

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Coram:
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of order: 2nd June, 2023

Petition No. 83/MP/2019 along with IA Nos.59/2019 and 61/2019

In the matter of

Petition under Section 19 of the Electricity Act, 2003 seeking revocation of trading licensees for breach of contractual obligation by allowing the source generator to sell the power in Power Exchanges instead of supply to MSEDCL, as per contract / LOI.

And

In the matter of

Maharashtra State Electricity Distribution Company Limited.
Fifth Floor, Prakashgad, Plot-G9,
Anant Kanekar Marg, Bandra (East), Mumbai, 400051

... Petitioner

Versus

1. GMR Energy Trading Limited,
25/1, Skip House, Museum Road, Bangalore-560025.
2. Tata Power Trading Company Limited
Office block 1A, 5th Floor, Corporate Block, DB City Park,
DB City area mills, opposite M. P. Nagar-I, Bhopal-462016 (MP)
3. Manikaran Power Limited,
2nd Floor, D21, Corporate Park, Sector-21, Dwarka, New Delhi-110075.
4. D B Power Limited
3rd Floor, Naman Corporate Link, Opp. Dena Bank, C-31, G Block,
Bandra Kurla Complex, Bandra (East), Mumbai- 400051.
5. Sai Wardha Power Generation Ltd.
8-2-293/82/A/431/A, Road No. 22, Jubilee Hills,
Hyderabad - 500033

... Respondents

Petition No. 403/MP/2019 along with IA No.10/2020

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for seeking recovery of amount deducted by Maharashtra State Electricity Distribution Company Limited (MSEDCL), with respect to a tender, being Tender Event No. MSEDCL/Short/18-19/ET/58 dated 5.7.2018.

And

In the matter of

1. GMR Energy Trading Limited,
New Shakti Bhawan, Terminal-3, Opp. ATS Complex,
Indira Gandhi International Airport, New Delhi- 110037
2. D. B. Power Limited,
3rd Floor, Naman Corporate Link, Opp. Dena Bank, C-31, G Block,
Bandra Kurla Complex, Bandra (East), Mumbai- 400051 ... **Petitioners**

Versus

Maharashtra State Electricity Distribution Company Limited,
Fifth Floor, Prakashgad, Plot-G9,
Anant Kanekar Marg, Bandra (East), Mumbai, 400051 ... **Respondent**

And

In the matter of

Petition No. 216/MP/2021

And

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for seeking recovery of amount deducted by Maharashtra State Electricity Distribution Company Limited (MSEDCL) and Tata Power Trading Company Limited (TPTCL) and, with respect to a tender, being Tender Event No. MSEDCL/Short/18-19/ET/58 dated 5.7.2018.

And

In the matter of

D. B Power Limited,
3rd Floor, Naman Corporate Link, Opp. Dena Bank, C-31, G Block,
Bandra Kurla Complex, Bandra (East), Mumbai- 400051. ... **Petitioner**

Versus

1. Maharashtra State Electricity Distribution Company Limited.
5th Floor, Prakashgad, Plot- G9,
Anant Kanekar Marg, Bandra (East), Mumbai- 400051
2. Tata Power Trading Company Limited,
2nd Floor, B 12 & 13, Shatabdi Bhawan,
Sector-4, Noida, Uttar Pradesh-201307

... Respondents

Parties Present:

Shri Gopal Jain, Sr. Advocate, MSEDCL
Shri Anup Jain, Advocate, MSEDCL
Shri Akshay Goel, Advocate, MSEDCL
Shri Sanjay Sen, Sr. Advocate, MPL
Shri Buddy Ranganadhan, Advocate, GETL & DBPL
Shri Vishrov Mukerjee, Advocate, GETL
Shri Hemant Singh, Advocate, GETL, DBPL & MPL
Shri Lakshyajit Singh Bagdwal, Advocate, GETL, DBPL & MPL
Ms. Sindhuja Rastogi, Advocate, GETL, DBPL & MPL
Ms. Alchi Thapliyal, Advocate, GETL & DBPL
Shri Hemant Sahai, Advocate, TPTCL
Shri Shreshth Sharma, Advocate, TPTCL
Ms. Nehul Sharma, Advocate, TPTCL
Shri Deepak Khurana, Advocate, DBPL
Ms. Nishtha Wadhwa, Advocate, DBPL
Ms. Swapna Sesahdri, Advocate, Sai Wardha
Shri Anand K Ganesan, Advocate, Sai Wardha
Shri Dinesh H Agarwal, MSEDCL

ORDER

Since the above three Petitions are based on similar set of facts and law, they have been clubbed together for convenience of discussion and adjudication by a common order.

2. Petition No.83/MP/2019 has been filed by Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as 'MSEDCL') under Section 19

of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking revocation of trading licences granted by the Commission to GMR Energy Trading Limited (hereinafter referred to as 'GETL'), Tata Power Trading Company Ltd (hereinafter referred to as 'TPTCL') and Manikaran Power Limited (hereinafter referred to as 'MPL') alleging breach of contractual obligations on the part of these licensees by allowing the source generator to sell the power in the Power Exchanges instead of supplying to MSEDCL, as per contract / LOIs. The Petitioner, MSEDCL has made the following prayers:

“(a) To admit the Petition as per the provision of Section 19 of Electricity Act, 2003; and / or

(b) To revoke trading Licensee of M/s GMR Energy Trading Ltd, M/s Tata Power Trading Company Ltd and M/s Manikaran Power Ltd, i.e., Respondent Nos. 1, 2 and 3 respectively upon invocation of Section 19(1)(b) of the Electricity Act, 2003; and / or

(c) To pass any other order / relief as the Hon'ble Commission may deem fit and appropriate under the circumstances of the case and in the interest of justice.

3. Respondent No.1, GETL, and Respondent No.3, MPL, have filed an IA No. 61/2019 and IA No. 59/2019 respectively in Petition No. 83/MP/2019, seeking dismissal of the said Petition on the ground of not being maintainable under Section 19 of the Act.

4. Petition No. 403/MP/2019 has been jointly filed by GETL and D B Power Limited (hereinafter referred to as 'DBPL') under Section 79(1)(f) of the Act seeking recovery of amount deducted by MSEDCL with respect to Tender No. MSEDCL/Short/18-19/ET/58 dated 5.7.2018. The Petitioners have made the following prayers:

'(a) Declare the deductions made and forfeiture of EMD & CPG of Petitioners as wrongful / illegal;

(b) Direct the Respondent to refund / make a payment of Rs. 1,72,08,482 /- to the Petitioner No. 1, along with interest;

(c) Direct the Respondent to refund / make a payment of Rs. 1,75,62,677 /- to the Petitioner No. 2, along with interest;

(d) Award litigation cost(s); and

(e)pass any order and / or any such orders as this Commission may deem appropriate.”

5. GETL and DBPL have also filed an IA No. 10/2020 in Petition No. 403/MP/2019

with the following prayers:

“(a) Direct the Respondent, in the interim, to make a payment of Rs. 1,02,62,677/- (Rupees One Crore Two Lakhs Sixty-Two Thousand Six Hundred Seventy Seven), to the Applicant No. 1 / Petitioner No. 1, towards wrongful deduction from a separate LOI issued qua another generator, being M/s Sai Wardha Power Generation Limited; and

(b) Direct the Respondent, in the interim, to make a payment of Rs. 57,78,579/- (Rupees Fifty-Seven Lakhs Seventy Eight Thousand Five Hundred Seventy Nine), to the Applicant No. 2 / Petitioner No. 2 towards excess deduction on account of alleged short-supply of power; and

(c) Pass any order and / or such orders as this Commission may deem appropriate.”

6. Petition No. 216/MP/2021 has been filed by DBPL under Section 79(1)(f) of the Act for seeking recovery of amount deducted by MSEDCL and TPTCL with respect to Tender No. MSEDCL/Short/18-19/ET/58 dated 5.7.2018. The Petitioner has made the following prayers:

“(a) Direct the Respondents to jointly and severally refund / make a payment of Rs. 3,40,22,909/- to the Petitioner, along with interest;

(b) Award litigation cost(s); and

(c) Pass any order and / or any such orders as this Commission may deem appropriate.”

Facts in Petition No.83/MP/2029

7. In order to promote competitive procurement of electricity by distribution licenses for short term demand and reduce the power purchase bill of Distribution Companies (DISCOMs) through planned procurement based on transparent guidelines, Ministry of Power, Govt. of India, under the provisions of Section 63 of Act, vide Resolution dated 15.5.2012 had issued Guidelines for Short Term (i.e. for a period less than or equal to one year) Procurement of Power by Distribution Licensees through Tariff based competitive bidding process. Subsequently, Ministry of Power, Government of India vide Resolution dated 30.3.2016 introduced e-bidding platform (Discovery of Efficient Energy Price or DEEP portal) and e-reverse auction in short term power procurement of power.

8. MSEDCL has been regularly procuring power on short term basis through DEEP portal, as and when required. On 5.7.2018, MSEDCL floated a tender (ET-58) on DEEP portal for 500 MW on RTC and Day period each for 10 requisitions (each having 15 or 16 days) during the period from 1st August, 2018 to 31st December, 2018. Subsequently, on 23.8.2018, MSEDCL floated another tender (ET-71) on DEEP portal for 500 MW on RTC and Day period each for 6 requisitions (each having 15 or 16 days) during the period from 1st October, 2018 to 31st December, 2018. After completion of the e-bidding process, MSEDCL issued Lols to the successful bidders i.e. GETL, MPL TPTCL and JSW Energy Limited (JSWEL) w.r.t. tender ET- 58 and Lols to MPL, TPTCL, JSWEL and Arunachal Pradesh Power Corporation Private Limited (APPCPL) w.r.t. tender ET-71.

9. The Petitioner, MSEDCL has submitted that though the bidders accepted the LOIs, the following bidders defaulted in supply of power as per the contractual terms and conditions of the Lols:

(a) Default in supply of power as per the LOI:

Tender	Bidder	Source	Period	Rate (Rs/Unit)	Lol Date	Acceptance Date
ET- 58	GETL	DBPL	1.10.2018 to 15.10.2018	4.84 to 4.86	26.9.2018	29.9.2018
			16.10.2018 to 31.10.2018		9.10.2018	Not accepted
			1.11.2018 to 15.11.2018		25.10.2018	Not accepted
	TPTCL	DBPL	1.10.2018 – 15.10.2018	4.84 – 4.86	26.9.2018	29.9.2018
			16.10.2018 – 31.10.2018		9.10.2018	Not accepted
			1.11.2018 – 15.11.2018		25.10.2018	Not accepted
ET- 71	MPL	SWPGL	1.10.2018 – 31.12.2018	4.41 – 4.39	19.9.2018	29.9.2018

(b) To tackle the power shortage, the above bidders were requested to supply power from any alternative sources as per terms and conditions of tender. However, GETL and TPTCL supplied power only for three days qua ET-58 during the period from 1.10.2018 to 15.11.2018. MPL did not supply power during the period 1.10.2018 to 31.10.2018 qua ET–71. Due to non-supply of power, MSEDCL was constrained to procure power from the Power Exchanges at the prevailing market rates which led to financial burden of Rs. 15.15 crore and was also compelled to implement load shedding for 18 days during October 2018.

(c) On pursuing the bidders / source generators, it was conveyed that the power couldn't be supplied on account of coal shortage. However, on the basis of the data collected from WRLDC and MSEDCL, it was revealed that DBPL (source generator for GETL and TPTCL in ET – 58) had sold 228.22 MUs in Power Exchange during the period from 1.10.2018 to 15.10.2018 amounting to Rs. 135.80 crore at average unit rate of Rs 5.95 and SWPGL (source generator for MPL in ET-71) has sold 26.91 MUs in Power Exchange during 1.10.2018 to 31.10.2018 amounting Rs. 16.82 crore at average unit rate of Rs. 6.25.

(d) The Respondents GETL, TPTCL and MPL being successful bidders and traders, had the sole responsibility of arranging supply of power from source generator to fulfil contractual obligations. However, neither they desisted source generator from unethical act i.e. selling the power in Power Exchange but not supplying to MSEDCL nor supplied power from alternative sources. It is a not only willful and prolonged default and a material breach of contract but also an imprudent unethical practice for short term commercial gain and hence, neglected trading in electricity as per the contractual obligations.

(e) In order to maintain sanctity of contracts to facilitate power procurement planning, it is necessary to take stern legal action under Section 19 of Act against the Respondents. As per Section 19 of the Act, the Appropriate Commission, i.e. CERC, may revoke trading licence in case of default or breach of agreement. Further, Regulation 11 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related

matters) Regulations, 2020 (in short 'Trading Licence Regulations') requires the licensee to do prudential reporting with regard to any significant change in circumstances to meet its obligations under the Act, Rules, Regulations and agreement or any material breach thereof. Under Section 14 of the Act, The Commission may revoke the licence if the licensee has neglected to undertake trading in electricity or failed to submit the information required under the Trading Licence Regulations including Regulation 14 thereof. MSEDCL has prayed for revocation of licences of these licensees.

Hearing dated: 30.5.2019

10. The Petition was admitted on 30.5.2019. The Petitioner was directed to implead the generators i.e. DBPL and SWGPL as parties to the Petition. Subsequently, the Petitioner vide submission dated 7.6.2019 has revised the memo of parties and made DBPL and SWGPL as Respondents to the Petition.

Replies and Rejoinders

11. The Respondent No. 3, MPL, vide reply dated 20.6.2019 has submitted that the present Petition is devoid of merit. Since the Petition is not maintainable, it has filed an IA No 59/2019 for dismissal of this Petition. The Respondent has mainly submitted as under:

(a) Subject matter is a contractual obligation, wherein, all remedies, rights and obligations are available but not a regulatory issue to proceed with the revocation of licence.

(b) In reference to MSEDCL's tender ET-71 for the period from 1.10.2018 to 31.12.2018, MPL vide letter dated 1.9.2018 to SWPGL clarified the terms and

conditions of the bid and requested for authorization to participate on its behalf. The said proposal was accepted by SWPGL vide letter dated 4.9.2018 and considering the same, MPL participated in the subject bid.

(c) MPL was declared as a successful bidder for 80 MW for the period from 1.10.2018 to 31.12.2018 and on 19.9.2018, MSEDCL issued Letter of Intent (LoI) for supply of firm power of 80 MW at Rs. 4.41 / unit for the period from 1.10.2018 to 30.11.2018, Rs. 4.38 / unit for the period from 1.12.2018 to 15.12.2018 and Rs. 4.39 / unit for the period from 16.12.2018 to 31.12.2018.

(d) MPL vide letter dated 20.9.2018 communicated the same to SWPGL and requested for acceptance of the same. Accordingly, SWPGL vide email dated 22.9.2018 accepted the subject LoI.

(e) MPL vide email dated 24.9.2018, on behalf of SWPGL, applied for Short-Term Open Access (STOA) to Maharashtra Electricity Transmission Company Limited (MSETCL) and the same was granted on 27.9.2018 for the period from 1.10.2018 to 31.10.2018. Accordingly, MPL vide email dated 29.9.2018 issued acceptance of LoI to MSEDCL for supply of power for the period from 1.10.2018 to 31.10.2018.

(f) SWPGL vide email dated 30.9.2018 communicated to MPL that due to non-availability of fuel at the power plant, it is not in a position to supply the contracted capacity of power. MPL communicated the same to MSEDCL vide email dated 1.10.2018.

(g) MSEDCL vide letter dated 3.10.2018 requested MPL to supply full quantum of power during the contracted period as per LoIs. In response, MPL vide its letter dated 4.10.2018 conveyed that due to some technical constraint of SWPGL, it would not be able to supply power and has been looking for alternative source to fulfil the obligations. However, as the spot market prices were highly inflated, no other generator was interested to provide alternative

supply. MPL had consistently pursued with SWPGL to resolve the issue, including calls and personal visits.

(h) Subsequently, SWPGL vide letter 27.10.2018 informed MPL that due to coal shortage, it was not in a position to supply power during the period from October, 2018. However, it would supply 85% of contracted power during November, 2018 and December, 2018. MPL further informed that in order to compensate the shortfall of supply during the month of October, 2018, it will supply 12 – 24 MW during November, 2018 and December, 2018, which is over and above 85% quantum. Accordingly, MPL vide letter dated 29.10.2018 has conveyed the same to MSEDCL but did not receive any response from MSEDCL thereon.

(i) Subsequently, MSEDCL vide demand notice dated 12.11.2018 to MPL raised demand for Rs. 6.24 crore and forfeited Earnest Money Deposit (EMD) of Rs. 0.74 crore. Further, MSEDCL in the demand notice alleged that SWPGL was selling power in the Power Exchange.

(j) SWPGL vide letter dated 15.11.2018 stated that in order to schedule RTC power under tender, it has identified one of its units i.e. unit-I. However, due to unavailability of fuel, the said efforts could not be materialized and power could not be supplied to MSEDCL. Further, the power sold in the Power Exchange (IEX) was of existing running units, after meeting the respective supply obligations, which would be known on day ahead basis.

(k) Thus, the Petitioner had made every effort under its control to mitigate the short supply. Further, the transaction of MPL with MSEDCL governed by Lol dated 19.9.2018 read with tender documents, which include clause 23 pertaining to obligation to pay damages in case of short of supply subject to force majeure. Accordingly, the breach of contract can be considered only if successful bidder fails to adhere to clause 23 of Lol.

(l) The Petitioner has already been resorted to the clause 23 of the Lol by deducting Rs. 6.24 crore from the payments to be made and therefore, the Petitioner is left with no grievance. Further, no subsisting breach of contract is there, which was liable to be reported to the Commission under Regulation 11 of Trading Licence Regulations.

(m) The grievance of the Petitioner is against the source generators but not the trading licensee, MPL. The entire transaction between MPL and SWPGL was a back-to-back transaction and MPL had limited role. Thus, the Petitioner instead of pursuing legal remedies against source generator, is wrongfully seeking revocation of trading licence of MPL.

(n) Even though there are separate causes of action for each of the said traders and involving different set of facts, the Petitioner has filed a single Petition making GETL, TPTCL and MPL as the Respondents. Since the facts of each of the cases are different and unique, the same cannot be clubbed together.

(o) MSEDCL vide letter dated 28.12.2018 informed MPL that due to non-supply of scheduled quantum, it is recovering Rs. 6.24 crore for the period from 1.10.2018 to 15.10.2018 and Rs. 2.419 crore for the period from 16.10.2018 to 31.10.2018 from the energy bill dated 1.12.2018 raised by MPL. Thus, MSEDCL has recovered money in excess and MPL is shortfall in recovery payment from MSEDCL for power supplied during the period from 1.11.2018 to 30.11.2018. Accordingly, MPL vide letters dated 7.1.2019 and 14.11.2019 requested MSEDCL to release the balance amount of Rs. 4.91 crore. However, no response was received in this regard.

(p) As the deduction made was in excess of clause 23 of tender document, MPL would initiate appropriate proceedings against MSEDCL for the same. The present petition has been filed to prevent MPL from such proceedings.

12. GETL vide reply dated 20.6.2019 has reiterated the submissions made by MPL and has additionally has submitted as under:

(a) In reference to MSEDCL's tender ET-58 for the period from 1.8.2018 to 31.12.2018, DBPL vide letter dated 11.7.2018 accepted the terms and conditions of the tender and issued Letter of Authorization to GETL for participating in subject tender. Accordingly, GETL participated in this bid.

(b) GETL being a successful bidder, MSEDCL vide dated 26.9.2018 issued a Letter of Intent (LoI) in favour GETL for supply of 50 MW power on firm basis at Rs. 4.86 / unit for the period from 1.10.2018 to 15.10.2018. Accordingly, GETL vide email dated 28.9.2018 requested DBPL to provide its consent for scheduling of power from 1.10.2018 to 15.10.2018, wherein, DBPL vide its communication dated 28.9.2018 accepted the LoI.

(c) On 29.9.2018, DBPL conveyed GETL that there is acute shortage of coal in the country and supply of power will be subjected to receipt of coal at plant. Further, due to various circumstances, it was forced to apply for day ahead applications as per coal availability.

(d) MSEDCL vide letter dated 3.10.2018 requested GETL for scheduling of full quantum of power under the contract and the same was communicated to DBPL, wherein, DBPL vide email dated 4.10.2018 conveyed that due to severe coal shortage in country, it was not possible to supply scheduled power as DBPL was compelled to withdraw one of its units from 5.10.2018.

(e) MSEDCL vide letter dated 4.10.2018 requested GETL to submit Contract Performance Guarantee (CPG) for supply of 50 MW from DBPL and 80 MW from SWPGL, as required under Clause 15.1 of the Tender document, wherein, GETL

vide letter dated 9.10.2018, has submitted one CPG of Rs. 0.8 crore (for SWPGL) and another CPG of Rs. 0.5 crore (for DBPL).

(f) GETL vide letter dated 5.10.2018 to MSEDCL conveyed the message of DBPL and also mentioned that as a trader it was taking all necessary steps, including in continuous touch with DBPL, to ensure continuous supply of power.

(g) MSEDCL vide demand notice dated 6.11.2018 conveyed that as the power was not supplied during 1.10.2018 to 15.10.2018, it was constrained to purchase power from Power Exchange, which led to financial burden of Rs. 2.47 crore. Accordingly, MSEDCL raised demand for Rs. 2.47 crore and conveyed that it is forfeiting the CPG of 0.5 crore and GETL was called upon to pay remaining of Rs. 1.97 crore within 7 days, else the same would be adjusted from the amount dues of the energy bill under Lols associated with DBPL and SWPGL.

(h) GETL vide letter dated 13.11.2018 informed MSEDCL that it had taken up two different power generation companies i.e. DBPL and SWPGL separately for participation in bid to supply power during the contract period. It was further informed that short supplies shall be dealt with in accordance with tender documents and not to proceed with encashment of CPG but to adjust from the energy charges of DBPL. GETL also informed that the compensation amount of Rs. 2.47 crore is not in accordance with tender documents and in order to ensure the exclusivity in settlement of transaction, requested MSEDCL not to adjust the amounts between the payments of two different sources.

(i) DBPL vide letter dated 16.11.2018 informed GETL that since it has already informed about its exit from the tender, payment of any amount doesn't arise. However, MSEDCL issued Lols for its convenience, but against guidelines of Ministry of Power. Even if the penalty is applicable, any cost of third party purchase by MSEDCL have no bearing on computation of the same and

compensation would be as per guidelines of MoP and tender documents. Further, MSEDCL is liable to pay compensation for not purchasing power in August – September, 2018, wherein, Power Exchange rates are lower than contract rate and led to financial loss.

(j) However, as MSEDCL, arbitrarily encashed the CPG of Rs. 0.5 crore as compensation, GETL vide letter dated 20.11.2018 informed to MSEDCL that penalty, if any, shall be as per MoP guidelines and tender documents and any third-party purchase shall have no bearing on compensation. Thus, MSEDCL can't arbitrarily force those costs on GETL.

(k) GETL vide letter dated 20.11.2018 to DBPL conveyed that MSEDCL has encashed the CPG of Rs. 0.5 crore towards the compensation for short supply of power by DBPL and the same has to be borne by DBPL and requested DBPL to arrange remittance of Rs. 0.5 crore.

(l) DBPL vide letter dated 22.11.2018 supported the notion of joint representation before MSEDCL but denied financial liability to MSEDCL and did not remit any money to GETL. Subsequently, GETL vide letter dated 29.11.2018 to DBPL conveyed that the contract is back-to-back and the entire compensation claimed by MSEDCL shall borne by DBPL.

(m) GETL vide letter dated 3.12.2018 informed MSEDCL that even though tender is for supply of power for the period from August-September, 2018, MSEDCL selectively issued Lols for the period from 1.10.2018 to 15.11.2018, when the Power Exchange rates are high and for the remaining period, obtained power from Power Exchanges to capitalize lower rates in Power Exchange. Further, during the validity of tender and pendency of issuance of Lols, MSEDCL has floated other tenders for the same period for its commercial gains. MSEDCL used its dominant position to block capacities of generators and compelled them to sell power in Power Exchanges at lower rates, which led to financial loss.

Further, MSEDCL is in default of contractual obligation, as the Letter of Credit (LC) was not submitted as per the terms and conditions of tender. MSEDCL had levied compensation of Rs. 2.47 crore on GETL towards short supply of power by DBPL but unilaterally and arbitrarily deducted the same from energy bill of another generator (SWPGL). Therefore, MSEDCL was requested to release the excess amount of Rs. 1.327 crore.

(n) MSEDCL vide letter dated 28.12.2018 informed GETL that GETL was liable to pay compensation of Rs.2.47 crore for period from 1.10.2018 to 15.10.2018 and Rs.0.77 crore for period from 16.10.2018 to 31.10.2018 on account of non-supply of requisite power, which necessitated MSEDCL to purchase power from Power Exchanges and whereas, the DBPL sold its power in market for commercial gains. It was also conveyed that it has recovered Rs. 2.47 crore by forfeiting CPG (Rs. 0.5 crore) as well as adjusting energy bills (Rs. 1.72 crore + Rs. 0.25 crore) and further Rs. 0.77 crore was recovering from energy bill dated 1.12.2018. Further, MSEDCL informed that due to non-acceptance of Lols for the period from 16.10.2018 to 31.10.2018 and from 1.11.2018 to 15.11.2018, the proportionate amount of Rs. 0.08 crore and 0.15 crore would be recovered through EMD.

(o) The action of DBPL to sell power in Power Exchange instead of supplying to MSEDCL was on its own and the same was beyond the control of GETL.

(p) MSEDCL in an unlawful manner adjusted an amount of Rs. 3.47 crore from due payments of energy bills for energy supplied by GETL, including separate Lol (associated with a source generator of another contract) and the said amount is not in accordance with tender. Thus, default was on the part of MSEDCL and not on the part of GETL. Since, MSEDCL has suppressed this material fact, the Petition is liable to be dismissed.

13. TPTCL vide reply dated 20.6.2019 made similar submissions as made by GETL and MPL. TPTCL has made the following additional submissions:

(a) In reference to MSEDCL's tender ET-58 for the period from 1.8.2018 to 31.12.2018, DBPL vide letter dated 11.7.2018 accepted the terms and conditions of the tender and issued Letter of Authorization to TPTCL for participating in subject tender. Accordingly, on 16.7.2018 TPTCL has participated in this bid. On 18.7.2018, the e-reverse auction was conducted for short listed bidders and TPTCL was declared a successful bidder

(b) MSEDCL issued Letter of Intent (Lol) dated 26.9.2018 to TPTCL for supply of 50 MW power on firm basis at Rs. 4.86/unit for the period from 1.10.2018 to 15.10.2018 and required TPTCL to execute the PPA and submit requisite CPG. DBPL, vide communication dated 28.9.2018, conveyed its acceptance to above Lol and TPTCL conveyed the acceptance of subject Lol to MSEDCL. Subsequently, DBPL supplied power to MSEDCL for the period from 1.10.2018 to 2.10.2018.

(c) MSEDCL vide letter dated 3.10.2018 to TPTCL highlighted the issue of non-supply of power w.r.t. Lol dated 26.9.2018 and requested to schedule full quantum on firm basis, failing which MSEDCL would be compelled to take stern action. TPTCL vide letter dated 4.10.2018 requested DBPL to schedule power in line with Lol.

(d) MSEDCL vide letter dated 9.10.2018 issued second Lol to TPTCL for the period from 16.10.2018 to 31.10.2018 and requested for CPG and execution of the PPA, as per tender documents. TPTCL communicated the same to DBPL. In response, DBPL vide letter dated 11.10.2018 informed TPTCL that since Lol was not issued within stipulated time (within 15 days from close of e-reverse auction) as per guidelines of Ministry of Power, DBPL was entitled to exit without

forfeiting EMD / CPG. Further, DBPL conveyed its inability to continue to supply for the balance period 1.11.2018 to 31.12.2018.

(e) TPTCL vide letter dated 12.10.2018 while acknowledging the letter of DBPL dated 11.10.2018 conveyed that DBPL would be responsible for any financial implication arising out of non-supply of power.

(f) Further, TPTCL vide letter dated 12.10.2018 to MSEDCL expressed its inability to supply power under the LOIs dated 26.9.2018 and 9.10.2018 and for the remaining period for which neither Lol had been issued nor PPA been signed, TPTCL expressed its desire to exit without any financial loss.

(g) MSEDCL vide letter dated 25.10.2018 issued third Lol to TPTCL for supply of power for the period from 1.11.2018 to 15.11.2018 and required TPTCL to execute PPA and submit requisite CPG. The same was communicated by TPTCL to DBPL.

(h) DBPL vide letter dated 31.10.2018 to TPTCL reiterated its earlier views that since issue of Lol and signing of PPA were not being completed as per MoP guidelines, DBPL would not be able to accept the Lols nor would be liable for payment of any compensation for the same.

(i) TPTCL vide letter dated 31.10.2018 expressed its inability to supply power to MSEDCL and highlighted that since it had already exited, it was neither liable for supply of power nor for any compensation w.r.t. any of the Lols, including issued previously.

(j) MSEDCL vide demand notice dated 6.11.2018 conveyed that as the power was not supplied during the period from 1.10.2018 to 15.10.2018, it was constrained to purchase power from the Power Exchange, which led to financial

burden of Rs. 2.47 crore. Accordingly, MSEDCL raised the demand for Rs. 2.47 crore.

(k) In response, DBPL vide letter dated 16.11.2018 denied the penalty levied by MSEDCL and informed that in case penalty was applicable, the same would be as per clauses 6 and 23 of tender documents but not as per the third party purchase by MSEDCL. Accordingly, TPTCL vide letter dated 16.11.2018 conveyed the same to MSEDCL.

(l) MSEDCL deducted Rs. 3.90 crore against all Lols. In response, TPTCL vide letter dated 15.2.2019 informed that the subject deduction is unlawful and is not as per tender document and TPTCL is entitled to recover this amount. However, no response was received from MSEDCL in this regard.

14. DBPL vide its reply dated 3.7.2019 has made similar submissions as made by GETL, TPTCL and MPL. A brief of submissions are as follows:

(a) Since the instant Petition has been filed for revocation of the trading licences granted to GETL, TPTCL and MPL under Section 19 of Act, the Petition is not maintainable against DBPL. MSEDCL's submissions are in contravention to documents and has distorted facts to suit its convenience.

(b) MSEDCL has issued tender for supply of power for the period from 1.8.2018 to 31.12.2018 but not issued Lols for the months of August–September, 2018 and procured power from Power Exchange to capitalize lower power rates of Power Exchange, i.e. blocked the capacity of generators, which in turn led to caused wrongful loss to DBPL. Further, during the pendency of the Lol issuance, MSEDCL has floated tenders ET-71 (October–December, 2018), ET-73 (September- 2018) and ET- 91 (December, 2018- February, 2019). In addition, MSEDCL has not submitted Letter of Credit (LC) as per tender documents, even after submission of CPG by bidder.

(c) MSEDCL has not taken any approval of the tender documents, wherein certain clauses were altered and are not in line with the MoP guidelines such as date of issuance of LoA from zero date and e-reverse auction. As per clause 12.3 of tender document, LoA is required to be issued three days prior to commencement of supply which is contradictory to clause 13.1 which provides that acknowledgment of LoA by successful bidder within 15 days of e-reverse auction. However, Lols are issued much later than 15 days from e-reverse auction which is in contrast to the provisions specified in the guidelines of MoP as well as tender documents, which entitles DBPL to exit without forfeiting its EMD. This was communicated to the concerned traders i.e. GETL and TPTCL vide communications dated 4.10.2018, 11.10.2018, 31.10.2018, 16.11.2018 and 24.12.2018. Thus, the Lols have no legal consequences and are not binding on any of the parties.

(d) Otherwise also, the Lols could not have been accepted and acknowledged on account of acute shortage of coal, which led to shutdown of one unit.

(e) In spite of above, MSEDCL wrongfully levied penalty by illegally forfeiting CPG and adjusting from energy bills. Further, the penalty levied for the period from 1.10.2015 to 15.10.2018 is based on differential tariff between Power Exchange price and Lol price for 100% contracted capacity. However, this wrongful penalty is not as per MoP guidelines and tender documents and any third-party purchase during the non-supply period has no bearing on computation of penalty. On the contrary, MSEDCL is liable for penalty on account of loss suffered for not purchasing power during the months of August to September, 2018.

(f) The Respondents MPL and GETL, have filed IAs bearing No. 59/2019 and 61/2019, respectively and reiterated submissions made in their replies to

dated 20.6.2019 and prayed for dismissal of the Petition No. 83/MP/2019. In spite of wrongfully recovering the money under clause 23, MSEDCL has filed the instant Petition for revocation of trading licence under Section 19 of Act citing that GETL and MPL have not complied with Regulation 11 of Trading Licence Regulations. However, as allegedly penalty was already being recovered under clause 23, there was no violation in Regulation 11 of the Trading Licence Regulations. Thus, Section 19 of Act read with Regulation 14 of the Trading Licence Regulations cannot be applied.

15. MSEDCL vide its rejoinder dated 26.8.2019 to the replies of GETL, TPTCL and MPL has reiterated the submissions made in the Petition and has mainly submitted as under:

(a) The successful bidders despite having commitment through Lols did not supply the power but sold in market, which not only disturbs the entire power procurement planning but also compels procurers to purchase the power at higher cost from the open market, to meet the existing demand, thereby burdening the end consumers with heavy cost of power. In case, long-term generators continue to sell power in market when market rates are higher instead of supplying power to their long-term beneficiaries, it would cause serious disruptions to power market. Thus, the issue is regulatory in nature rather than contractual.

(b) Clause 23 is for deviation from schedules but not for unethical sale of power in market. The Respondents on one hand disputing the said adjustments and on other hand using these as defence to initiate proceedings. Thus, the amount adjusted from the bills does not absolve the Respondents of their breach of contractual obligations towards supply of power and penal consequences.

(c) The submissions of Respondents GETL, TPTCL and MPL that being inter-State traders, their roles are limited for supply of power, reflects non-seriousness

of these traders. As they were unable to supply power as per Lols, they could have intimated the circumstances which led to such inability to the Commission. Further, the internal correspondence between the traders and source generator don't have any relevance as failure of internal arrangement of bidder is to fulfil its contractual obligation would not respire the bidder or absolve them from fulfilling any contractual obligation.

(d) In regard to non-supply of power, the bidders selectively relied on the coal shortage as claimed by source generator but submitted that the sale of power in Power Exchange by source generators is beyond their control.

(e) As per terms and conditions of tender, the bidders / traders are required to supply at least 85% of the contractual power from the contracted source generator and supply power from any possible alternate source, in case of unforeseen circumstances, which is not fulfilled by these traders.

(f) In regards to blocking of capacity and suppression of information, it was submitted that the bidders have participated on their own and the adjustments made are being a matter of record between the parties, there is no question of misrepresentation or suppression of information.

(g) In order to facilitate flexibility in scheduling of power, MERC allowed MSEDCL to modify the clause of issuance of LOA within 15 days from the closing of e-reverse auction to issue Lol / LoA 3 days prior to supply period in Case No. 135/2017.

(h) In regards to proposal of MPL to offer 12 – 24 MW additional power in the months of November-December, 2018 to compensate the shortfall w.r.t. October, 2018, it was mentioned that instead of offering 100% power as per Lol, the bidder offered 85% of supply and balance 15% i.e. 12-24 MW as a compensation for October, 2018. Accordingly, the same was not accepted.

Further, MPL has not mentioned any specific unit of source generator in the bidding, thus, the plea of supply from unit 1 is mala fide and afterthought.

16. MSEDCL vide its rejoinder dated 26.8.2019 to the reply of DBPL reiterated the submissions made in the Petition & rejoinders to the replies of GETL, TPTCL & MPL and has mainly submitted as under:

(a) In regards to non-adherence to Guidelines issued by MoP, the DBPL had participated in various other tenders ET- 63, ET-109, ET- 40, etc, which had similar terms and conditions of ET-58 and DBPL supplied the power without any objection. Thus, this objection is to an excuse to their contractual obligation.

(b) Even though under subject Lols, DBPL had supplied power for 3 days out of 45 days contract period, the Lols do not have any legal consequences and not binding on parties. Thus, it is a willful attempt to not to supply under contract.

(c) Since during the months of August, 2018-September, 2018, MSEDCL had not issued any Lol to bidders, there was no contractual obligation to take off the power from bidders. Further, the claim that it had procured power from Power Exchanges during lower rates is completely baseless and false.

(d) The plea of coal shortage raised by DBPL is an attempt to misguide this Commission from the Power Exchange schedule.

Petition No. 403/MP/2019

17. The Petitioners, GETL and DBPL which are Respondent Nos. 1 and 4 in Petition No. 83/MP/2019 have filed a joint Petition No. 403/MP/2019 against MSEDCL on 23.10.2019, *inter-alia*, seeking action against MSEDCL for wrongful deduction and encashment of EMD and CPG. The Petitioners have mainly submitted as under:

(a) Apart from Lol dated 26.9.2018, subsequently, MSEDCL has issued two Lols i.e. dated 9.10.2018 and 25.10.2018, which are in violation of short-term bidding guidelines. Accordingly, GETL and DBPL have not accepted these two Lols vide letter dated 12.10.2018 and 31.10.2018. However, MSEDCL arbitrarily deducted Rs. 3.48 crore on account of non-acceptance of these two LOIs.

(b) As per Clause 8.1 of the Short-term Bidding Guidelines, the approval of Appropriate Commission is required to be taken for any deviation in tender. In the instant case, MSEDCL has not only violated the mandate of issuing the Lol within 15 days of e-reverse auction but also failed to seek prior approval from the Appropriate Commission. Therefore, the period of 3 days, as provided in the tender document, does not hold any merit and the same is not a binding upon the Petitioners.

(c) In respect of Lol for the period from 1.10.2018 to 15.10.2018, as DBPL had not supplied power from 3.10.2018 to 13.10.2018 and on 15.10.2018, in terms of clause 6.4 (vi) (e) of the Short-Term Bidding Guidelines and Clause 23 of the tender document, any shortfall in supply of power beyond 15% of the contracted quantum, the bidders become liable to pay damages at the rate of 20% of tariff per unit. However, MSEDCL deducted Rs. 2.74 crore from payments, including Rs. 1.02 crore from another Lol, which is not only in variance with clause 23 of tender document but also demonstrates arbitrary action. In addition, MSEDCL had encashed Rs. 0.5 crore of CPG and Rs. 0.23 crore of EMD for shortfall in supply of power.

(d) The deductions made by MSEDCL are illegal. As per Contract Act, 1872, MSEDCL is required to necessarily demonstrate actual loss suffered on account of above short-supply of power and the affected party is only entitled to actual loss or liquidated damages, whichever is lower. Further, the liquidated damages have ceiling as per clause 23 of tender document. Accordingly, MSEDCL is liable to

refund the excess recovery w.r.t. Lol dated 26.9.2018 and deductions made w.r.t. Lols dated 9.10.2018 and 25.10.2018, which were never accepted.

(e) DBPL vide email dated 29.9.2018 informed GETL that as in the country, acute shortage of coal is there and Lol was issued 4 days prior to supply, could not able to arrange coal in such short notice and supply of power will be dependent on supply of fuel at plant.

(f) Subsequently, on issuance of Lol dated 9.10.2018 by MSEDCL for supply of power during the period from 16.10.2018 to 31.10.2018, wherein, DBPL conveyed to GETL that it is not in a position to accept Lol, since MSEDCL has again violated terms of Short-Term Bidding Guidelines i.e. Lol issued only 7 days prior to commencement of supply. Subsequently, on issuance of Lol dated 25.10.2018, DBPL conveyed similar stand (not acceptable) as it was done w.r.t. previous Lol (dated 9.10.2018). It was further stated that as the exit from tender is on account of default of MSEDCL, its EMD shall not be fortified.

Hearing dated 11.12.2019

18. Petition No. 403/MP/2019 was heard on 11.12.2019. Notice was issued to the Respondent to file its reply. MSEDCL has filed its reply and the Petitioner has filed rejoinder thereof.

19. MSEDCL in its reply dated 30.12.2019 has reiterated the submissions made in the Petition No. 83/MP/2019 and has mainly submitted as under:

(a) GETL and DBPL have wrongly invoked Section 79(1)(f) of the Act which is related to disputes of tariff. The present dispute is legislatively barred to be adjudicated by this Commission. Hence, the present Petition without even going

into the merits of disputes needs to be dismissed at the threshold, for want of jurisdiction.

(b) Section 79(1)(f) of Act can be invoked by the parties only on matters specified under sub-sections 79(1)(a) to 79 (1)(d) i.e. “*regulation of tariff*”, which undisputedly is not the instant Petition i.e. Petition No. 403/MP/2019. Any adjudication of matter other than tariff under Section 79 (1)(f), would be beyond legislative scope of the Commission. Further, Clause 29 read with Clause 30 of tender documents provided that all other disputes, apart from tariff needs to be resolved through arbitration mechanism, at Mumbai.

(c) Upon collecting the data from WRLDC / POSOCO website, it was noticed that DBPL instead of supplying the contracted power to MSEDCL, was selling the same in Power Exchanges for vested gains i.e. taken an undue and unlawful benefit of high market rates (additional commercial gain at the rate of Rs. 1.79 per unit over and above the Lol Rate of Rs.4.86 per unit) by selling 159.64 MUs, amounting Rs. 106.13 crore at the loss of MSEDCL.

(d) Despite proper planning, on account of non-supply / short supply of power by GETL and DBPL, MSEDCL was constrained not only to procure costly power from the Power Exchange at the prevailing high market rates and thus caused financial burden of Rs 3.25 crore but also compelled to implement the load shedding for 18 days in the month of October, 2018.

20. The Petitioners, vide its rejoinder dated 24.1.2020, have mainly submitted as under:

(a) As per the tender conditions, MSEDCL is liable to pay consideration at tariff of Rs. 4.86 per unit for supply of power. The primary issue is directly related to tariff i.e. denied lawful tariff and illegal recovery of money by MSEDCL. Since the entire monetary claim of the GETL and DBPL in the present case (Petition No. 403/MP/2019), arises out of the said tariff only, the Commission has jurisdiction in

the matter and same has already been settled by the Hon'ble Supreme Court in its judgment the case of *Energy Watchdog vs Central Electricity Regulatory Commission & Ors.*, [reported in (2017) 14 SCC 80], wherein it has been held that if a generating company has a composite scheme, and the issue relates to tariff, then it is only this Commission has the jurisdiction for adjudication of a dispute.

(b) As per Clause 8.1 of the Short-Term Bidding Guidelines, MSEDCL was to issue LOA within 15 days of e-reverse auction, which facilitates bidders to arrange the logistics, including coal. However, the provision in tender document was modified as LoA issued 3 days prior to commencement of supply i.e. deviation from bidding guidelines and did not have any approval of MERC.

21. GETL and DBPL filed IA No. 10/2020 in Petition No. 403/MP/2019 seeking direction to direction to MSEDCL for making payment of Rs. 1.03 crore and Rs. 0.58 crore to GETL and DBPL, respectively.

Petition No. 216/MP/2021

22. DBPL has filed a separate Petition No. 216/MP/2021 seeking recovery of Rs. 3.40 crore from the Respondents, MSEDCL and TPTCL jointly and severally, deducted as damages on account of non-supply of power during the period from 1.10.2018 to 15.11.2018, along with interest and award litigation cost. Further, DBPL reiterated the submissions made in the Petition No. 83/MP/2019 and additionally has submitted as under:

(a) As the MSEDCL has not issued LoA in terms of Guidelines and issued only 3 days prior to commencement of supply i.e. short notice, DBPL could manage to supply power only for 3 days i.e., on 1.10.2018, 2.10.2018 and 14.10.2018.

(b) At the time of submission of bid, there was a deviation in the tender document, i.e. reduction of period of issuance of Lol from 15 days to 3 days. It is only after the issuance of LOI that DBPL came to know about the conduct of MSEDCL whereby no regulatory mandatory approval was obtained.

(c) As per clause 7.17 of the Guidelines and clause 13.1 of the tender document, post acknowledgment of the Lol / LoA by the successful bidder(s), the MSEDCL was required to execute the requisite PPA, within a period of 15 days from the date of closing of e-reverse auction, failing which the bidder is entitled to withdraw from the tender without any liability. However, MSEDCL never executed a PPA with the DBPL or TPCPL, thereby violating its own tender document.

(d) MSEDCL has not demonstrated the actual loss suffered by it on account of alleged shortfall in supply of power. However, MSEDCL arbitrarily deducted a total amount of Rs. 3.25 crore, much higher than the alleged loss suffered by MSEDCL as well as Rs. 1.14 crore envisaged under clause 23 of tender document. It is a settled position of law that without demonstrating actual losses, the deductions cannot be made.

(e) MERC's order dated 6.10.2017 in Case No.135 of 2017 referred by MSEDCL in support of deviation in tender documents is a completely different tender and only allowed in-principle approval for the period from October to December 2017 but not for the tender's post December, 2017.

(f) In line with Lol dated 26.9.2018, even though DBPL supplied power on 1.10.2018, 2.10.2018 and 14.10.2018, could not supply on other days due to shortage of coal, it has rejected the subject Lol as it was issued in violation of Short Term Bidding Guidelines. Further, DBPL vide letters dated 11.10.2018 and 31.10.2018 outrightly rejected Lols dated 9.10.2018 and 25.10.2018 and

conveyed that will not accept any Lol till 31.12.2018. However, TPTCL vide its letter dated 12.10.2018 to DBPL conveyed that although terms and conditions are in deviation from bidding guidelines, the Lol shall be accepted. Further, conveyed that non-acceptance of Lols would attract recovery through EMD / CPG.

(g) Amounts deducted by TPTCL in lieu of non-supply of power for Lols is completely separate tenders altogether, wherein DBPL had not defaulted. Accordingly, DBPL raised invoice of Rs. 0.54 crore against TPTCL towards reversal of payment. TPTCL had replied that it will release the balance amount after furnishing an equivalent BG.

23. TPTCL vide additional submissions dated 15.11.2021 in Petition No. 83/MP/2019 has submitted the certain documents, including TPTCL's letter dated 31.10.2018 and 16.11.2018 to MSEDCL, wherein, it was mentioned that TPTCL has already exited and is not accepting Lol dated 25.10.2018. Thus, no penalty shall be levied. In case, any penalty is leived, it shall be as per MoP Guidelines.

24. TPTCL vide its reply dated 14.4.2022 in Petition No. 216/MP/2022 has reiterated the submissions made in its reply in Petition No. 83/MP/2019 and has additionally submitted as under:

(a) Prior to the submission of bid, TPTCL vide its letter dated 11.7.2018 shared the terms of RfP. Upon its unequivocal acceptance vide letter dated 11.7.2018 and on the legitimate expectation of the Petitioner honoring its obligation to supply power, TPTCL has participated in the subject bid.

(b) In reference to Lols dated 26.9.2018 and 9.10.2018 and non-supply of power during the period from 3.10.2018 to 31.10.2018 (excluding 14.10.2018), wherein Lol

dated 26.9.2018 was accepted and Lol dated 9.10.2018 was not accepted, MSEDCL has collected liquidated damages from TPTCL by deducting certain amount (from its bills), based on difference in the tariff rate and the rate in Power Exchange. However, in reference to Lol (3rd) dated 25.10.2019 for supply during the period of 1.11.2018 to 15.11.2018, MSEDCL adjusted EMD associated with Lols dated 26.9.2018 and 9.10.2018, but not claimed any differential price of power procurement from the Power Exchange.

(c) In response to DBPL's letter dated 11.10.2018 wherein, it conveyed its inability to supply power, the tender is not in line with the MoP Guidelines and exit from tender, TPTCL vide letter dated 12.10.2018 categorically informed DBPL that in case of any financial implication arising due to non-supply of power, DBPL shall be solely responsible. Further, TPTCL had communicated MSEDCL that the tender is not in line with subject Guidelines and it is exiting from the tender.

(d) The role of an intermediary trader vis-à-vis a merchant trader has been considered by the APTEL in its Judgment dated 4.11.2011 in Appeal No. 15 of 2011 in the matter of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors* . Further, the damages are provided under the Indian Contract Act, 1872 to restitute an aggrieved party for any loss caused to it due to breach of contract committed by the other party. In the instant case, TPTCL is a trader with very thin trading margins and within the framework of the proposed transaction and cannot be made to absorb such costs which are not as a consequence of any action on its part.

(e) On account of non-supply of power, MSEDCL has levied penalty and deducted certain amount from the energy bills of TPTCL, which is purely attributable to lapse on part of DBPL. As the power supply arrangement is being back-to-back, TPTCL deducted appropriate amount from the bills of DBPL. Accordingly, TPTCL cannot be held responsible for any payment to DBPL.

(f) As the RfP and consequent documents were not in conformity with law, no amounts are payable. Even in case of binding, the same shall be within framework allowed therein but MSEDCL has not heeded to such submissions. However, even though deviation in tender don't have any approval of MERC, after accepting the tender and Lol, DBPL cannot seek an exile from the bid on the ground that the tender is not in accordance with law and put financial burden on TPTCL i.e. the issue can be challenged while supplying power under tender.

(g) MSEDCL has not furnished Letter of Credit, which is in violation of Clause 20.3 of tender document. Further, MSEDCL did not return the EMD, when CPG was furnished and instead proceeded to illegally encash both the securities, which is in violation of Clause 6.2.6 of tender document. In addition, inspite of repeated requests, DBPL has not submitted the Bank Guarantee.

25. MSEDCL vide its reply dated 18.4.2022 in Petition No. 216/MP/2021 has reiterated the submissions made in Petition No. 83/MP/2019 and submissions made in its reply to Petition No. 403/MP/2019 and has additionally submitted as under:

(a) The tender floated being in portal and accessible to bidders / participants, including DBPL, in case of any deviation in tender from the subject guidelines, DBPL should not have given its consent to be the source generator of any trader. Having duly participated, cannot breach terms and conditions of the subject tender.

(b) As relief sought is not associated with Section 79(1)(f) of the Act, the adjudication of Petition No. 216/MP/2021 by the Commission will be beyond its legislative powers.

(c) Accordingly, the question of legality of tender is completely out of the preview of the adjudicatory powers of this Commission and hence the prayer regarding refund of money cannot allowed.

26. MSEDCL vide its reply dated 26.4.2022 in IA No. 10/2020 in Petition No. 403/MP/2019 has submitted that prayers sought in the said petition are in the nature of grant of final relief. Therefore, shall not be considered at interim stage. The transaction under question was between MSEDCL & GETL and GETL had the option of arranging supply of power through alternative sources, the same is independent of the source generator. Further, deductions were made from GETL which was the bidder and not from DBPL, which is the source generator identified by the bidder. Clause 23 is applicable only in a scenario where there is deviation from the bidder's side in the scheduled energy, and not in the case of zero supply by the bidder due to unethically selling power in the market for commercial gain instead of supplying power to the contracted party. Further, taking cognizance of the issue, Ministry of Power vide resolution dated 21.2.2022 has provided compensation as entire sale revenue, over and above LD, as well as penalty in the nature of debarment for three months.

27. DBPL vide its rejoinder dated 8.6.2022 to the reply of MSEDCL in Petition No. 216/MP/2021 reiterated its submissions made in the Petition and rejoinder dated 8.6.2022 to the reply of TPTCL and has additionally submitted as under:

(a) As per Regulation 7 of the Trading Licence Regulations, it is the obligation of a licensee to always ensure payment of dues to the seller for purchase of the agreed quantum of electricity. Thus, TPTCL must have demanded MSEDCL to make payments to DBPL, which was illegally withheld. Accordingly, TPTCL's claim that it is mere a 'conduit' between DBPL and MSEDCL cannot stand.

(b) In spite of repeated communications by DBPL, TPTCL has not taken any coercive steps towards MSEDCL.

(c) Since, the power sold by DBPL was not the contracted capacity, it has right to sell power for the quantum which is not contracted.

28. The Commission through the RoP dated 25.8.2022 sought certain information from parties, such as signing of PPA, action taken for non-supply of power, energy sold in market, energy purchased from market, etc.

29. The Respondent No. 5, SWPGL, vide its reply affidavit dated 10.9.2022 in Petition No. 83/MP/2019 has furnished certain information called vide ROP dated 25.8.2022. SWPGL has mainly submitted as under:

(a) Since the filing of the Petition No. 83/MP/2019, SWPGL has gone through a CIRP process which has culminated into an Order dated 9.11.2018, passed by the NCLT Hyderabad. Further, since the contract between MPL and SWPGL are settled between parties, no order can be passed against SWPGL.

(b) SWPGL had given authorization to MPL to participate in ET-71 for supply of power from 1.10.2018 to 31.12.2018, wherein, e-reverse auction was conducted on 6.9.2018 and LOIs dated 19.9.2018 were issued by MSEDCL for supply of 80 MW for the period from 1.10.2018 to 31.10.2018.

(c) In order to supply power to MSEDCL under ET-71, third unit of SWPGL was to be lighted up. SWPGL vide letter dated 1.10.2018 conveyed to MPL that it would not be in a position offer power from 1.10.2018 to 15.10.2018 and authorized MPL to explore and supply power from alternate sources.

(d) Subsequently, SWPGL vide letter dated 27.10.2018 to MPL conveyed that it was not able to supply power in October, 2018 due to coal shortage. In order to compensate shortfall in supply of power for the month of October,

2018, it would supply more power (12 – 24 MW) over and above 85% during the months of November, 2018 and December, 2018. MPL vide letter dated 29.10.2018 conveyed the same to MSEDCL.

(e) MSEDCL vide letter dated 12.11.2018 refused the proposal of MPL and claimed compensation of Rs. 6.24 crore and wrongly alleged that SWPGL has sold the electricity in Power Exchange.

(f) In November, 2018 and December, 2018, SWPGL supplied power as per Lol. Further, it would have supplied additional quantum of Rs. 12 – 24 MW, if it was accepted by MPL / MSEDCL.

(g) The installed capacity of plant is 540 MW (4 X 135 MW units). During October, 2018 two units of 135 MW each, were in operation, out of which energy from one unit was being sold to captive consumers dedicatedly. Any surplus power not consumed by captive consumers, were being sold on the Power Exchange. However, SWPGL has not sold any power in the Power Exchange or on short-term basis, which was committed to supplied to MPL.

(h) SWPGL has submitted day-wise energy sold in short term and in Power Exchange and the revenue received thereof during the period from 1.10.2018 to 31.10.2018.

30. MPL vide affidavit dated 12.9.2022 has submitted the information called vide ROP for the hearing dated 25.8.2022 in Petition No. 83/MP/2019 as under:

(a) MPL has not signed any PPA with SWPGL but as per standard market practice in short term, the transactions were through acceptance of Lol dated 19.9.2018.

(b) MPL has consistently pursued with SWPGL for continuous supply.

(c)MPL was not a party/trader to the power sold by SWPGL in Power Exchange during the period from 1.10.2018 to 15.11.2018.

31. TPTCL, vide affidavit dated 12.9.2022, has submitted the certain information called vide ROP dated 25.8.2022 in Petition No. 83/MP/2019 as under:

(a) From time to time, TPTCL has transparently communicated both DBPL and MSEDCL the communication to each other. However, TPTCL had not signed any PPA with DBPL.

(b) TPTCL being a trader has acted as a mere conduit and was an intermediary facilitator for purchase and resale.

(c) TPTCL has not sold any power on behalf of DBPL on Power Exchange during the period from 1.10.2018 to 15.11.2018.

32. GETL, vide affidavit dated 12.9.2022, has submitted certain information sought vide ROP dated 25.8.2022 in Petition No. 83/MP/2019 as under:

(a) No separate PPA was signed as issuance of Letter of Authorization and Letter of Award is equivalent to arrangement for supply of power envisaged in the contract.

(b) GETL has consistently pursued with DBPL for continuous supply. However, could not arrange for alternative supply due to higher market rates.

(c) GETL is not a party / trader in any of the arrangements entered into by DBPL for selling power in Power Exchange during the period from 1.10.2018 to 15.11.2018.

Written submissions

33. MSEDCL vide its written submissions dated 12.9.2022 in Petition No. 83/MP/2019, has reiterated the submissions made in original Petition and rejoinders to the replies of the Respondents and furnished additional information called vide ROP dated 25.8.2022. A brief of these additional submissions is as under:

(a) The tender documents, ET-58 and ET-71, provide for issuance of LOI three days before the commencement of power supply. The bidder(s), after satisfying themselves with terms and conditions of tender document, had participated in bidding, without any objections. MSEDCL has issued Lols to successful bidder strictly as per the terms and conditions of tender. Thus, there is no delay from MSEDCL's side for issuance of the LOI's.

(b) MSEDCL has placed on record the day-wise energy purchased and amount incurred from 1.10.2018 to 15.11.2018. On account of non-supply of the contracted power to MSEDCL by bidders, MSEDCL was compelled to procure power from Power Exchanges at the rate much higher than the LOI rates and paid Rs. 839.87 crore and Rs. 96.97 crore towards procurement of power during October, 2018 and November, 2018, respectively. In the interest of consumers of MSEDCL and to avoid the undue burden, MSEDCL has recovered the loss incurred due to non-supply of power at the differential rate of landed IEX rate at State transmission system periphery and LOI's rate as delivery of power supply as per tender conditions was at State transmission system periphery.

(c) MSEDCL incurred loss of Rs. 2.47 crore w.r.t. each of contract under tender ET- 58 with GETL and TPTCL for supply of power for the period from 1.10.2018 to 15.10.2018. These losses were recovered by fortifying CPG and adjusting energy bills for both bidders. Similarly, it has incurred Rs. 0.78 crore w.r.t. each of contract under tender ET-58 with GETL and TPTCL for

supply of power from 16.10.2018 to 31.10.2018 and the same were recovered by adjusting energy bills of GETL. In addition, MSEDCL has incurred loss of Rs. 6.24 crore and 2.42 crore w.r.t. contract under ET- 71 with MPL on account of supply of power for the period from 1.10.2018 to 15.10.2018 and 16.10.2018 to 31.10.2018, respectively.

(d)The penalty as per amendment to MoP Guidelines on short term procurement is much higher than the recovery made by MSEDCL.

34. TPTCL, vide vide its written submissions dated 26.9.2022 in Petition No. 216/MP/2021, has reiterated its submissions made in its reply to the Petition.

35. DBPL vide its written submission dated 30.9.2022 in Petition No. 216/MP/2021 has reiterated its submissions made in the Petition and rejoinders therein. In addition, in response to RoP for the hearing dated 25.8.2022, has furnished the declared availability, energy sold in Power Exchange, etc., Relevant submissions in brief are as follows;

(a) As the deductions were made from energy charges i.e. tariff and the generator being under composite scheme, the Commission has jurisdiction to adjudicate the dispute under Section 79(1)(f) of the Act.

(b) The power sold by the DBPL was not the contracted capacity. Therefore, it has right to sell power for the quantum which is not contracted.

(c) Subsequent to MSEDCL's demand notice dated 6.11.2018 and 28.12.2018, TPTCL, instead of supporting DBPL, has decided to withhold the outstanding amount payable by it to DBPL under other tenders, which are not at all connected with tender of MSEDCL. Thus, the action of TPTCL is arbitrary and illegal.

(d) MoP amendment dated 21.2.2022 do not have any relevance in the instant case, as the same is prospective in nature.

36. MPL, TPTCL and GETL vide their written submissions dated 26.9.2022, 26.9.2022 and 30.9.2022, respectively, in Petition no. 83/MP/2019 have reiterated their submissions made in their replies to Petition No. 83/MP/2019 along with IA Nos. 59/2019 and 61/2019

Analysis and Decision

37. Based on the submissions made by the parties, the following issues arise for consideration of the Commission:

Issue No.1: Whether the Commission has necessary jurisdiction to adjudicate upon the disputes involved in Petition Nos. 403/MP/2019 and 216/MP/2021?

Issue No. 2: Whether MSEDCL is entitled for damages or compensation for short supply or non-supply of power by traders/Source Generators? If yes, then to what extent?

Issue No.3: Whether MSEDCL has made out the case for initiation of proceedings for revocation of licence of the Respondent trading licensees?

38. At the outset, it is clarified that the Issue Nos. 1 and 2 arise out of Petition Nos.403/MP/2019 and 216/MP/2021 and therefore, are limited to the trading licensees, namely, GETL and TPTCL and their source generator, DBPL in context of the MSEDCL's tender ET- 58 and the LOIs issued thereunder. These issues do not cover the case of the trading licensee, MPL and its source generator SWPGCL in context of MSEDCL's tender ET - 71 as they have not challenged the actions of MSEDCL. Issue No.3 relates to all the three trading licensees, namely, GETL, TPTCL and MPL being

the subject matter of Petition No.83/MP/2019 filed by MSEDCL. Accordingly, we now proceed to deal with the aforesaid issues.

Issue No.1: Whether the Commission has necessary jurisdiction to adjudicate upon the disputes involved in Petition No. 403/MP/2019 and Petition No. 216/MP/2021?

39. MSEDCL has raised an objection with regard to the jurisdiction of this Commission to deal with Petition No. 403/MP/2019 filed by GETL and DB Power and Petition No. 216/MP/2021 filed by DB Power. In Petition No.403/MP/2019, directions have been sought to declare the deductions and forfeitures of EMD and CPG as wrongful and illegal and to refund of the forfeited amount by MSEDCL to DB Power and GETL. In Petition No.216/MP/2021, DB Power has sought a direction to MSEDCL and TPTCL to refund the deducted amount with interest. MSEDCL has submitted that provisions of Section 79(1)(f) read with Section 79(1)(b) of the Act can only be invoked by the parties, if the dispute *inter se* relates to 'regulation of tariff' which is not the issue raised in these Petitions. MSEDCL has further submitted that adjudication of a dispute, apart from the one concerning regulation of tariff, does not invoke the adjudicatory jurisdiction of this Commission and for this very reason, the Clauses 29 and 30 of MSEDCL's Invitation to Bid expressly provided that all other disputes, apart from tariff needs to be resolved through arbitration mechanism with its seat at Mumbai. MSEDCL has also submitted that the legality of its tender is also completely out of the purview of the adjudicatory powers of this Commission and hence, the prayers for refund cannot be gone into without going into the issues of legality of tender process and Lol terms issued thereafter.

40. *Per contra*, GETL and DB Power have submitted that the above contention of MSEDCL has no legs to stand since this Commission has consistently taken a view that whenever, a generator having a composite scheme is involved in a dispute, the said case is amenable to the jurisdiction of this Commission. In this regard, GETL and DB Power have placed the reliance on the order dated 26.11.2019 in IA No.100/IA/2018 in Petition No. 275/MP/2018 (TPTCL v. SKS Power Generation (Chhattisgarh) Ltd.) and order dated 7.8.2021 in Petition No. 162/MP/2020 (Shree Cement Ltd. v. Vedanta Ltd. and Anr.). It has been submitted that this Commission placing reliance on the decision of Hon'ble Supreme Court in Energy Watchdog Case [(2017) 14 SCC 80] has held that as long as a generating company has a composite scheme and is one of the parties to the case, the Commission would have the necessary jurisdiction to adjudicate the dispute between the parties. It has been further submitted that in these cases, MSEDCL has wrongly deducted the tariff amount from the monthly energy bills in violation of the Bidding Guidelines and tender documents, which provide that only in case of any alleged non-supply of power which is beyond 15% of the contracted power for which open access has been allocated on monthly basis, MSEDCL is entitled to receive a compensation @ 20% of 'Tariff per kWh'. Thus, the said provisions make it clear that the issues in these petitions relate to wrongful deduction of 'tariff' only. GETL and DB Power have submitted that the preliminary objection on issue of maintainability of the Petitions as raised by MSEDCL deserves to be rejected.

41. We have considered the submissions made by the parties. At the outset, we observe that as such MSEDCL has not raised any objection with regard to the existence of the 'composite' scheme for generation and supply of power in more than one State

by the source generator DB Power who is the Petitioner in both these petitions. Therefore, as per the judgment of the Hon'ble Supreme Court in Energy Watchdog Case, DB Power having a composite scheme for generation and supply of power and the concerned transaction, being inter-State in nature, would only be amenable to the jurisdiction of this Commission. Moreover, it is also not in dispute that supply to MSEDCL by traders, namely, GETL and TPTCL, was on back-to-back arrangement from the DB Power which has granted its consent at every stage of the tender. The tender documents issued by MSEDCL categorically required the traders to identify the source generator [Cls. 4(iv) and 6.3.3 of tender] and to submit the copy of Power Purchase Agreement or equivalent arrangement for supply of power. Further, the Lols issued by MSEDCL also specified the source of power/details of source generating station. It is now well settled that when power is being supplied by a generating company to a distribution licensee through a trading licensee for ultimate consumption of the consumers, the tariff would be amenable to the regulatory jurisdiction of the Regulatory Commission.

42. Another contention of MSEDCL is that since disputes in these matters do not relate to 'regulation of tariff' as envisaged in the Section 79(1)(b) of the Act, jurisdiction of the Commission under Section 79(1)(f) of the Act cannot be invoked in this case. In this connection, we observe that the Petitioner, DB Power has in fact raised the dispute with regard to the legality of the deductions made by traders and in turn, by MSEDCL from the invoices raised by DB Power for the power supplied during the relevant periods. Thus, essentially the issues involved in these two Petitions relate to the regulation of tariff of a generating company having composite scheme for generation

and supply of power in more than one State and consequently, the adjudicatory jurisdiction of this Commission under Section 79(1)(f) read with 79(1)(b) of the Act is attracted. We do not find any merit in the objection of MSEDCL in this regard and jurisdiction of the Commission to adjudicate the disputes between the parties is upheld.

43. MSEDCL has further argued that the disputes are to be resolved through arbitration in accordance with the provisions of the LOIs. Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited [(2008)4 SCC 755] has laid down that after coming into force of the Electricity Act, 2003, whenever there is a dispute between the licensee and the generating company, only the State Commission or the Central Commission (as the case may be) or arbitrator (arbitrators) nominated by it can resolve such a dispute. Thus, merely because there is a provision in the LOIs for resolution of dispute through arbitration does not mean that the jurisdiction of the Commission to adjudicate the dispute is ousted. We have already noted that the dispute between MSEDCL and DB Power/GETL is amenable to the adjudicatory jurisdiction of this Commission under section 79(1)(f) of the Act. Section 79(1)(f) clearly provides that the Commission shall discharge the function "to adjudicate upon the disputes involving generating companies or transmission licensees in regard to matters connected with clause (a) to (d) above and to refer any dispute to arbitration". Thus, the Commission has the discretion under Section 79(1)(f) of the Act to either adjudicate the dispute itself or refer the matter to arbitration. Furthermore, in the course of hearing, we observed that there is least *element of settlement* between the parties, which is *sine qua non* for reference of any dispute to an alternate dispute resolution. The Commission is of the view that since the parties have already completed the pleadings on merit and have

extensively argued the matter before the Commission, referring the matter to arbitration at this stage would only prolong the litigation and not serve any useful purpose. Accordingly, the Commission deems it appropriate to examine and decide the disputes on merit.

Issue No. 2: Whether MSEDCL is entitled for damages or compensation for short supply or non-supply of power by traders/Source Generators? If yes, then to what extent?

44. On perusal of records, it emerges that MSEDCL had floated two tenders on the DEEP portal i.e. ET-58 on 5.7.2018 for 500 MW for RTC power during the period from 1.8.2018 to 31.12.2018 in ten requisitions (each requisition corresponding to a fortnight) and ET-71 on 23.8.2018 for 500 MW for RTC power in 6 requisitions (each requisition corresponding to a fortnight) for supply during the period from 1.10.2018 to 31.12.2018. The details of two tenders, namely ET-58 and ET-71 which are subject matter of dispute are noted in the table below:

ET 58

Tender	Period of supply	Bidder	Source Generator	Quantum (MW)	Rate (Rs / kWh)	Lol Date	Date of acceptance of LOI	Period of supply
ET – 58	1.10.2018 – 15.10.2018	GETL	DBPL	50	4.86	26.9.2018	29.9.2018	1.10.2018 2.10.2018 14.10.2018
	16.10.2018 – 31.10.2018	GETL	DBPL	50	4.86	9.10.2018	Not accepted	No Supply
	1.11.2018 – 15.11.2018	GETL	DBPL	100	4.84	25.10.2018	Not accepted	No Supply
	1.10.2018 – 15.10.2018	TPTCL	DBPL	50	4.86	26.9.2018	29.9.2018	1.10.2018 2.10.2018 14.10.2018
	16.10.2018 – 31.10.2018	TPTCL	DBPL	50	4.86	9.10.2018	Not accepted	No Supply
	1.11.2018 – 15.11.2018	TPTCL	DBPL	50	4.84	25.10.2018	Not accepted	No Supply

ET-71

Tender	Period of supply	Bidder	Source Generator	Quantum (MW)	Rate (Rs / kWh)	Lol Date	Date of acceptance of LOI	Period of supply
ET – 71	1.10.2018 – 15.10.2018	MPL	SWPGL	80	4.41	19.9.2018	29.9.2018	No Supply
	16.10.2018 – 31.10.2018	MPL	SWPGL	80	4.41	19.9.2018	29.9.2018	No Supply
	1.11.2018 – 15.11.2018	MPL	SWPGL	80	4.41	19.9.2018	29.9.2018	Supplied
	16.11.2018 – 30.11.2018	MPL	SWPGL	80	4.41	19.9.2018	29.9.2018	Supplied
	1.12.2018 – 15.12.2018	MPL	SWPGL	80	4.38	19.9.2018	29.9.2018	No Supply
	16.12.2018 – 31.12.2018	MPL	SWPGL	80	4.39	19.9.2018	29.9.2018	No Supply

45. MSEDCL has submitted that due to non-supply/short-supply of power by the trading licensees/generator(s) for the periods: (i) from 1.10.2018 to 15.10.2018 against the Lols dated 26.9.2018; (ii) from 16.10.2018 to 31.10.2018 against the Lols dated 9.10.2018; and (iii) from 1.11.2018 to 15.11.2018 against the Lols dated 25.10.2018, it was constrained to procure the costly power from the Power Exchange at the prevailing market rate which caused financial burden of Rs. 3.25 crore in each case for the period from 1.10.2018 to 31.10.2018. MSEDCL has further submitted that even after procuring the costly power from the Power Exchanges, it was compelled to implement the load shedding for 18 days in the month of October, 2018 impairing its vision for supply of 24x7 power to its consumers. MSEDCL has submitted that it was, therefore, constrained to recover this loss of Rs. 3.25 crore from the energy bills and CPG of GETL and TPTCL (both of whom had participated in the bid after obtaining consent from DB Power). MSEDCL has also submitted that it had repeatedly requested the management of the trading licensees (GETL and TPTCL) at all levels for supply of contracted power and even suggested to supply the contracted power from any

possible alternate sources in case of exigencies, which did not yield any result. On the contrary, in view of the high market/exchange rates during the said period, the generator DB Power continued to supply the MSEDCL's contracted power on the Power Exchange at the average rate of Rs. 5.16 to Rs 9.23 per unit as clearly evident from the RLDC/POSOCO monthly report of October, 2018.

46. The trading licensees, namely GETL and TPTCL, and source generator DB Power, on the other hand, have submitted that Lols issued by MSEDCL were in complete violation of the Bidding Guidelines issued by the Central Government, which was required to be strictly adhered to while issuing the tender document. It has been submitted that as per Clauses 7.13 and 7.17 of the Guidelines, the procurer has to issue the LoA/Lol and execute the PPA within a period of 15 days from the date of closure of e-RA failing which the successful bidder has the option to exit without forfeiting the EMD. In the present case, e-RA took place on 18.7.2018 and therefore, the cut-off date for issuance of Lols and execution of the PPA was 2.8.2018. However, MSEDCL, in utter violation of the above provisions of the Bidding Guidelines, issued the 1st Lol only on 26.9.2018 (after a delay of 54 days), 2nd Lol on 9.10.2018 (after a delay of 66 days) and 3rd Lol on 25.10.2018 (after a delay of 82 days) in ET 58. The reliance on the Clause 12.3 of tender by MSEDCL, which permitted it to issue Lol 3 days prior to commencement of power under the requisition, is misplaced as deviations from the provisions of the Bidding Guidelines were without prior approval of the Appropriate Commission as required under Clause 8.1 of the Bidding Guidelines. It has also been submitted that MSEDCL's reliance on the order of MERC dated 6.10.2017 in Case No. 135 of 2017 to state that such deviations were permitted is completely

misplaced as the said approval was for a separate tender and for a separate period. It is stated that in view of the violation of the Bidding Guidelines, Lols issued by MSEDCL are invalid and are not binding on them and in this regard, it is settled principle that there can be no estoppel against law. Without prejudice to the above, it has also been submitted that as per Clause 23 of the tender and Clause 6.4 of the Bidding Guidelines, in case of any alleged short supply of power, MSEDCL can only claim the compensation to the extent of 20% of tariff per kWh and the deductions made beyond such amounts are completely arbitrary. The reliance has also been placed on Section 74 of the Indian Contract Act, 1872 to submit that in terms of the settled principle of law of contract where a sum is named in the contract as liquidated amount payable by way of damages, the same does not mean that the said amount is automatically payable. MSEDCL has to demonstrate the actual loss and only upon such demonstration, it would be entitled to claim the said actual loss or the liquidated damages whichever is lower. It is also submitted that MSEDCL has as such not produced any actual proof which could act as evidence of actual loss suffered by MSEDCL and without proof of such actual loss, no damages can be claimed by it.

47. In response, MSEDCL has submitted that trading licensees and source generators participated in tender with open eyes and only upon being in breach of the terms therein with regard to supply of power, are now raising an objection to the maintainability of tender itself as an afterthought. MSEDCL has also submitted that contention regarding violation of Bidding Guidelines is misleading as MSEDCL had approached MERC for Short-term Power Purchase above the ceiling rate as approved in MYT due to acute shortage of power in Case No. 135 of 2017 wherein through its

submissions, MSEDCL had informed MERC regarding tender condition for issuance of LoA/Lol, 3 days prior to supply period for providing flexibility in scheduling the power. MSEDCL has submitted that MERC had noted the changes made in the tender document and upon taking cognizance thereof had principally allowed MSEDCL to insert/modify the clause of issuance of LoA within 15 days from the close of e-RA to issue LoA within 3 days before the commencement of power as per requisitions. It is also submitted that prior to the tender in question (ET 58), DB Power herein had also participated in a tender ET-40 having same terms and conditions as that of ET 58 and supplied the power to MSEDCL without any dispute. The contention of non-acceptance of Lol due to violation of Bidding Guidelines is completely baseless as the traders/ DB Power having accepted the terms and conditions of tender and also acting thereof, cannot be allowed to change their stand to suit their commercial interest. MSEDCL has submitted that reliance on Clause 23 of tender which contemplates an obligation to pay damages in the event of short supply of power is erroneous as the said clause is applicable only in a scenario where there is a deviation in supply of the scheduled energy by the bidder and not in case of zero supply by the bidder due to unethically selling power in market for commercial gain instead of supplying to the contracted party.

48. We have considered the submissions made by the parties. GETL, TPTCL and DB Power have pointed out that as per Clause 7.13 of the Bidding Guidelines, LoA must be issued within a maximum capped period of 15 days from the closing of e-RA, whereas the Clause 12.3 of the tender ET-58 issued by MSEDCL permitted it to issue the LoA/Lol within 3 days before the commencement of power as per the requisition. They have further submitted that this is a clear case of deviation from the Bidding

Guidelines for which MSEDCL has not obtained no prior approval of the Appropriate Commission as required under the Clause 8 of the Bidding Guidelines. MSEDCL on the other hand has claimed that the tender document has the approval of MERC including deviations from the Bidding Guidelines.

49. The relevant provisions of the Bidding Guidelines for short term procurement of power issued by MoP, Government of India under Section 63 of the Act are reproduced as under:

“7. Bid Submission and Evaluation

... ..
7.13 *The Procurer shall have the right to issue Letter of Award (LoA) to the Successful Bidder(s) [Selected Bidder(s)] in the same order to fulfill its requirement, which can be lower than the Requisitioned Capacity but not less than the quantum of Lowest Bidder. In the event of Procurer rejects or annuls all the Bids, it may go for fresh Bids hereunder. In case the Procurer fails to issue the LoA within the period of 15 days from the close of e-Reverse Auction, the Successful Bidder(s) shall have the option to exit without forfeiting the EMD.*

7.14 *In case the Selected Bidder(s) is allocated a quantity of power less than the minimum threshold quantum mentioned by it, it shall have the option to exit without forfeiting the EMD.*

... ..
7.17 *After acknowledgement of the LOA by the Selected Bidder(s), the Procurer shall cause the Selected Bidder(s) to execute the PPA within the prescribed period in the Bid document i.e. within 15 days from the close of the e- Reverse Auction. The Selected Bidder(s) shall not be entitled to seek any deviation, modification, or amendment in the PPA. The Procurer would appropriate the EMD of such Bidder as Damages on account of failure of the Selected Bidder(s) to execute the PPA. In case the Procurer fails to sign the PPA within the period prescribed above, the Selected Bidder(s) shall have the option to exit without forfeiting the EMD/CPG as the case may be.*

... ..
8. Deviation from process defined in the Guidelines

8.1 *Generally, no deviation shall be allowed from these Guidelines. However, if it is essential to have the deviation from these Guidelines, the same could be done with the prior approval of the Appropriate Commission.*”

50. The relevant provisions of the tender document (ET 58) as issued by MSEDCL read as under:

“12. Issuance of Letter of Award (LOA)

.....
12.3. The MSEDCL shall have the right to issue Letter of Award (LoA) to the Successful Bidder(s) [Selected Bidder(s)] in the same order to fulfil its requirement, which can be lower than the Requisitioned Capacity but not less than the quantum of Lowest Bidder. In the event, MSEDCL rejects or annuls all the Bids, it may go for fresh Bids hereunder. MSEDCL will issue the LOA within 3 days before the commencement of power as per requisition. Further in case MSEDCL requires the power during the requisition period for which the LOA is not issued as mentioned above but if successful bidder is ready to provide such power; LOA with mutual consent will be issued for agreed period, else otherwise bidder shall have option to exist without forfeiting the BG.....”

51. From a bare reading of the provisions of the Bidding Guidelines and the tender document for ET-58, it is apparent that Clause 12.3 of tender document is in clear variation from Clause 7.13 of the Bidding Guidelines. While the Bidding Guidelines required the issuance of LoA within 15 days from the closure of e-RA, tender document permitted MSEDCL to issue LoA/LoI within 3 days before the commencement of supply of power under the requisition, there being multiple requisitions under the tender document. Further, Clause 8 of the Bidding Guidelines provides that generally no deviation shall be allowed from the Guidelines and if it is essential to have the deviation from these Guidelines, the same could be done with the prior approval of the Appropriate Commission. MSEDCL has submitted that MERC vide its order dated 6.10.2017 in Case No. 135 of 2017 had noted such changes made in the tender documents and allowed MSEDCL to insert such clause. The relevant extract of the MERC’s order dated 6.10.2017 as relied upon by MSEDCL reads as under:

“Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) has filed a Petition on 18.9.2017 seeking in-principle approval for short-term power purchase at a higher cost

than the ceiling rate approved by the Commission in its Multi-Year Tariff (MYT) Order dated 3.11.2016 in Case No. 48 of 2016 ('MYT Order').

.....

5.1.5. As the time for entering into the Letter of Award (LoA) had lapsed in the earlier bidding process, MSEDCL has floated another short-term power purchase tender on 22.09.2017 for 500 MW RTC power and for 500 MW power from 06:00 to 16:00 hrs. from October to December, 2017 on the MSTC DEEP e-bidding portal, for which Reverse Auction was conducted on 29.09.2017.

5.1.6. The rates discovered in the above tender are in the range of Rs 4.15/kWh to Rs 5.50/kWh, all above the approved ceiling rate of the Commission.

5.1.7. In the second tender process, MSEDCL floated a tender on 15 days' basis. It stipulated a condition for the LoI 3 days prior to the supply period, which will provide flexibility to MSEDCL to procure power as per the demand. This will also enable MSEDCL to stop procuring at the discovered rate in case of improvement in coal availability of the Thermal Power Plants of Maharashtra State Electricity Generation Co. Ltd. (MSPGCL) and Independent Power Producers (IPPs) or a reduction in demand, which may also result in cost saving.

.....

8. Considering the factual position set out above, and in order to offset the shortage of power and avoid load shedding, the Commission allows MSEDCL in principle to procure additional power as and when required on the e-bidding portal in accordance with the Short-Term Competitive Bidding Guidelines, and any residual power from the Power Exchanges, till the end of December, 2017. These rates being transparent and market-discovered, the Commission also relaxes the ceiling determined in the MYT Order to the extent that the rates so discovered are higher during that period. The Commission has also noted the additional stipulation introduced by MSEDCL in its tenders in order to provide it greater flexibility. This dispensation is subject to the following conditions:

From the above quoted order, it is noticed that MSEDCL filed Case No. 135 of 2017 for seeking in-principle approval for short-term power purchase at a higher cost than the ceiling rate as approved in MYT order. In the said letter MSEDCL pointed out to MERC that in the second tender it has stipulated a condition for issue of LOIs three days prior to the supply period which will provide MSEDCL the flexibility to procure power as per the demand. MERC had granted *in-principle approval* to MSEDCL to procure additional power as and when required on e-bidding portal in accordance with the Bidding Guidelines and any residual power from the Power Exchanges till the end

of December, 2017. Further, MERC has noted the additional stipulation introduced by MSEDCL in its tenders in order to provide it greater flexibility which means that such a dispensation would be applicable only for procurement of power till end of December, 2017. However, MERC has nowhere approved that in all cases of e-tender for short term purchase of power even beyond end December 2017, the said stipulation would be applicable. Therefore, we are not in agreement with the contention of MSEDCL that the aforesaid stipulation in its tender ET-58 has a prior approval of MERC vide order dated 6.10.2017 in Case No. 135 of 2017.

52. The next question is whether the LOIs issued by MSEDCL within three days of requisition in accordance with the tender document which is in violation of Bidding Guidelines is valid and binding on the trading licensees or not. It is noticed that the tender notice for ET-58 was issued as far back as 5.7.2018 which contained the provision that “MSEDCL will issue LOA within 3 days before the commencement of power as per requisitions” and at no point of time during the tendering process, the trading licensees and DB Power had either inquired or raised their concerns with MSEDCL with regard to the said conditions in the tender document being in deviation of the Bidding Guidelines and whether the approval of Appropriate Commission for such deviation was obtained before the commencement of the tendering process. Further, the trading licensees with the consent of DB Power participated in the tender process being fully aware of the terms and conditions thereof and after having been selected as the successful bidders, they accepted the Lols dated 26.9.2018, acted upon it and supplied power to MSEDCL for three days. In our view, LOIs dated

26.9.2018 issued by MSEDCL are valid since DB Power and the trading licensees despite being aware of deviations in the tender documents from Bidding Guidelines have participated in the bidding process, accepted the LOIs and acted on the LOIs.

53. DB Power and the trading licensees have not acknowledged the LOIs dated 9.10.2018 and 25.10.2018 on the ground that the LOIs have not been issued in accordance with the Bidding Guidelines. The issue for consideration is whether the LOIs which are not accepted by DB Power/trading licensees have resulted in concluded contracts or not. Hon'ble Supreme Court in Dresser Rand S.A. v. Bindal Agro Chem Ltd., [(2006) 1 SCC 751] has dealt with the scope of "letter of intent" as under:

"39. 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. This Court while considering the nature of a letter of intent, observed thus in Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd. [(1996) 10 SCC 405] : (SCC p. 408, para 7)

"The letter of intent merely expressed an intention to enter into a contract. ... There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with Respondent 1 or not."

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. Chitty on Contracts (para 2.115 in Vol. 1, 28th Edn.) observes that where parties to a transaction exchanged letters of intent, the terms of such letters may, of course, negative contractual intention; but, on the other hand, where the language does not negative contractual intention, it is open to the courts to hold that the parties are bound by the document; and the courts

will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. Be that as it may.”

54. Thus, depending on the terms of the letter of intent, it may be construed as either a letter of acceptance or merely an intention to enter into contract. In the latter case, it does not result in concluded contract. The Letter of Intent issued by MSEDCL clearly mentions that the selected party is required to forward its acceptance by return mail. It further provides that the selected bidder is required to execute the PPA with MSEDCL and submit the Contract Performance Guarantee in accordance with the NIT. The other terms and conditions of LOI shall be as stipulated in the NIT. Para 12.6 of the NIT provides as under:

“12.6 After selection, a Letter of Award (the LOA) shall be issued, in duplicate, by MSEDCL to the Selected Bidder(s) and the selected Bidders shall sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, MSEDCL may, unless it consents for the extension of time for submission thereof, forfeit the EMD of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA.”

Further, as per Clause 13.1 of NIT of ET-58, the Selected Bidder is required to execute the PPA and in case of failure of the Selected Bidder(s) to execute the PPA, MSEDCL is entitled to forfeit the EMD of such Bidder as damages.

55. From the above provisions, it appears that the LOIs issued by MSEDCL were in the nature of an “expression of an intention to enter into contract”, since the selected bidder is required to acknowledge the LOI by signing on the duplicate copy, enter into PPA and deposit the stipulated CPG failing which its EMD would be forfeited. Parties have submitted that as per the industry practice, supply of power is made on the basis

of accepted LOIs without signing the PPA. Thus, where the Selected Bidders have accepted the LOIs despite being aware of the deviation from the Bidding Guidelines, the LOIs have resulted in concluded contracts. On the other hand, where the Selected Bidders have not accepted the LOIs for any reasons whatsoever, such LOIs do not result in concluded contracts. Therefore, we hold that the LOIs dated 9.10.2018 and 25.10.2018 issued by MSEDCL in favour of GMRETL and TPTCL have not resulted in concluded contracts between the parties. However, LOIs dated 26.9.2018 with GMRETL and TPTCL and LOIs dated 19.9.2018 with MPL which have been accepted by the Selected Bidders have resulted in concluded contracts. In case of LOIs dated 9.10.2018 and 25.10.2018 which have not been accepted by the bidders (trading licensees), their EMDs are liable to be forfeited on account of failure to acknowledge the LOIs. In terms of Clause 12.6 of the NIT.

56. Next question that arises is the quantum of damages that the trading licensees and source generators are liable to pay to MSEDCL for short supply or non-supply of power as per the accepted LOIs. Both trading licensees and DB Power have contended that in terms of Clause 23 of the tender (and Clause 6.4 (vi) of the Bidding Guidelines), in case of any short supply of power above the permissible deviation, MSEDCL can only claim the compensation to the extent of 20% of tariff per kWh. However, MSEDCL has proceeded to deduct the amount way beyond what had been prescribed in the LOI. The trading licensees and DB Power have submitted that as per settled principle of law, where a sum is named in the contract to be payable as liquidated damages, the affected party is required to demonstrate the actual loss or damages suffered. Therefore,

MSEDCL is required to demonstrate actual loss and only upon such demonstration, it would be entitled to claim the said actual loss or the amount of liquidated damages mentioned in the LOI, whichever is lower. In this context, the reliance has been placed on the judgment of Hon'ble Supreme Court in the cases of (i) Fateh Chand v. Balkishan Das [AIR 1963 SC 1405], (ii) Maula Bux v. Union of India [AIR 1970 SC 195], and (iii) Kailash Nath Associates v. DDA and Anr. [(2015) 4 SCC 136].

57. *Per contra*, MSEDCL has submitted that Clause 23 of the tender document applies only in a scenario where there is deviation by the bidder in the scheduled energy and not in case of zero supply by the bidder due to unethically selling power in market for commercial gain instead of supplying to contracted party. MSEDCL has further submitted that on account of non-supply of contracted power by the traders and DB Power, it was compelled to procure the power from Power Exchanges at the rate much higher than the rates under the Los and hence, in the interest of consumers of Maharashtra, it has recovered the loss incurred at the differential rates of landed IEX rate at the State transmission system periphery and Lols rate for delivery of power as per tender conditions at the State transmission system periphery. MSEDCL has furnished the details relating to day-wise energy purchased from the Power Exchange and the amount paid for the same for period from 1.10.2018 and 15.11.2018.

58. We have considered the submissions made by the parties. The question for consideration is whether Clause 23 of NIT encompasses compensation of all types of breaches of the LOIs. We have perused the LOIs read with the NIT ET-58 and have noticed the following:

(a) MSEDCL is entitled to forfeit the EMD in the following three circumstances:

- (i) If the successful bidder fails to acknowledge the LOI;
- (ii) If the successful bidder fails to enter into PPA after the process of signing of PPA is initiated by MSEDCL; and
- (iii) if the Contract Performance Guarantee (CPG) is not furnished by the successful bidder within stipulated date.

(b) MSEDCL is entitled to forfeit the CPG for non-performance of the contractual obligations by the successful bidder in terms of 15.4 of the NIT which is extracted as under:

“15.4 The CPG provided by the Successful Bidder(s) shall be forfeited for non-performing the contractual obligations. The CPG should be released within 30 days after completion of Contract Period”.

(c) As per Clause 23, there is a permitted deviation upto 15% of the contracted power as per the approved open access on monthly basis. In case of deviation from Procurer side or the Bidder side is more than 15% of the contracted power, the Procurer or Bidder, as the case may be, shall be liable to pay compensation at the rate of 20% of tariff for kWh for the quantum in excess of permitted deviation. Clause 23 of ET 58 which forms part of the Lols dated 26.9.2018, 9.10.2018 and 25.10.2018 under ET-58 provides as under:

“23. Payments of Liquidated Damages for failure to Supply the Instructed Capacity

23.1 Both the parties would ensure that actual scheduling will not deviate by more than 15% of the contracted power as per the approved open access on monthly basis.

23.2 In case deviation from Procurer side in scheduled energy is more than 15% of the contracted power for which open access has been allocated on monthly

energy basis, Procurer shall pay compensation at 20% of Tariff per kWh for the quantum in excess of permitted deviation.

23.3 *In case deviation from Bidder side in scheduled energy is more than 15% of the contracted power for which open access has been allocated on monthly energy basis, Bidder shall pay compensation to Procurer at 20% of Tariff per kWh for the quantum in excess of permitted deviation.”*

Thus, the parties have envisaged different types of damages or compensation for different types of breaches in the LOIs.

59. While the trading licensees/source generators insist that Clause 23 covers all sorts of damages arising out of short supply or non-supply of power, MSEDCL has submitted that Clause 23 only covers the cases of deviation beyond the permissible limit and does not cover the cases of non-supply of power. MSEDCL has further submitted that since on account of non-supply of power, it was constrained to buy costly power from the Power Exchange, it is entitled to be compensated at the rate of difference in prices between the Power Exchange and contract price on the days of the breach. The trading licensees/source generators have relied upon Section 74 of the Indian Contract Act and judgement of the Hon'ble Supreme Court in (i) Fateh Chand v. Balkishan Das [AIR 1963 SC 1405], (ii) Maula Bux v. Union of India [(1969) 2 SCC 554], and (iii) Kailash Nath Associates v. DDA and Anr. [(2015) 4 SCC 136] and have contended that in terms of the said judgement, since an amount of compensation is stipulated in clause 23 of the LOI read with NIT for ET-58, MSEDCL is only entitled for compensation as per the said stipulation, subject to establishing that it has suffered actual loss or damages on account of non-supply of power by the trading licensees/DB Power.

60. In *Steel Authority of India Limited v. Gupta Brother Steel Tubes Ltd.*, [(2009) 10 SCC 63], the Hon'ble Supreme Court examined the issue as to whether an agreement specifying damages for certain types of breach of contract excludes any other breach not mentioned in the agreement. In that case, the Respondent (Gupta Brothers) submitted an application for 1500 MT of imported material for the first quarter (July to September 1988) and the second quarter (October to December 1988) pursuant to the scheme formulated by SAIL namely, "Full Requirement Supply Scheme", for supply of HR coils/skolps. On 15-9-1988, SAIL informed their inability to arrange for the import against the indent for quarter July to September 1988 for reasons beyond its control. However, for the quarter October to December 1988, Respondent got physical delivery of the goods on 7.3.1989. When dispute/differences arose between the parties with regard to quarter July to September 1988, they appointed an Arbitrator who gave an award dated 7.9.1993 in favour of the Respondent. Clause 7.2 of the Agreement between SAIL and Respondent dealt with compensation for delayed supply of goods. The Arbitrator decided that since no supply was made during July to September quarter against the duly registered indent demand placed on SAIL, the case would not fall within the ambit of Clause 7.2 of the Agreement. The award was challenged by SAIL before Sub-judge First Class Chandigarh, District Judge Chandigarh, Single Judge of Punjab and Haryana High court and Hon'ble Supreme Court. The relevant observations and decision of the Hon'ble Supreme Court on the issue whether breach not mentioned in the compensation clause would be covered under Section 74 of the Indian Contract Act, 1872 are as under:

"20. The question that needs to be determined by us is whether the breaches alleged by the respondent are covered by the stipulations contained in Clause 7.2. If the answer

is in the affirmative, obviously compensation cannot be awarded beyond what is provided therein. On the other hand, if breaches are not covered by Clause 7.2, cap provided therein with regard to liquidated damages will not be applicable at all.

21. *Insofar as booking of July-September 1988 quarter by the respondent is concerned, it is an admitted position that the appellant (SAIL) declined the supply of materials i.e. 1500 MT of 2 mm thickness HR coils on the ground of “reasons beyond control”. The arbitrator in the award observed that SAIL has admitted that the demand was validly registered by the claimant; that material was available in abundance specially from domestic source and that supplies were made to others ignoring the claim of the present respondent. The arbitrator held that the intimation of SAIL to the present respondent that the material will not be supplied to the claimant cannot fall within the ambit of Clause 7.2.*

22. *Although it has been strenuously urged on behalf of the appellant that stipulations contained in Clause 7.2 are comprehensive enough to include all types of breaches, on a careful consideration thereof, we are unable to accept the submission made on behalf of the appellant. Can it be said that SAIL intended to provide for liquidated damages in the contract even in a situation where they were unable to make supply of materials for the reasons beyond control or they declined to supply the materials on one ground or the other. The answer has to be plainly in the negative.*

23. *It is well known that intention of the parties to an instrument has to be gathered from the terms thereof and that the contract must be construed having regard to the terms and conditions as well as nature thereof. Clause 7.2 that provides for compensation to the respondent for failure to supply or delayed supply of the materials by SAIL was never intended to cover refusal to deliver the materials of the supplies on the part of SAIL. Refusal to supply materials by SAIL resulting in breach is neither contemplated nor covered in Clause 7.2.*

24. *There is no impediment nor we know of any obstacle for the parties to a contract to make provision of liquidated damages for specific breaches only leaving other types of breaches to be dealt with as unliquidated damages. We are not aware of any principle that once the provision of liquidated damages has been made in the contract, in the event of breach by one of the parties, such clause has to be read covering all types of breaches although parties may not have intended and provided for compensation in express terms for all types of breaches.”*

61. Thus, in Steel Authority of India Limited, it was decided that liquidated damage provision in a contract covers specific breaches mentioned therein, and not all types of breaches. Considering the facts of the present case in the light of the legal proposition decided in Steel Authority of India Limited, it emerges that soon after accepting the LOI dated 26.9.2018, DB Power raised the issue of non-availability of coal. Further, after

supplying power for two days, DB Power completely stopped supplying power to MSEDCL except for third day on 14.10.2018. During the said period, DB Power continued to sell power at the Power Exchange and MSEDCL was forced to purchase power from the Power Exchange to meet its consumer demands and had to also resort to load shedding. In case of SWPGL and MPL, there was no supply of power from 1.10.2018 to 31.10.2018 and from 1.12.2018 to 31.12.2018. In our view, the provision of Clause 23 of the LOIs is meant to encompass only the damages on account of deviation in scheduled energy at the rate of 20% of tariff per kWh for the quantum in excess of permitted deviation of 15% of the contracted power and cannot cover other types of breaches of the terms and conditions of the LOIs such as non-supply of power or failure to discharge contractual obligations. We are therefore of the view that the compensation for non-supply of power cannot be covered under clause 23 of the NIT for ET-58 and ET-71.

62. It is a settled principle of law that the intention of the parties to a contract has to be gathered from the terms and conditions as well as nature thereof. As we have observed in para 58 of this order, the parties have agreed to different compensation mechanisms for different types of breaches i.e. in case of non-acknowledgement of LOIs, EMD shall be forfeited; in case of non-performance of contractual obligations, the CPG shall be forfeited in terms of Clause 15.4; and in case of deviation beyond the permitted limit of deviation, liquidated damages shall be computed at the rate of 20% of tariff per kWh for the quantum in excess of permitted deviation in terms of clause 23. Coming to the dispute between the parties, the provisions of clause 23.3 would be applicable only when there is deviation in scheduled energy from contracted energy in

excess of permitted deviation of 15%. On the days when the Bidder has stopped supplying power to the Procurer, the provisions of Clause 23.3 would not be applicable since it is not possible to determine the quantum of deviation in scheduled energy from the contracted power in the absence of actual supply of power to MSEDCL. Such instances of stoppage of supply of power would be treated as a separate breach of LOI and would be covered under clause 15.4 which deals with non-performance of contractual obligations.

63. The other argument of the trading licensees and DB Power is that the claims of MSEDCL need to be dealt with under provisions of Section 74 of the Indian Contract Act, 1872 and in the light of the judgments of Hon'ble Supreme court in (i) Fateh Chand v. Balkishan Das [AIR 1963 SC 1405], (ii) Maula Bux v. Union of India [(1969) 2 SCC 554], and (iii) Kailash Nath Associates v. DDA and Anr. [(2015) 4 SCC 136]. It has been contended that since an amount of compensation is stipulated in LOIs, MSEDCL is entitled for compensation as per the said stipulation subject to establishing that MSEDCL has suffered actual loss or damages on account of non-supply of power by the trading licensees/DB Power.

64. We have considered the submissions of the parties. Section 74 of the Indian Contract Act, 1872 provides as under:

“74. Compensation for breach of contract where penalty stipulated for.- 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, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

As per law on the compensation for breach of contract under Section 74 of the Indian Contract Act, it is well settled that where a sum is named in contract as a liquidated amount payable by way of damages or by way of a penalty, the party claiming a breach can only receive as reasonable compensation such liquidated amount if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. Whereas in other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

65. Hon'ble Supreme Court has elaborated the law on compensation for breach of contract under Section 74 of the Indian Contract Act, 1872 in its judgement in Kailash Nath Associates v. Delhi Development Authority and Anr. [(2015) 4 SCC 136] as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

66. Thus, as per the above judgement, where a sum is named in a contract as a liquidated amount payable by way of damages or penalty, only reasonable compensation can be awarded not exceeding the amount so stated if it is a pre-estimate of damages fixed by both the parties and found to be such by the Court. In other words, the liquidated amount or penalty is the ceiling limit beyond which the court cannot grant reasonable compensation.

67. In the light of the above discussion, we decide the various aspects of the issue arising out of the breach on account of deviation in scheduled energy from contracted power or short supply of power or non-supply of power as under:

(a) Any deviation from the Bidding Guidelines requires prior approval of the appropriate Commission. Whereas Clause 7.13 of the Bidding Guidelines

provide that “in case the Procurer fails to issue the LOA within a period of 15 days, the successful bidder will be at liberty to exit without getting their EMD forfeited”, MSEDCL in clause 12.3 of the NIT for ET-58 has stipulated that the “issue the LOA within three days before the commencement of power as per requisition” On perusal of the records, it appears to us that MSEDCL has not obtained approval for the deviation in the NIT for ET-58 from MERC as required under the Bidding Guidelines.

(b) The bidding under ET-58 was for the period from 1.8.2018 to 31.12.2018 and the reverse auction took place on 18.7.2018. However, MSEDCL issued LOIs dated 26.9.2018 for supplies during 1.10.2018 to 15.10.2018, LOIs dated 9.10.2018 for supply during 16.10.2018 to 30.10.2018 and LOIs dated 25.10.2018 for supply during 1.11.2018 to 15.11.2018. Certainly, issue of LOIs after a lapse of two months from the date of reverse auction would have adverse impact on the preparedness of the generators to arrange coal for supply of power to MSEDCL. This provision in the tender document which is in clear violation of the Bidding Guidelines tilts the scale in favour of MSDECL and does not provide a level playing field to the bidders. We expect MSEDCL to take a balanced view in this regard and incorporate timelines as per the Bidding Guidelines in future.

(c) Notwithstanding our observation in sub-paras (a) and (b) above, since the Successful Bidders, namely GMRETL and TPTCL in ET-58 have accepted the LOIs dated 26.9.2018, and MPL in ET-71 has accepted all LOIs under ET-71, even after being aware of the deviation from Bidding Guidelines, such accepted

LOIs resulted in concluded contracts. However, in case of LOIs dated 9.10.2018 and 25.10.2018 where the successful bidders have not acknowledged the LOIs through acceptance, such cases did not result in concluded contracts. In case of ET-71, MPL accepted all six LOIs dated 29.9.2018 for supply of power from 1.10.2018 to 31.12.2018, Therefore, all LOIs have resulted in concluded contracts.

(d) GMRETL and TPTCL have not given acceptance in response to LOIs dated 9.10.2018 and 25.10.2018 in Bid-58 on the ground that the issue of LOIs was in deviation of the Bidding Guidelines. However, despite being aware of the provisions in NIT which are in deviation of Bidding Guidelines, both GMRETL and TPTCL had participated in the bid process and were issued LOIs. Having participated in the bid process on the basis of the NIT containing the deviation from the Bidding Guidelines, GMRETL and TPTCL cannot take advantage of the lapse on their part. In terms of Clause 12.6 of the NIT, their EMDs are liable to be forfeited for their failure to give their acceptance after having participated in the bidding process. Accordingly, forfeiture of EMD in respect of LOIs dated 9.10.2018 and 25.10.2018 is upheld.

(e) Liquidated damages as mentioned in Clause 23 of NIT is applicable in case where deviation in scheduled energy from Bidder Side or deviation in scheduled energy from Procurer side is more than 15% of the contracted power. This provision is applicable to the specific breach of deviation in scheduled energy and does not cover cases of non-supply of power.

(f) There is stoppage of supply of power by GMRETL and TPTCL and their source generators resulting in failure to discharge contractual obligations for 12 days in response to LOIs dated 26.9.2018 and by MPL and SWPGL for the periods from 1.10.2018 to 31.10.2018 and from 1.12.2018 to 31.12.2018 even though LOIs have been accepted. In such cases, MSEDCL shall be entitled to forfeit CPG as per Clause 15.4 of the LOIs.

Issue No. 3: Whether MSEDCL has made out the case for initiation of proceedings for revocation of licence of the Respondent trading licensees?

68. MSEDCL has submitted that the trading licensees namely, GMRETL, TPTCL and MPL being the successful bidders were having sole responsibility for arranging supply of power from source generators to fulfil their contractual obligations. However, the trading licensees neither desisted the source generators from doing such unethical act nor supplied power from alternate sources and thus made wilful and prolonged default and constructed a material breach of the contract, demonstrated imprudent and unethical practice for short-term commercial gain and thereby neglected the trading in electricity as per the contractual obligations. MSEDCL has further submitted that as per Regulation 11 of the Trading Licence Regulations, 2009 dealing with Prudential Reporting, the trading licensee is required to report the Commission any significant changes in circumstances which affects its ability to meet the obligations or any material breach. However, in the present case, none of the trading licensees herein had reported to the Commission regarding any eventuality affecting their ability to fulfil the obligation of power supply contemplated under the LOIs. Accordingly, MSEDCL has invoked jurisdiction of the Commission under Section 19 of the Act for revocation

of the licences of these licensees. MSEDCL has also invoked the provision of Regulation 14(1) of the Trading Licence Regulations for revocation of licences on the ground that these licensees have neglected to undertake the trading in electricity and have failed to submit the information as required under Regulations 11 of the Trading Licence Regulations.

69. The Respondents, trading licensees submitted that MSEDCL is attempting to convert a pure contractual issue into a regulatory issue related to the performance of obligations of the trading licensees. The Respondents have further submitted that the pure contractual issues, where all remedies, and rights and obligations are provided under the contract, cannot be the basis for initiating any regulatory proceedings with respect to revocation of trading licence. It has been submitted that in the present case, there is no breach of tender document conditions as MSEDCL has already resorted to Clause 23 of the tender document by deducting the payment to be made by the trading licensee and in fact, MSEDCL proceeded to deduct the amount in excess of what had been provided in the Clause 23 of the tender document. The trading licensees have submitted that MSEDCL has made a grave error by not disclosing the above facts to the Commission and the Petition No. 83/MP/2019 deserves to be dismissed on this ground of suppression of facts alone. It has also been submitted that on account of resorting to Clause 23 by MSEDCL itself, there remains no breach of tender conditions by the trading licensees and as such there is nothing which was required to be reported to the Commission in terms of Regulation 11 of Trading Licence Regulations and as such the provision of the said Regulation does not apply. It is stated that in absence of the applicability of Regulation 11 of the Trading Licence Regulations, the entire case of

MSEDCL fails as the jurisdictional fact for exercise of jurisdiction under Regulation 14 of the Trading Licence does not exist. The licensees have also submitted that upon the non-supply of power by the source generators, they had made serious efforts to pursue the source generators to commence the supply and fulfil its contractual obligation, however, on account of non-availability of coal, the source generators could not supply power to MSEDCL. It has been also stated that trading licensees also made the efforts to identify an alternate source for scheduling the power to MSEDCL. However, due to rise in market price, none of the generators were interested in supplying alternate power at the tariff as provided in the said arrangement.

70. The source generators, DB Power and SWPGL have also filed their replies in Petition No. 83/MP/2019. DB Power, in its reply, has flagged the issues of non-maintainability of the Petition for misjoinder of separate cause of actions, tender documents not being in line with MoP Guidelines, non-issuance of Lols by MSEDCL for the contracted period of supply, Lols issued by MSEDCL being not in terms of MoP Guidelines, wrongful levy of penalty by MSEDCL, allegation of MSEDCL concerning the sale of power on the Power Exchanges, etc. Whereas SWPGL, in its reply, has pointed out non-availability of coal leading to non-supply of power, gaming by MSEDCL by blocking the capacity of bidder(s) and issuing LoA only if it was not able to source cheaper power on Power Exchange, no sale of power which it was to supply to MPL/MSEDCL on the Power Exchange, it having offered to supply extra power from 12-24 MW in November & December, 2018 to compensate the short-fall in October, 2018, etc. SWGPL has also pointed out that since filing of the Petition, it has gone through CIRP process which has culminated into an order dated 9.11.2018 passed by

the NCLT, Hyderabad and that no order(s) can be passed against it in the present proceedings.

71. MSEDCL, in its rejoinder, has submitted that the Petition No.83/MP/2019 is not a contractual dispute but a regulatory issue which needs to be addressed by the Commission in order to regulate the *mala fide* and unethical practices adopted by bidders in not supplying power despite the commitment through Lols and selling the same in open market. MSEDCL has further submitted that the amount adjusted from the bills of trading licensees by MSEDCL does not by itself absolve them of their breach of contractual obligations towards supply of power which, on admission, standalone calls for invocation of power under Section 19 of the Act by this Commission.

72. We have considered the submissions made by MSEDCL, trading licensees and the source generators, DB Power and SWGPL on the issue of revocation of licence. MSEDCL has sought revocation of trading licences of GMRETL, TPTCL and MPL under Section 19 (a) and (b) of the Act for default and breach of agreement on the part of the trading licensees. Section 19 (a) and (b) of the Act is extracted hereinbelow:

“Section 19. (Revocation of licence): --- (1) If the Appropriate Commission, after making an enquiry, is satisfied that public interest so requires, it may revoke a licence in any of the following cases, namely: -

(a) where the licensee, in the opinion of the Appropriate Commission, makes wilful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder;

(b) where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation;”

73. Thus, for revocation under Section 19(1)(a) and (b), the Commission has to be satisfied that the licensee has made willful and prolonged default in doing anything required of him under the Act, or the Rules or regulations thereunder or the licensee has broken any of the terms or conditions of the licence which makes it liable for revocation. MSEDCL has submitted that the licensees have violated Clauses (a) and (b) of Regulation 11 of the Trading Licence Regulations which are extracted as under:

“11. Prudential Reporting

The licensee shall, as soon as possible, report to the Commission -

(a) any significant change in the circumstances which may affect his ability to meet the obligations under the Act, the Rules and the Regulations, directives and orders issued by the Commission, the Grid Code, agreement or the licence;

(b) any material breach of the provisions of the Act, the Rules and the Regulations, directives and orders issued by the Commission, the Grid Code, agreement or the licence; and.....”

MSEDCL has also invoked following provisions of Regulation 14 of the Trading Licence Regulations:

“14. Revocation of Licence

(1) The Commission may revoke the licence, in any of the following circumstances, namely:

.....

(e) Where the licensee has neglected to undertake trading in electricity:

.....

(g) Where the licensee fails to submit the information as required in accordance with the Regulations 9, 10 and 11 or knowingly furnishes false and wrong information....”

74. In the light of the above cited statutory provisions, we now proceed to examine the various grounds/ contentions of MSEDCL for initiation of proceedings for revocation of licences of the trading licensees. Firstly, MSEDCL has adverted to the wilful and prolonged default on the part of the licensees in supplying the power despite having been selected as successful bidders and existence of Lols in their favour. It may be

noted that the wilful and prolonged default in doing anything required of the licensee, under Section 19(1)(a) of the Act, is contemplated in the context of the Act or Rules or Regulations made thereunder. The expression 'wilful' in its natural and ordinary sense, would mean an act which is intentional, conscious and deliberate whereas the expression 'prolonged' would mean 'extended period' or 'for long duration'. In the present case, MSEDCL was fully aware of the fact that these trading licensees participated in the bid process by identifying their source generators beforehand as it being one of requirements for participating in the bid process by trading licensee (Cl. 4(iv) & 6.3.3 of tender). The non-supply of power has occurred only against the Lol dated 26.9.2018 by TPTCL and GETL for 12 days and four LOIs dated 19.9.2018 in case of MPL for the period 1.10.2018 to 15.10.2018, 16.10.2018 to 31.10.2018, 1.12.2018 to 15.12.2018 and 16.12.2018 to 31.12.2018. It is noticed that the non-supply of the power has taken place from the end of the source generators, and not at the end of trading licensees. It is further noticed that the trading licensees had approached source generators to commence supply of power and had taken initiative to arrange power from alternative sources but could not succeed. Moreover, the licensees had not been part of selling of such power from the source generators at the Power Exchanges. MSEDCL has vehemently agitated the malpractice and unethical conduct on the part of the licensee in not supplying the power in terms of the Lols issued by it and permitting the source generator(s) to sell the power in Power Exchanges at the same time for the commercial gains. However, we do not find any force in the aforesaid submission of MSEDCL inasmuch as it has not produced any material on record indicating that the trading licensees had in connivance with the

source generator(s) diverted the power meant for MSEDCL under the Lols. In fact, in response to the specific query of the Commission, all the three trading licensees have stated on affidavit that they had not been party/trader in any of the arrangements entered into by the source generators for selling the power in Power Exchange during the period from 1.10.2018 to 15.11.2018. Interestingly, for reasons best known to MSEDCL, it has not sought to invoke any proceedings/relief against the source generators for alleged diversion of the power meant for supply under its Lols/tender. Thus, in our view, the provision of Section 19(1)(a) of the Act cannot be invoked in the present case as the allegation of willful and prolonged default on the part of the trading licensees cannot be conclusively established. Similarly, MSEDCL has also not indicated as to how the provision of Section 19(1)(b) of the Act is attracted in the present case and has failed to demonstrate the terms or conditions of licence which have been breached by these licensees so as to result in revocation of licence.

75. MSEDCL has further relied upon the provisions of Regulation 11(a) & (b) read with Regulation 14(1)(e) and (g) of the Trading Licence Regulations, 2009 as already quoted above. Regulation 14(1)(e) of the Trading Licence Regulations enables the Commission to revoke the licence where the licensee has neglected to undertake trading in electricity. Though the licensees have failed to undertake trading in electricity in terms of the LOIs issued in their favour by MSEDCL, the traders have not succeeded to ensure that the source generators discharge their contractual obligations. Of course, the trading licensees should have approached this Commission or any other competent legal forum for specific performance of the LOIs by the source generators as at every stage of the bidding, the trading licensees have consulted and obtained the consents

of the source generators. No such actions have been taken by the trading licensees to compel the source generators to comply with their contractual obligations.

76. Furthermore, MSEDCL has relied upon the Regulation 14(1)(g) to contend that the trading licensees in the present case have failed to report the information as required in accordance with Regulation 11, in particular Regulation 11(a) & (b) and this calls for initiation of the revocation proceedings against the trading licensees herein. Under Regulation 14(b), the licensee is required to report to the Commission as soon as possible any material breach of the provisions of the Act, the Rules & Regulations, directives and orders issued by the Commission, the Grid Code, agreement or the licence. MSEDCL has emphasized that the trading licensees have failed to report the breach of agreement/Lols to this Commission as required under the aforesaid regulation and this coupled with the conduct of the licensee calls for initiation of the revocation proceedings in the present case. On the other hand, the trading licensees have submitted that MSEDCL having already resorted to Clause 23 of the tender documents in levying the liquidated damages for non-supply against the Lol, there was no occasion left for MSEDCL to initiate the present proceedings. It has also been submitted that once MSEDCL having proceeded to deduct the compensation for breach in terms of the tender documents, there was no subsisting breach of the said document which was liable to be reported to the Commission under the Regulation 11 of the Trading Licence Regulations, 2009. We have considered the rival submissions on the above aspect. We are of the view that the non-supply of contracted capacity under the Lols would amount to significant change in circumstances affecting the ability of the trading licensees to meet their obligations under the Act and Trading Licence

Regulations i.e. to undertake trading in electricity which require the licensees to report to the Commission under Regulation 11(a) of the Trading Licence Regulations, 2009. We are of the view that the trading licensees should have reported to the Commission about the change in their circumstances affecting their ability to supply under the Lols to MSEDCL in discharge of obligation under Regulation 11(a). However, this lapse on the part of trading licensees alone in our view would not be sufficient to initiate the proceedings for revocation of trading licence of the licensees herein especially since they have duly discharged the liability towards such non-supply under the Lols as per the provisions of thereof i.e. through forfeiture of liquidated damages.

77. Since the licensees have failed to report the information as required under Regulation 11(a) of Trading Licence Regulations, it amounts to contravention of the provisions of the regulations. This is the first instance of contravention of the contractual obligations which has been reported to the Commission against these trading licensees. Since we have already directed for payment of damages to MSEDCL for failure of the trading licensees to discharge their contractual obligations, we consider it appropriate to issue a stern warning to GMRETL, TPTCL and MPL and direct these licensees to ensure that such instances of violation of contractual obligations are not repeated in future.

78. The source generators have authorised the trading licensees to bid on their behalf and after selection, have given consent to supply power as per the terms and conditions of the LOIs. The sanctity of contracts needs to be maintained and the generators are under obligations to generate and supply power under the LOIs to MSEDCL through

the respective trading licensees. However, the source generators have failed to discharge their commitment as a result of which the trading licensees have not been able to discharge their contractual obligations. This practice has not only sent a wrong message about the efficacy of the regulatory mechanism in place, but also has resulted in causing avoidable inconvenience and hardship to MSEDCL to arrange power from the Power Exchange. The Commission records its strong disapproval of this practice on the part of DB Power and SWPGL to sell electricity in the Power Exchanges while accepting commitment to supply power to MSEDCL under the LOIs through the trading licensees.

Reliefs

79. In Petition No.83/MP/2019, MSEDCL has prayed for revocation of trading licences of M/s GMR Energy Trading Ltd., M/s Tata Power Trading Company Limited and M/s Manikaran Power Limited under Section 19(1)(b) of the Act. We are of the view that since the allegation of willful and prolonged default on the part of the trading licensees cannot be conclusively established, no case for revocation of trading licences is made out. However, the licensees have failed to report the information as required under Regulation 11(a) & (b) of Trading Licence Regulations which amounts to contravention of the regulations of the Commission. The Commission has issued stern warning to M/s GMR Energy Trading Ltd., M/s Tata Power Trading Company Limited and M/s Manikaran Power Limited to ensure that such instances of violation of contractual obligations are not repeated in future. The Commission has also recorded its strong disapproval of the conduct of the generators which have failed to supply power despite giving commitment to supply under the LOIs through the trading licensees.

80. In Petition No.403/MP/2019, GMRETL, and D.B.Power Limited have prayed for a declaration that the deductions made and forfeiture of EMD and CPG by MSEDCL are wrongful/illegal and for direction to MSEDCL to refund the deducted amounts of Rs.3,47,71,159/- to them. It is decided that where GMRETL and TPTCL have not acknowledged the LOIs, such LOIs have not resulted in concluded contracts and in such cases, MSEDCL is entitled to forfeit the EMD only. Where LOIs have been accepted by GMRETL and TPTCL resulting in concluded contracts, MSEDCL shall be entitled to recover liquidated damages in terms of Clause 23 of the tender ET-58 if the deviation in scheduled energy from Bidders' side (Trading Licensees) is more than 15% of the contracted power. Further, where the LOIs have been accepted by GMRETL and TPTCL resulting in concluded contracts but GMRETL and TPTCL have failed to supply power, MSEDCL shall be entitled to damages to the extent of Contract Performance Guarantee under Clause 15.4 of the tender ET-58. MSEDCL is directed to reconcile the deduction/forfeitures made in the light of the above directions and settle within 15 days of issue of this order.

81. DB Power has filed Petition No.216/MP/2021 seeking a direction for recovery of Rs. 3,40,22,909/- from MSEDCL and TPTCL. It is noticed from the reply of TPTCL that MSEDCL deducted Rs. 3,90,33,967/- on account of non-supply of power and TPTCL has deducted Rs.3,40,22,909/- from the receivables of DB Power on the basis of back-to-back arrangement between TPTCL and DB Power. In para 67 of this order, we have decided the principles for compensation for not acknowledging the LOIs, damages for deviation in supply from contracted power, and damages for non-supply of power which

are payable to MSEDCL. Therefore, recovery of damages by MSEDCL from TPTCL for the requisitions under ET-58 shall be reconciled by MSEDCL in terms of the said directions. Since there is a back-to-back arrangement between DB Power and TPTCL, TPTCL is directed to settle the claims of DB Power in terms of the settlement between MSEDCL and TPTCL in terms of our order.

82. No specific directions are issued qua MPL in ET-71 as no petition has been filed by MPL or its source generators.

83. Petition Nos. 83/MP/2019, 403/MP/2019 and 216/MP/2021 along with the pending IAs are disposed of in terms of the decisions in this order.

**Sd/-
(P.K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S. Jha)
Member**