011 as the expression "the above clause shall be applicable on back to back basis with Buyers" did not appear in the LOI on which the sole compensation is based.

Thirdly, by letter dated 14.06.2011, the respondent objected that its offer dated 18.05.2011 also included the night period (23.00- 24.00 & 00.00 -06.00 hrs.) quantum which was excluded in the LOI dated 26.05.2011 in the absence of which, they were facing much difficulty in tying up day and peak power with the buyer(s). As between the petitioner and the respondent, therefore, the schedule of hours of supply was never agreed to.

By letter dated 24.06.2011, the respondent informed the petitioner that they were trying to tie up the power with best effort basis and shall intimate to the petitioner as soon as any firm tie up was made with a buyer. Though there was no written agreement the respondent in the spirit of mutual goodwill made their best efforts to identify the buyers.

From the above correspondence, the Commission has noted that acceptance of LOI by conduct of the respondent cannot be proved. Therefore, the Commission is of the view that the respondent has not submitted its acceptance of LOI dated 26.05.2011 on the terms and conditions mentioned therein.

14. Having heard the parties as also considering their written submissions, the Commission concludes that a legally enforceable contract in terms of the relevant provisions of the Indian Contract Act, 1872 did not exist when the LOI dated 26.05.2011 was issued by the petitioner and received by the respondent. The

**Sub : In the matter of adjudication of disputes between Madhya Pradesh Power Trading Co. Ltd. and M/s NTPC Vidyut Vyapar Nigam Ltd.**

Commission also holds that since there is no legally enforceable contract, question of breach of contract does not arise. Therefore, this petition for adjudication of dispute under Section 86(1)(f) of the Electricity Act, 2003 is not sustainable and is dismissed.

Ordered accordingly.

sd/-

**(Alok Gupta)**  
**Member**

sd/-

**(Rakesh Sahni)**  
**Chairman**