

Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.185 of 2011

Dated 04th October, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member
Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

Gujarat UrjaVikas Nigam Limited,
Sardar Patel Bhawan, Race Course Circle,
Vadodra – 390 007
Gujarat

...Appellant(s)

Versus

1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower,
Opp Nehru Bridge,
Ashram Road, Ahmedabad- 380 009.
2. The Adani Power Limited,
9th Floor, Shikhar, Mithakali Six Road,
Navarangpura, Ahmedabd,
Gujarat – 380 009.

...Respondent(s)

Counsel for the Appellant (s) : Shri M.G. Ramachandran, Adv.
Ms.Swagatika Sahoo, Adv.

Counsel for the Respondent (s) : Shri Amit Kapur, Adv.
Ms. Poonam Verma, Adv. and
Mr. Malav Deliwala for R-2

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The appeal at the instance of Gujarat UrjaVikas Nigam Ltd.(hereinafter to be referred to as GUVNL),preferred against the order dated 21.10.2011 in Petition No. 109 of 2011 passed by the Gujarat Electricity Regulatory Commission, the respondent no.1 herein is concerned with interpretation of certain clauses of a contract called Power Purchase Agreement entered into by and between the appellant GUVNL and the Adani Power Ltd.(hereinafter to be referred to as APL), the respondent No.2 herein on 2.2.2007 in order to find out the contractual obligations of the parties in so far as it relates to the time of commencement of supply of electricity by the APL to the GUVNL.To be more precise, what is the connotation of the words 'Commercial Operation Date' (COD) and 'Scheduled Commercial Operation Date' (SCOD) has been the bone of contention between the appellant and the respondent No.2 and the order impugned having gone in favour of the latter, the appeal is before us.

2. Bereft of all unnecessary verbiages, we are to state that though in the Memorandum of Appeal, the appellant has extensively quoted

different clauses of the agreement, we refrain from quoting the same here and now for the sake of brevity and precision since we will be extensively considering the same as we will proceed with the deliberation in the course of the judgment. It was by way of a bidding process that an agreement came into being on 2.2.2007 as aforesaid consequent upon Request For Qualification (RFQ) issued sometime in February, 2006 by the GUVNL and then Request For Proposal (RFP) on 24.11.2006. As a part of the RFP, the GUVNL made available to the participating bidders, a draft of the Power Purchase Agreement which the selected bidder in terms of the RFP would be required to enter into with it. The last date of submission of bids was fixed on 2.1. 2007 on which date technical bids were opened and on 4.1.2007 were then opened the financial bids. On 11.1.2007, a Letter Of Intent (LOI) was issued to the respondent no.2 which accepted the same on 13.1.2007. As said above, the Power Purchase Agreement was entered into on 2.2.2007 which was subsequently modified by a supplementary Power Purchase Agreement on 18.4.2007 regarding change in the Delivery Point for delivery of power. Annexure 9 of the bid is relevant for the purpose which is tabled below:-

Unit	Rated Capacity (in MW)	Contracted capacity (in MW)	Date of commencement of supply	Unit No.	Project	Delivery Point
First	600 MW	500 MW	60 months from effective date	1	The APL Thermal Power Project	Interconnection point of CTU and Gujarat STU
Second	600 MW	500 MW	60 months from effective date	2		
All Units	1200 MW	1000MW				

3. The respondent No.2 raised certain issues from time to time questioning its obligation to supply power to the appellant and then issued a notice on 28.12.2009 purporting to terminate the agreement dated 2.2.2007. The appellant then filed a petition before the Commission, being Petition No.1000 of 2010, which was decided in favour of the appellant by the Commission by order dated 31.8.2010. The respondent No.2 preferred appeal against that order of the Commission before this Tribunal which by judgment dated 7.9.2011 dismissed the Appeal no.184 of 2010. Now, by letter dated 7.12.2010, the respondent No.2 wrote to the appellant regarding synchronisation of the first unit of 660 MW of the power project at Mundra and sale of power generated thereon. It was somewhat a lengthy letter which it is not necessary to reproduce in extenso, but only it is to be stated that in the said letter, the respondent No.2 contended that it was not liable to supply power to the appellant prior to SCOD as per the provisions of the Power Purchase Agreement and it is more so when the Mundra-Zerda transmission line planned for GUVNL for evacuation of power under the Power Purchase Agreement was far from completion; and subject to the outcome of the decision regarding termination of the Power Purchase Agreement and in case it is held that the GUVNL has right to avail itself of electricity prior to SCOD, the respondent No.2 would pay to GUVNL the net excess realization above the tariff under the Power Purchase Agreement, alternatively until the disposal of the termination dispute, the GUVNL may avail itself of electricity on cost plus basis. The appellant by letter dated 20.12.2011 objected to the contents of the letter and maintained that the respondent No.2 was bound to generate and supply electricity from the generating units synchronised and commissioned, that is, the first unit of 660 MW as well as the subsequent unit as and when to be commissioned. Then, came another correspondence dated

27.1.2011 whereby the respondent No.2 contended that it was not liable to supply power to the appellant prior to SCOD while communicating that the first unit of 660 MW of Mundra Phase-III (2X660MW) has been commissioned with effect from 26.12.2010. It was further informed to the appellant that the respondent No.2 would commence sale of power to third party as soon as possible from unit no. 5. On 16.3.2011, the respondent No.2 filed a petition before the Commission being, Petition No.1093 of 2011, disputing its obligation to supply power to the appellant under the Power Purchase Agreement prior to the Scheduled Commercial Operation Date (SCOD). The appellant on 17.5.2011 filed a reply to such petition. On 29.7.2011, the respondent No.2 declared commercial operation of the second unit of 660 MMW and forwarded to the appellant the testing and commissioning certificates. All these developments took place during the pendency of the Appeal no.184 of 2010 which was disposed of on 7.9.2011 but which we are not concerned with in the present appeal. The Commission by the order dated 21.10.2011, passed in petition no.103 of 2011, accepted the contention of the respondent No.2 to the effect that the said respondent No.2 has no obligation to supply the contracted capacity prior to SCOD which is 2.2.2012. According to the appellant, the Commission committed error in holding so and it ought to have held that the respondent No.2 had obligation to supply power to the appellant from the COD and not from the SCOD. The Commission overlooked the fact that the unit no.1 (660MW) was commissioned undisputedly on 26.12.2010 and this was evident from the communication dated 27.1.2011 issued by the respondent No.2. Commissioning, according to the appellant, occurs when COD occurs in respect of a unit. The respondent No.2 had declared the availability of the power generated from its 660 MW in a 15 minute time block to the State Load Despatch

Centre from 1.3.2011 and it also sent the details of declaration of availability, scheduling of power along with invoices for a certain period that ranged between May, 2011 to October, 2011. The Commission failed to appreciate that as per Article 4.3.1 of Power Purchase Agreement, the respondent No.2 was required to supply power throughout the term of the Power Purchase Agreement. The Power Purchase Agreement commences from the date of signing it which was 2.2.2007. The expiry date of the Power Purchase Agreement which, according to the appellant, is the outer date i.e. 25th anniversary of the COD. The obligation of the respondent No.2 to supply electrical output to the appellant is earlier than SCOD as per Article 4.3.1. If the intention of the parties was that the supply should commence only from the SCOD then there was no necessity to define the COD separately. The definition of SCOD is with reference to the entire project. The term 'commissioned unit' is always with reference to the COD, not with the SCOD, and for the purpose of the Power Purchase Agreement, the operating period commences from the COD of the respective unit and not from the SCOD. Article 4.1.1 casts an obligation on the part of the respondent No.2 to execute the project so as to enable achievement of the COD both in relation to the unit and the total contracted capacity not later than SCOD. In terms of Article 4.4.1, the respondent No.2 cannot sell electricity to any third party and Article 6.4 refers to the COD, not to the SCOD. The RFP and the bid documents cannot supersede the Power Purchase Agreement. There was no hindrance or technical restriction at any point of time for delivering the power through the alternative 220 KV Mundra-Nanikhakhar D/C, 220 KV Mundra-Tapper D/C and 400 KV Mundra-Versana-Hadala D/C transmission lines of GETCO.

4. The respondent No.2 in its counter-affidavit has contended as follows:-

- a) The appellant firstly is guilty of suppression of certain material facts namely, that 400 KV/DC Mundra-Zerda line which was identified for the Power Purchase Agreement consisted of Line1 and Line 2 and the tender for Line 1 was finally awarded in May, 2011, and for the Line 2, tender was issued on 23.10.2009 i.e. 32 months after the execution of the Power Purchase Agreement and then the appellant instructed the APL Enterprises Ltd. (AEL) to keep the project in abeyance on account of which the construction of the transmission line was delayed.
- b) It further suppressed certain communications namely the APL's letter dated 20.6.2011 to the appellant regarding information on the evacuation of power, a study report of the WRLDC stating that net injection from the Mundra Power Project should not exceed 1800 MW on the existing transmission system, the letter dated 31st May, 2011 issued by the State Load Despatch Centre stating that there was evacuation problem and that the State Load Despatch Centre could not permit synchronisation, the appellant's own letter dated 24.6.2011 to the effect that since the actual power flow on GETCO's system was high on account of system dynamics any further injection by The APL would lead to increase in flow over GETCO's lines, the APL's letter dated. 8.7.2011 requesting the appellant to instruct the State Load Despatch Centre for necessary permission to undertake commissioning test to achieve full load generation, the appellant's letter dated 22.7.2011 stating that the State Load Despatch Centre conveyed its permission for

synchronisation but existing transmission / evacuation system did not have any margin for taking full load testing of unit no.6 and lastly the appellant's letter dated 1.8.2011 wherein the appellant stated that the existing evacuation facility was not sufficient to evacuate power from the unit no.6 .

- c) The data available in public domain shows the sale of power outside the State of Gujarat by the appellant and the appellant's advertisement dated 31.5.2011 for sale of its surplus power.
- d) The appellant misrepresented that alternative evacuation facilities were available to evacuate power from the Unit Nos.5 & 6 while the actual position was that the State Load Despatch Centre directed the respondent No.2 to back down the generation as the lines were overloaded and the appellant's letter dated 1.8.2011 read with the State Load Despatch Centre's letter dated. 1.5.2011 revealed that there was admittedly no evacuation facility to evacuate the power and post 1.8.2011 no other transmission line did come up.
- e) It was the case of the appellant before the Commission that the APL refused to declare commercial operation by supplying power to it before the SCOD and that the APL had been deliberately postponing the declaration of commercial operation.
- f) The APL was supplying power to the appellant only on the basis of the understanding through Memorandum of Understanding dated 31.12.2010 to the effect that the said supply was subject to the outcome of the petition of the respondent No.2 before the Commission.
- g) The appellant misrepresented the provisions of the Power Purchase Agreement relating to commissioning and declaration of commercial operation.

- h) The provisions of Article 4.2 are to be read with Article 12 (force majeure).
- i) Right to declare commercial operation is always with the seller and declaration of commercial operation and commissioning are two different expressions and they do not amount to the same thing. If interpretation of the appellant is to be accepted, then Article 6.4 of the Power Purchase Agreement would be rendered redundant because that Article specifically provides for commercial operation.
- j) The appellant's contention that the State would suffer if the APL did not supply power to the appellant was not correct in view of the fact that the data of the WRLDC would reveal that the appellant had been at the material point of time selling power outside the State.
- k) The appellant by its letter dated 20.11.2007 identified Mundra-Zerda 400 KVDC line for evacuation of power from the unit no. 5 and unit no.6 and the COD therein has been mentioned as 1.2.2012.
- l) The RFP and the bid documents have to be read harmoniously with the Power Purchase Agreement and the former two are not got superseded by the Power Purchase Agreement.
- m) The APL's obligation to supply power commences from the SCOD and not from the COD and it has power to sell power prior to the SCOD in the de-regulated scenario.
- n) The GUVNL had provided a time schedule for the seller (The APL) to achieve the SCOD of the entire contracted capacity with a maximum period of 60 months from the date of signing of the Power Purchase Agreement although earlier supply was not to form an obligation on GUVNL to give preference to any bidder.

The Seller (The APL) was provided with a choice to indicate the date [not later than 60 months from the Effective Date (02.02.2007)] when the supply of the contracted capacity to the GUVNL was to commence.

- o) The APL's Bid dated 02.01.2007, more particularly, Annexure 9, establishes that since inception the APL intended to supply the contracted capacity to the GUVNL only upon completion of 60 months from the Effective Date (02.02.2012) from both the Units (2 X 660 MW), and not before that. The tariff quoted by the APL in its Bid dated 02.01.2007 was predicated upon this contractual obligation of the APL to supply the contracted capacity to GUVNL commencing after 60 months from the execution of the Power Purchase Agreement. The submission of the Bid and early execution of the Project by incurring additional huge expenditure at its own cost by the APL were based on the fact that the APL was free to supply power to third parties prior to the SCOD. The choice given to the bidder under RFP was duly availed of APL in its Bid dated 02.01.2007 and was duly accepted by the GUVNL by accepting the Bid. The APL's obligation to supply power to GUVNL (from both the Units) was crystallized to be effective from SCOD, i.e. 60 months from 02.02.2007.
- p) GUVNL/GETCO have delayed and defaulted in fulfilling their obligation to construct, establish, operate and maintain the identified Mundra-Zerda transmission line, under the Bid-02, connecting with the APL's bus bar. In furtherance to the APL's letter dated 06.07.2009 the APL requested GETCO to take necessary action for ensuring availability of Mundra-Zerda Transmission Lines within the period of 18 months. As per the terms of the Power Purchase Agreement between the APL and the

GUVNL, the GUVNL is responsible for procuring the Interconnection and Transmission Facilities from the Delivery Point not later than the Scheduled Connection Date in case of Bid-2. The 220 kV Mundra-Nanikhakhar is not the appropriate delivery point for evacuation of 2000 MW from the APL and it is the duty of the GETCO as a State Transmission Utility to ensure that it has to plan out evacuation of power at appropriate level.

5. The appellant has filed a rejoinder to the counter-affidavit of the respondent No.2 contending that the said counter-affidavit contains extraneous and irrelevant points which are not decisive at all. Before the Commission, the APL did not rely on Article 6.4 of the Power Purchase Agreement which in fact has no relevance and the admitted case of the APL was that the COD occurred after commissioning of the units. The intent of Article 6.4 is that even after commissioning, the power plant may not be able to actually commence supply of power on a consistent basis, but if the plant commences supply on regular basis, COD has to be deemed to have been achieved. Therefore, the main dispute was whether the APL had or had no obligation to supply contracted power to the appellant from Unit No.5 before the SCOD namely after the commissioning of the generating units of the power project. Secondly, the Delivery Point for supply of electrical energy generated by the APL from Unit no.1 to Unit no.6 including unit no.5 & 6 which are the subject matter of the Power Purchase Agreement dated 2.2.2007 is the Bus Bar of the generation units. The Power Purchase Agreement does not envisage the APL's right to refuse to deliver power from the generating units because of the alleged non-availability of any specific transmission system and the Power Purchase Agreement does not envisage any

specific transmission system through which only the contracted power between the two parties has to be evacuated. Thirdly, the APL has been indulging in backing down Units 1 to 6 in order to inject power from Units 7, 8 and 9 for evacuation through the GETCO's line connected to Nanikhakhar, Tapper and Varsana / Hadala and has thus taken the benefit from the transmission lines meant for evacuation of power contracted with the GUVNL. The system constraints leading to the backing down instructions given by State Load Despatch Centre were mainly on account of the constraints at Dehgam on the interconnection point of the transmission line of the APL with the Central Transmission Network and not on account of any constraint on the three lines of the GETCO to Nanikhakhar, Tapper and Varsana / Hadala. Fourthly, the claim of the APL that the appellant already had a power surplus and does not require the power of the APL is incorrect on many a grounds but the principal point is that the mandate of the GUVNL is to supply the cheaper power available from long term sources such as the APL to the consumers and the expensive power is considered for sale to third parties in the event of surplus power at any month and such surplus power, if available, is only seasonal.

6. The pleadings of the parties are voluminous and many a points have been raised by the respondent No.2 namely, the appellant's alleged suppression of material facts, the appellant's alleged misrepresentation, the appellant's alleged contradictory stand before the Commission, non-availability of alternative evacuation facilities, appellant's availability of surplus power and consequential sale of them outside the State of Gujarat, and the conduct of the appellant. But the principal issue on which the fate of the appeal would be decided is

whether the legal obligation of the respondent No.2 to supply power to the appellant in terms of the Power Purchase Agreement dated 2.2.2007 begins from the COD or from the SCOD. The other points raised by the respondent No.2 will come up for consideration in course of the analysis of the principal issue and while deciding the said principal issue, we will be strictly interpreting according to law of interpretation of contract the Power Purchase Agreement entered into by and between the parties on 2.2.2007.

7. Mr. M.G.Ramachandran, learned advocate appearing for the appellant submitted as follows:-

- a) The date of synchronisation and commissioning of Unit No.5 (660 MW) was 25.12.2010.
- b) By the letter dated 27.1.2011, the APL declared the first unit of 660 MW as duly commissioned and a copy of the certificate of the Independent Engineer was sent to the GUVNL.
- c) The APL did not dispute the proposition that the supply of power to GUVNL prior to SCOD was without prejudice to the outcome of the adjudication upon the claim of the GUVNL that in terms of the Power Purchase Agreement itself it was entitled to supply of power from the APL prior to SCOD.
- d) It could not be the case of the APL that COD had not taken place because with effect from 1.3.2011 the supply of power on regular and firm basis with scheduling and dispatch in accordance with the applicable Grid Code Regulations had commenced. Therefore, the question to be decided was not whether the commercial operation has or has not commenced but whether for the purpose

of Power Purchase Agreement and for the obligation of the APL to supply power to the GUVNL, the COD should be taken to be the SCOD. The APL admitted before the Commission that supply of power from the Unit no.1 after the COD was available from 26.12.2010, and in relation to the SCOD, it would be 2.2.2012. Similarly, in respect of the Unit No.2, the dates would be 3.6.2011 (COD) and 2.2.2012 (SCOD). Therefore, that the COD did not occur qua the GUVNL was a new case set up by the Commission itself in the impugned order without any pleading to that effect of the APL. In fact, the alleged non-existence of COD with respect to the supply of Contracted Capacity as distinguished from commissioning of the units was the finding of the Commission without any pleading.

- e) Once the Commission held that the terms COD and SCOD as used in the Power Purchase Agreement are not inter-changeable terms and they have different applications, then the irresistible conclusion would be that when COD occurs, the APL cannot run away from its obligation to commence supply of power to the GUVNL in terms of the Power Purchase Agreement.
- f) The finding of the Commission that even though the final testing certification of the Independent Engineer had been issued and commissioning of the unit had occurred still then the absence of declaration of the APL to the effect that supply of power was available on commercial basis is a faulty finding in as much as after declaration of the commissioning of the unit immediate after issuance of testing certificate by the Independent Engineer, there remained nothing further to achieve the COD because with the two as above, and when these two events as above occur the COD occurs. Thus, there cannot be any differentiation between

the date of commissioning of the unit and the date of commercial operation and any such differentiation is fanciful one and this differentiation really vanishes when the definitions of the two terms 'COD' and 'commissioned' unit are noticed because commissioning of the units comes only when the COD occurs and COD occurs in relation to unit when the supply of electrical energy equivalent to the contracted capacity of that unit commences on commercial basis and this commencement starts only when the final test certificate of the Independent Engineer is available. That the unit was commissioned admitted of no dispute and before the Commission the APL admitted the position that Unit No.5 had achieved commercial operation.

- g) The reference to the definition of COD does not leave any scope to argue that the APL has right or option to decide on a date from which it would commence supply to the GUVNL in respect of the Contracted Capacity and this interpretation is consistent with the term 'operating period' which means the date on which the COD occurred in relation to unit or the contracted capacity of that unit. Thus, a combined reading of the terms 'COD', 'Commissioned Unit', 'Operating Period' and 'Final Test Certificate' makes it clear that there cannot be any position where a unit has been commissioned but COD has not occurred. If the unit has been commissioned, it would imply that COD has occurred as per the definition of the term contained in the Power Purchase Agreement. It must not be forgotten that the COD is always with reference to a generating unit or station and not with reference to a supply of power to any specific person. It is not logical to say that the COD had not occurred qua the GUVNL but has occurred with some other person. Asking for production of documents to the effect

that the APL has declared commercial operation vis-à-vis the GUVNL is uncalled for in view of the fact that the unit was commissioned upon receipt of the test certificate from the Independent Engineer. The letter of the APL dated 07.12.2010, the letter of GUVNL dated 20.12.2012 and again the APL's letter dated 27.01.2011 and also the further letter of the APL dated 26.03.2011 will all clearly show that the unit no.5 was commissioned and there happened COD in respect of that unit. The seven invoices raised by the APL will show that the APL supplied power to the GUVNL not on the ground that the COD had not occurred but only on the basis that it had no obligation to supply power prior to the SCOD. In fact, the APL had itself stated that it would commercially supply electricity from 01.03.2011 without prejudice to its contentions pending before this Tribunal to the effect that the Power Purchase Agreement stood terminated. The Article 6.4 of the Power Purchase Agreement clearly states that the seller shall along with the submissions of the final test certificate of the Independent Engineer as per provisions of Article 6.2.6 indicate a date as the COD for the concerned unit and the unit shall be considered to have achieved COD on the date indicated in such letter or the date on such supply of power actually commences after commissioning of the unit whichever is later.

- h) Neither the Power Purchase Agreement nor any other document does specify any right of the APL to sell or use the Contracted Capacity for any other purpose; on the other hand the Power Purchase Agreement contains express provisions with regard to the right of the GUVNL to get power from the APL in respect of the Contracted Capacity and there was no stipulation that the

GUVNL had no right to receive power prior to the SCOD and, moreover, the Power Purchase Agreement has negative provisions on the APL about not selling the Contracted Capacity or using the same for any other person. Neither the Power Purchase Agreement nor the RFP does contain any positive right of the APL to sell electricity to third party prior to the SCOD.

- i) Articles 4.1, 4.2, 4.3, 4.4, 4.6, 4.7, 6, 11.1 of the Power Purchase Agreement, when they are read together in conjunction with the definition of the terms as aforesaid, will leave no scope of doubt to hold that the obligation of the APL to supply power commences with the achievement of COD of the concerned unit and the reference to time in the SCOD indicates the maximum permissible outer limit and it does not indicate that the obligation does not arise prior to the SCOD.
- j) The definition of the term 'Expiry Date' is with reference to the COD, not to the SCOD and even the example given below the definition fortifies this position.
- k) Article 4.4.1, Article 4.4.3 and Article 4.4.4 of the Power Purchase Agreement do not enable the APL to effect sale to third party after commissioning of the unit.
- l) In terms of Articles 4.6 and 4.7, liquidated damages are payable if the COD does not occur before the SCOD which means that the two have different connotations.
- m) Schedule 6 of the Power Purchase Agreement deals with tariff for the period prior to the SCOD and the tariff for the period beyond 25th year of the COD of the first unit.

- n) When the APL sought to obtain open access for sale to the Jharkhand State Electricity Board on 12.2.2011, it was explicit that the Unit No.5 was ready for commercial operation.
- o) It is fallacious to argue that Clause 3.4 of the RFP could override the provisions of the Power Purchase Agreement because Article 18.4 of the Power Purchase Agreement clearly provides that the agreement under schedules are conclusive and except as provided in the agreement all written or oral understandings, offers or other communications would stand superseded.
- p) Even on merits of the interpretation of the RFP, it would appear that the RFP document specifically envisages the supply of power prior to SCOD, of course, subject to the ability of the State Transmission Utility to take delivery of the power. Clauses 3.4.1, 3.4.2 and 3.4.3 and also the Annexure 9 of the RFP also make it clear that the obligation of the APL to supply power to GUVNL commences prior to the SCOD. Postponement of the SCOD or preponement of the SCOD has nothing to do with the obligation to supply power upon achievement of the COD.
- q) Neither the Power Purchase Agreement, nor any of the other documents entered into between the parties stipulates that the power to be evacuated shall be only through a specific transmission line namely 400 KV Mundra-Zerda D/C line. Since the power is to be delivered by the APL at the bus bar of the Mundra generating station, the APL is not concerned with which particular transmission line shall be used by the GUVNL to evacuate the power. The total Contracted Capacity of the GUVNL from Units 5 and 6 is 1000 MW and from Units 1 to 4 under another Power Purchase Agreement is 1000 MW. The total generation of the units will have to be proportionately determined

as against the above 2000 MW for supply to the GUVNL. If, for example, at any time the total generation is 80% of the installed capacity, then the supply to the GUVNL would be 80% of Contracted Capacity of 2000 MW which would be 1600 MW. As such, the availability of transmission capacity to evacuate the Contracted Capacity of 2000 MW need to be, therefore, determined on the basis of the capacity declared available to the GUVNL by the APL from time to time.

- r) The contention of the APL that the GUVNL in collusion with the GETCO had recommended and forced the use of Mundra-Dehgam line of the APL for evacuation of GUVNL's Contracted Capacity and prevented the APL power to evacuate its surplus power from Units 1 to 6 or from Unit 7 is frivolous and for the GUVNL or the GETCO to compulsory use the Mundra-Dehgam line for evacuation of the power from the Contracted capacity. So long as the power to the GUVNL up to the Contracted capacity is made available, the GUVNL had no objection for the use of GETCO lines for evacuation of surplus power which the APL is entitled to sell to others. The APL had commenced injection of power for supply to the GUVNL on its own and even before the filing of the proceedings before the State Commission on 16.3.2011. Similarly, the APL had injected power for supply to GUVNL from Unit No.6 also from August 2011. Thus, there was actual injection into the system and evacuation of the same even before the Mundra-Zerda Line is commissioned. From 1.3.2011 the APL had injected 500 MW of power on the existing available line of GETCO on a regular basis and the same has been taken delivery of by the GUVNL. This process continued up to 8.11.2011 when the impugned order was communicated. Since 2.3.2012 and 3.3.2012, the APL has

been supplying power to GUVNL from Unit No.5 and 6 respectively, with the same transmission capacity of GETCO existing as on March-2011 (maximum flow of 1780 MW on GETCO lines) and there has been no constraint in regard to the same. The Mundra-Zerda Line has not been commissioned till the above time. In the circumstance, non-availability of Mundra-Zerda transmission line is wrong and without merit.

8. Mr. Amit Kapur, learned advocate appearing for the respondent No.2 has submitted as follows:-

- a) The initial stand of the GUVNL that it had been facing acute shortage of power due to which procurement of power as soon as the APL commissioned its unit nos.5 & 6 has been given go-by by the GUVNL itself when it was pointed out by supporting documents that the GUVNL was actually selling power outside the State with no shortfall in the State of Gujarat. It changed its stand with the substitution that it could not be the concern of the APL as to how the GUVNL would utilize its power. In fact, documents would show that the GUVNL floated tender for sale of power outside the state.
- b) When the unit nos.5 & 6 were about to be commissioned the GUVNL through State Load Despatch Centre forced the APL to back down the generation on the ground of transmission constraints. The GUVNL relied on certain correspondences between it and the GETCO showing delay in transmission line and then changed its stand to submit on the basis of the meeting with Central Electricity Authority, PGCIL, WRLDC, WRPC and GETCO that it had arranged the capacity to evacuate more than 2,400 MW of power. Before the Commission the GUVNL maintained that the

delay in construction of designated Mundra-Zerda line was owing to force majeure situation. The GUVNL does not have the capacity to evacuate the entire contracted capacity without using the APLs' Mundra-Dehgaam line.

- c) A conjoint reading of the different provisions of the Power Purchase Agreement would reveal that the obligation of the APL to supply power to GUVNL in terms of the Power Purchase Agreement will start only after 60 months from the effective date of the Power Purchase Agreement (2.2.2012). The defined SCOD will be 2.2.2012. Prior to this date, the APL would be at free to sell power to any third party. The RFP and the bid documents if read with the Power Purchase Agreement make it easier to say that prior to 2.2.2012, the APL had no obligation to supply power to GUVNL on commercial basis. The option of pre-ponment SCOD (provided by GUVNL in the RFP and the Power Purchase Agreement) has not been exercised by the APL under Article 3.1.2 (viii) of the Power Purchase Agreement, therefore SCOD remains 60 months from Effective Date i.e. 02.02.2007. The APL has availed its option provided under Clause 3.4.3 of the RFP. In the bid document following which the GUVNL executed the contract. There was clear indication that commencement of supply of power to the GUVNL would be 60 months from the effective date of the Power Purchase Agreement. The argument of the appellant that in view of the Power Purchase Agreement having been signed, the bid document and the RFP would be relegated to the secondary importance is not acceptable in view of the latter two documents forming part of the Power Purchase Agreement. Pre ponment of the SCOD was merely an option available to the APL.

- d) The APL had no obligation to supply power to GUVNL within 48 months from the date of execution of the Power Purchase Agreement. To supply power between the period from 48 to 60 months was merely an option to the APL and, thirdly the APL's obligation to supply power commences is 60 month from the effective date as defined in the Power Purchase Agreement.
- e) Commissioning a unit does not amount to commercial operation. Article 6.4 of the Power Purchase Agreement provides that commercial operation is the date as indicated by the Independent Engineer in the final test certificate or the date on which supply of power actually commences after commissioning the unit, whichever is later. The word 'after Commissioning of the unit' clearly shows that commissioning is not the 'Commercial Operation'. Article 6.2.6 read with Article 6.4 of the Power Purchase Agreement means that before commencement of supply to GUVNL commissioning and issuance of final test certificate from the Independent Engineer must be completed, but the converse is not true. Therefore, there is no question of supply of power to GUVNL before SCOD.
- f) GUVNL identified 400 kV D/C Mundra-Zerda line for evacuation of power under bid no.2 from unit no.5 & 6. In the progress report dated 10.11.2007, the GUVNL identified this line for evacuation of power from the APL. Moreover, it was clearly emphasised by the GUVNL that The 200 kV Mundra-Nanikhakhar is not the appropriate delivery point for evacuation of 2000 MW from the APL and it is the duty of GETCO as an STU that it has to plan out for evacuation of power at appropriate level. Further, there are series of documents and correspondences to show that for

evacuation of power from the APL, the GUVNL was in anxiety to have 400 kV/DC Mundra-Zerda line ready and available.

- g) The allegedly available transmission lines : 220 kV Mundra-Ninikhakhar D/C, 220 KV Mundra-Tapper D/C and 400 kV Mundra-Versana-Hadala D/C of GETCO, were/are not sufficient to evacuate the power from Mundra Power Project and the APL is still using its own dedicated transmission line from Mundra-Dehagaam to evacuate its power. The documents submitted on 14.05.2012 on behalf of the GUVNL do not show that the existing evacuation facility is sufficient. The GUVNL has been able to evacuate power to its maximum capacity only after utilizing the APL's Mundra-Dehgaam line.

9. In order to appreciate the merit of the appeal, it is necessary to traverse only the relevant clauses of the Power Purchase Agreement dated 2.2.2007 along with definition of the terms used therein and also those of RFP and RFQ of clauses which we reproduce below:-

- a) **Commercial Operation Date (COD)** :- means, in relation to a unit, the date on which the supply of Electrical Output to the Procurer, equivalent to the Contracted capacity of the Unit (as offered by the Seller in the Bid) and in relation to the Contracted capacity, the date on which the supply of Electrical Output to the Procurer, equivalent to the Contracted capacity of all the Units (as offered by the Seller in the Bid) commences on commercial basis. Provided that Commercial Operation Date shall occur only after the Procurer receives a Final Test Certificate of the Independent Engineer as per the provisions of the Article 6.2.6, in relation to a Unit, for the Unit and in relation to the Contracted capacity, for all the Units.
- b) **Commissioned Unit**: - means the Unit in respect of which COD has occurred.

- c) **Contracted capacity:** - means 1000 MW net capacity of the Delivery Point or such capacities as may be determined in accordance with Article 6.2.10 or Article 8.2 of this Agreement.
- d) **Effective Date:** - means the date of signing of this Agreement by last of all the Parties.
- e) **Expiry Date:** - means the 25th anniversary of the Commercial Operation Date in relation to the Contracted capacity. For the avoidance of doubt, in case the COD in relation to the Contracted capacity occurs on June 1, 2013, then the 25th anniversary of the Scheduled COD in relation to the Contracted capacity shall occur on June 1, 2038 i.e. in the Contract Year 2038-39.
- f) **Final Test Certificate** :- means a certificate of the Independent Engineer certifying and accepting the results of a Commissioning Test/s in accordance with Article 6.2.6 of this Agreement; or a certificate of the Independent Engineer certifying the result of a Report performance Tests in accordance with Article 8.2.1 of this Agreement.
- g) **Operating Period**:- in relation to a Unit or the Contracted capacity means the period from respective COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement.
- h) **Scheduled COD or Scheduled Commercial Operation Date**:-
means 60 months from Effective Date in respect to the entire Contracted Capacity or such other dates from time to time specified in accordance with the provisions of this Agreement;
- i) **Scheduled Connection Date** shall mean the date falling maximum 30 days before the Scheduled Synchronisation date of First Unit
- j) **Term of Agreement:** - shall have the meaning ascribed thereto in Article 2.1.

2. Article 2: TERMS OF AGREEMENT

2.1 Effective Date and Term of Agreement

2.1.1 This Agreement is effective from the date of its signing of this Agreement by all the Parties. This Agreement shall be valid for a term commencing from the Effective Date until the Expiry Date ("Term of Agreement") unless Tribunal terminated earlier pursuant 2.2. Upon the occurrence of the Expiry Date, this Agreement shall, subject to Article 18.9 automatically terminate, unless mutually extended by the Parties on mutually agreed terms and conditions, at least one hundred and eighty

(180) days prior to the Expiry Date, subject to approval of the Appropriate Commission, as necessary.

4. ARTICLE 4 : DEVELOPMENT OF THE PROJECT

4.1.1. Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:

b) executing the Project in a timely manner so as to enable achievement of COD of each of the Units and the contracted capacity as a whole, not later than its Scheduled Commercial Operations Date and such that as much of the Contracted capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and dispatch requirements throughout the term of this Agreement but under no event earlier than 48 months from Effective Date.

4.2 Procurer's obligation

Subject to the terms and conditions of this Agreement, the Procurer:

- a) Shall be responsible for procuring the Interconnection and Transmission Facilities to enable the evacuation of Contracted capacity from the Delivery Point to the Procurer's customer's network not later than the Scheduled Connection Date.
- b) Shall be responsible for payment of the Transmission Charges and State Load Despatch Centre charges beyond the Delivery Point.
- c) Shall make all reasonable arrangements for the evacuation of the infirm Power from the Power station; subject to such power being made available by the Seller at the Delivery Point; and
- d) Shall be responsible for fulfilling obligations undertaken under this Agreement."

"4.3 Purchase and sale of Available Capacity and Scheduled Energy

4.3.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurer, and the Procurer undertakes to pay the Tariff for all of the Available Capacity up to the Contracted capacity and Scheduled Energy corresponding to the Contracted capacity **throughout the terms of this Agreement.**

4.3.2 Unless otherwise instructed by the Procurer, the Seller shall sell all the Available Capacity in respect of the Contracted capacity of the Power Station to the Procurer pursuant to Dispatch instructions.

4.4 Right to Available Capacity and Scheduled Energy

4.4.1 Subject to other provisions of this Agreement, the entire Contracted capacity to the extent Commercial Operation is achieved, shall at all times be for the exclusive benefit of the Procurer and the procurer shall have the exclusive right to purchase such Contracted capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Available Capacity and/or Scheduled Energy.

4.4.2 If the Procurer does not avail of power upto the Available capacity as per the provisions of Article 4.4.2, the Seller shall be entitled to sell such Available Capacity not procured, to any person without losing the right to receive the Capacity Charges from the Procurer for such un-availed Available Capacity. In such a case, the net sale realization at the Delivery Point in excess of Energy Charges shall be equally shared by the Seller with the Procurer. In the event, the Seller sells such Available Capacity to the shareholders of the Seller or any direct or indirect affiliate of the Seller / shareholders of the Seller without obtaining the prior written consent of the Procurer, the Seller shall be liable to sell such Available Capacity to such entity at tariffs being not less than the Tariff payable by the Procurer. Upon the Procurer not availing of the Available Capacity, as envisaged under this Article, intimating to the Seller or its intention and willingness to avail of the part of the Available Capacity not availed of and therefore sold to the third party, the Seller shall, notwithstanding anything contained in the arrangement between the Seller and said third party, commence supply of such capacity to the Procurer from the later of two (2) hours from receipt of notice in this regard from the Procurer or the time for commencement of supply specified in such notice.

4.4.3 The Seller shall not itself use any of the electricity generated by the Project from Contracted capacity during the term of this Agreement.

4.4.4 The Sale under Unscheduled interchange shall not be considered as sale to third party for the purposes of this Agreement.

4.6 Liquidated damages for delay in providing Contracted capacity

4.6.1 If any unit does not achieve COD by its Scheduled Commercial Operation Date other than for the reasons specified in Article 4.5.1 the seller shall pay to the Procurer liquidated damages for such delay in achieving COD. The sum total of the liquidated damages payable by the Seller to the Procurer for such delayed COD shall be calculated as follows:

$SLDb - [C_{cun} \times d_n \times DR1]$, if $d_n \leq 60$

$SLDb = [C_{cun} \times 60 \times DR1] + \{C_{cun} \times (d_n - 60) \times DR2\}$, if $d_n > 60$

Where :

- a) "SLDb" are the liquidated damages payable by the Seller during the period beginning with day from the scheduled commercial operation date of a Unit up to and including the day on which Unit actually achieves COD;
- b) "CCun" is the Contracted capacity of Unit "n",
- c) "d" is the number of days in the period beginning with the day after the Scheduled Commercial Operation Date of Unit "n" up to and including the day on which such unit actually achieves COD".
- d) "DR1" is Rs. Ten Thousand (10,000) of damages per MW per day of delay and "DR2" is Rs. Fifteen Thousand (15,000) of damages per MW per day of delay.

4.6.2 The seller's maximum liability under this Article 4.6 shall be limited to the amount of liquidated damages calculated in accordance with Article 4.6.1 for and up to twelve (12) Months of delay for Contracted capacity of the Unit. Provided that in case of failure of the Seller to achieve COD of the Unit even after expiry of twelve (12) Months from its scheduled commercial Operation Date the provisions of Articles 14 shall apply.

4.6.3 The Seller shall pay the liquidated damages calculated pursuant to Article 4.6.1 to the Procurer within ten (10) days of the earlier of :

- a) the date on which the Unit actually achieves COD; or
- b) the date of termination of this Agreement.

If the Seller fails to pay the amount of damages within the said period of ten (10) days, the Procurer shall be entitled to recover the said amount of the liquidated damages by; invoking the Performance Guarantee. If the then existing Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the Seller to the Procurer under this Article 4.6, then the Seller shall be liable to forthwith pay the balance amount.

4.6.4 The parties agree that the formula specified in Article 4.6.1 for calculation of liquidated damages payable by the Seller under this Article

4.6, read with Article 14 is a genuine and accurate pre-estimation of the actual loss that will be suffered by the procurer in the event of Seller's delay in achieving COD of a Unit by its Scheduled COD.

4.6.5 If any Unit does not achieve COD by its Revised Scheduled COD other than for the reasons specified in Article 4.5.1, the Seller shall pay to the Procurer liquidated damages payable for the delay in achieving such COD. The sum total of the liquidated damages payable by the Seller to the Procurer for such delayed Commissioning shall be equivalent to the damages payable by the Procurer to the Gujarat State Transmission Utility for the period of delay, as per the terms of agreement proposed to be entered into by the Procurer with Gujarat State Transmission Utility for establishment of transmission system. Provided however, the liquidated damages payable by the Seller to the Procurer in case of delay under this Article 4.6.5 shall not be more than twenty percent of liquidated damages computed in the manner mentioned in Article 4.6.1. Provided further, in case of delay beyond Scheduled Commercial Operation Date, the provisions of Article 4.6.1 to 4.6.4 will apply for such delay.

4.7 Liquidated damages for delay due to Procurer Event of Default and Non-Natural Force Majeure Events and Natural Force Majeure Event (affecting the Procurer)

4.7.1 if

- (a) A Unit cannot achieve COD by its Scheduled Commercial Operations Date, due to a procurer Event of Default or due to Non Natural Force majeure Event or Natural Force Majeure affecting the Procurer) provided such Non Natural Force Majeure Event (or Natural Force Majeure affecting the Procurer) has continued for a period of more than three (3) continuous or non-continuous Months; or
- (b) a Unit is available for conducting Commissioning Tests and is anticipated to be capable of duly completing the Commissioning Tests as certified by the Independent Engineer, but the said Commissioning Tests are not undertaken or completed due to such Procurer Event of Default or due to Non Natural Force Majeure Event (or Natural Force Majeure affecting the Procurer) provided such Non Natural Force Majeure Event (or Natural Force Majeure affecting the Procurer) has continued for a period of more than three (3) continuous or non-continuous months: Such Unit shall, until the effects of the Procurer Event of Default or of Non Natural Force Majeure Event (or Natural Force Majeure affecting

the Procurer) no longer prevent the Seller from undertaking a Commissioning Tests, be deemed to have, if applicable, a Tested Capacity equal to the Contracted capacity and to this extent, be deemed to have achieved COD with effect from the Scheduled COD without taking into account delay due to such Procurer Event of Default or Non Natural Force Majeure Event (or Natural Force Majeure affecting eh Procurer) and shall be treated as follows:

a) In case of delay on account of the Procurer Event of Default, the Procurer shall make payment to the Seller of Capacity Charges calculated on Normative Availability of Contracted capacity of such Unit for and during the period of such delay, Provided however, if any Unit does not achieve COD by its Revised Scheduled COD due to unavailability of transmission system beyond the delivery point, the Procurer shall make payment to the seller of an amount equivalent to the amounts paid by the Gujarat State Transmission Utility to the procurer as per the terms of agreement proposed to be transmission system for the period of delay beyond the Scheduled Commercial Operation Date.

b) In case of delay on account of Direct Non Natural Force Majeure Event, eh Procurer shall make payment to the Seller of Capacity Charges calculated on Normative Availability of Contracted capacity of such Unit for the period of such events in excess of three (3) continuous or non-continuous Months in the manner provide in (d) below.

c) In case of an Indirect Non Natural Force Majeure Event (or Natural Force Majeure affecting eh Procurer), the Procurer shall make payments for amounts (“Debt Service”) relating to such Unit, which are due under the Financing Agreements, subject to a maximum of Capacity based on Normative Availability, for the period of such events in excess of three (3) continuous or non-continuous Months in the manner provided in (d) below.

d) In case of delay due to Direct and Indirect Non Natural Force Majeure Events (or Natural Force Majeure affecting eh Procurer), the Procurer shall be liable to make payments mentioned in (b) and (c) above, after Commercial Operation of the Unit, in the form of an Increase in Capacity Charges. Provided such increase in Capacity Charges shall be determined by Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid amounts mentioned in (b) and (c) above in a situation where the

Direct Non Natural Force Majeure or Indirect Non Natural Force Majeure Event, as the case may be, had not occurred.

4.7.2 In every case referred to in Article 4.7.1 hereinabove, the Seller shall undertake a Commissioning Test as soon as reasonably practicable [and in no event late than two (2) weeks] after the point at which it is no longer prevented from doing so by the effects of Force Majeure Events or Procurer Event of Default (as appropriate) and if such Commissioning Test/s is not duly completed and/or demonstrate/s is not duly completed and/or demonstrate/s a Tested Capacity of a Unit which is less than ninety five (95) percent of its Rated Capacity and the Seller falls to make available the Contracted capacity at the delivery point from the aggregate Tested Capacity of Unit (s) of the Police Station, then:

- The Unit which falls the Commissioning Tests, shall be deemed to have not achieved COD from the deemed COD referred to in Article 4.7.1.*
- The Seller shall repay to the Procurer, all sums received by way of Capacity Charge for such Unit along with Interest at the same rate as Late Payment Surcharge; and,*
- If the Seller falls to achieve COD by the Scheduled Commercial Operation Dated, it shall also pay liquidated damages to the Procurer for such Unit calculated in accordance with Article 4.6 and;*

In case the Seller makes available the Contracted capacity at the delivery point from the aggregated Tested Capacity of Unit (s) of the Power Station, the Tested Capacity shall be the capacity of the Power Station for the purpose of Declaration of availability under Article 8.3”

6. ARTICLE 6 : SYNCHRONISATION, COMMISSION AND COMMERCIAL OPERATION

6.1.1 The Seller shall give the Procurer and RLDC/SLDC at least (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronise a unit to the Grid system.

6.1.2 Subject to Article 6.1.1, a unit may be synchronized by the seller to the Grid system when it meets all connection conditions prescribed in any Grid Code then in affect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

6.4 Commercial Operation

The seller shall, along with the submission of Final Test Certificate of the Independent Engineer as per provisions of Article 6.2.6, indicate a date as the COD for the concerned Unit. The Unit, for the purposes of this Agreement, shall be considered to have achieved COD on date indicated in such letter or the date on such supply of power actually commences after Commissioning of the Unit, whichever is later.”

11.1 General

11.1.1 From the COD of the first Unit, procurer shall pay the Seller the Monthly Tariff payment, on or before the due date, comprising of Tariff for every contract Year determined in accordance with this Article 11 and Schedule 6. All Tariff payment by the procurer shall be in Indian Rupees.

Provided however, if the procurer avails of any Electrical output from the Seller prior to the Commercial Operate date of a Unit made available at the Delivery Point (“Infirm Power”) then the Procurer shall be liable to pay only energy charges (as applicable for the Contract Year in which the Infirm Power is supplied or next contract year in case no energy charges are mentioned in such Contract Year), for Infirm Power generated by corresponding unit, the quantum of infirm power generated by Units synchronized but have not achieved COD shall be computed from the energy accounting and audit meters installed at the Power Station as per Central Electricity Authority (Installation and operation of meters) Regulations 2006 as amended from time to Time.

18.4 Entirety

18.4.1 This Agreement and the Schedules are intended by the Parties as the final expression of their agreement and are intended also as a complete and exclusive statement of the terms of their Agreement.

18.4.2 Except as provided in this Agreement, all prior written or oral understandings offers or other communications of every kind pertaining to this Agreement or the sale or purchase of Electrical Output and Contracted.

Schedule 6

12.9 Tariff for the period prior to schedule COD of first unit and for Contract Years beyond the 25 years from the COD of the first Unit.

The Tariff for the period prior to scheduled COD of the first unit shall be the quoted tariff of the first year with escalation for relevant period only

for energy charges. The Tariff for the Contract Years beyond the 25 Years from the COD of the first Unit shall be the Quoted tariff of the 25th year from the COD of the first unit with applicable escalation.

SUPPLEMENTARY POWER PURCHASE AGREEMENT DATED 18.4.2007

“Recitals”

The Seller informed the Procurer that it will supply the Contracted capacity from its Mundra Thermal Power Project and requested to accept Mundra Power Project Bus Bar as the delivery point in view of the technical-commercial advantage to the Procurer. GUVNL has conveyed its decision vide letter No.GUVNL/GM (Comm)/480 dated 16th April 2007 to off take the Contracted capacity from Mundra Thermal Power Project Bus Bar instead of 220 KV NaniKhakhar sub-station of GETCO and accordingly communicated to the Seller to complete the formality of amending the Articles of the Agreement relating to delivery point.

2.0 The agreement shall be supplemented and modified as under:

2.1 The existing definition of the ‘Delivery Point’ in Article 1.1 of the agreement shall be replaced by the following definition:

‘Delivery Point’ means the point of delivery for fulfilling the obligation of the Seller to deliver the contracted electrical output/energy to Procurer i.e. Mundra Thermal Power Project Bus Bar situated at Mundra, District Kutch, Gujarat.

2.2 The Existing Schedule 7 : DETAILS OF INTERCONNECTION FACILITIES of the Agreement shall be replaced as following :

The Delivery Point shall be the point of delivery for fulfilling the obligation of the Seller to deliver the contracted electrical output/energy to Procurer i.e **Mundra Thermal Power Project Bus Bar situated at Mundra, District Kutch, and Gujarat.** All necessary arrangements to receive the Contracted capacity from the delivery point and transmission there onwards shall be taken care of by the Procurer.

2.3 All other terms and conditions of Power Purchase Agreements dated 2nd February, 2007 remains unchanged.”

REQUEST FOR PROPOSAL

“3.3 Evacuation of Power

3.3.1 *The Seller shall supply power at the Delivery Point and the responsibility for evacuation of power beyond the delivery point will be of the Procurer as per the Power Purchase Agreement. The Seller shall be responsible for obtaining all the clearances/approvals including open access, wherever required, from Central / State Government, and statutory bodies, for supply of power up to the delivery point.*

3.3.2 *The Procurer shall ensure that the Gujarat State Transmission Utility connects at the Delivery Point for evacuation of its Contracted capacity.*

3.4.1 The Seller shall be required to achieve Scheduled Commercial Operation Date of the entire Contracted capacity within 60 months from the date of signing of the Power Purchase Agreement.

3.4.2 *Bidders may offer Scheduled Commercial Operation Date, for whole or part of the capacity offered, before expiry of 60 months from the date of signing of Power Purchase Agreement. The Bidder has to declare such schedule at the time bid submission. Thus the Bidder can provide a Unit wise time schedule for commencing supply of the Contracted capacity (power supply schedule) to the Procurer.*

3.4.3 *The procurement of power earlier than 60 months, as envisaged under Article 3.4.2, would be subject to Gujarat State Transmission Utility’s ability to evacuate from the Delivery Point, GUVNL shall procure power from such sources based on competitiveness of the offer and such earlier supplies will not form an obligation on GUVNL to give preference to such Bidders.”*

REQUEST FOR QUALIFICATION

“2.3 Purchase of power by procurer

2.3.1 *Procurer plans to procure power to the extent of 2000 MW. The power shall be delivered at the generator switchyard bus-bar, in case the station is directly connected to the State Transmission Utilities’ Grid, otherwise at the nearest Centre Transmission Utility interconnection point. The Normative Availability required to be met by the Bidder shall be 80%.”*

10. The Commission by the impugned order referred to the aforesaid clauses of the agreement as also the clauses of the RFP and the bid document. The Commission posed the question whether the GUVNL was entitled to its share in the electricity generated by the APL from the generating units concerned during the period from the COD till the SCOD. According to the Commission, the mere provision of 60 months' period in respect of the SCOD may not restrict the declaration of commercial operation on any earlier date provided the power plant was ready, synchronised and capable of being commercially operated. According to the Commission, the object of the exercise would be to discover the intention of the parties at the time of execution of the contract and construction of contract is a mixed question of fact and law. The Commission referred to the decision of the Supreme Court in *Uduman vs. Aslum, (1991) 1SCC 412* where it was held that the guiding role would be to ascertain the natural and ordinary sensible meaning of the language through which the parties have expressed themselves unless the meaning leads to any absurd result. The Commission held that the expression '*commercial basis*' is significant in this that it implies that the supply of electrical output from the unit or from the equivalent contracted capacity will be on a commercial basis, meaning thereby that the COD would be only after declaration of commercial operation by the seller and as provided in Article 6.2.6 of the Power Purchase Agreement, the COD shall occur only after the issuance of a final test certificate by Independent Engineer but issuance of such certificate does not ipso facto lead to the COD and the further condition is that there has to be declaration by the seller. Then, the Commission refers to the definitions of the expressions, namely, "Commissioned Unit", "Contracted capacity", "Commissioning", "Delivery Point", "Effective Date", "Expiry Date", "Inter Connection Facilities", "COD" and "SCOD".

Then, the Commission held that the SCOD is 60 months from the effective date i.e. 2.2.2007 in respect of the entire Contracted Capacity of 1000 MW which works out to 2.2.2012 and thus, the SCOD is provided to achieve COD by the entire Contracted Capacity prior to 2.2.2002 by the APL. Thus, according to the Commission, the COD and the SCOD are not interchangeable terms and under Article 3.1.2(VIII) there can be a revision in the SCOD. The Commission also referred to the 'scheduled connection date' which as per the definition is the date falling maximum 30 days before the scheduled synchronisation date of the first unit. After analysing the different provisions of the Power Purchase Agreement, RFP and the bid documents the Commission concluded that the respondent No.2 herein was not obligated upon to commence supply in terms of the Power Purchase Agreement prior to the SCOD which is 2.2.2012.

11. Mr. Kapur, learned counsel for the respondent No.2 referred to certain decisions of the Hon'ble Supreme Court namely, *Khardah Company Ltd. Vs. Rayman & Co. (India) Pvt. Ltd. : AIR 1962 State Commission 1810*, *Modi and Co. Vs. Union of India : AIR 1969 State Commission 9*, *Amravati District Central Cooperative Bank Ltd. Vs. United India Fire and General Insurance Co. Ltd., Delta International Ltd. Vs. Shyam Sunder Ganeriwalla and Another : (1999)*, *General Assurance Society Ltd. Vs. Chandmull Jain : AIR 1966 State Commission 1644*. All these decisions speak in different words but the pith and substance of the decisions is that the mind of the makers of the documents has to be revealed through the words expressed in a contract. Mr. Kapur also speaks of the law of bundle of jural relationships and emphasizes upon the Doctrine of *Contra Proferentem*

in terms of which an interpretation has to be in favour of a party that did not insist on its inclusion of any terms and since it was the GUVNL which inserted conditions in the Power Purchase Agreement it is the GUVNL that must suffer from the consequences of such interpretation that should go against the GUVNL. In this connection, Mr. Kapur also referred to the decision in *United India Insurance Co. Ltd. Vs. Pushpalaya Printers (2004) 3 SCC 694*.

12. The question is one of interpretation of contract. Rendered not too in remote past, an oft-quoted decision of the House of Lords in *Investors Compensation Scheme Vs. West Bromwich Building Society (1998) 1 W.L.R. 896* through the speech of Lord Hoffmann, though suffered from criticism by the Law Lords in subsequent decisions appears to be well accepted by the Courts following Anglo-Saxon Jurisprudence. Lord Hoffmann's speech enunciated five principles contained in a single sentence which is "*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*" In later times, in *HSBC Bank Plc Vs. Liberty Mutual Insurances (2001) All E.R. (D) 61*, Lord Patten observed that the five principles have to be read as a whole (Reference is found in Sir Kim Lewison's "The Interpretation of Contracts"). These are all academia and now we are to go to the crude facts, terms and conditions of the contract and the surrounding circumstances that are associated with the contract.

13. What the parties intended by such contract has to be deciphered with reference to the Power Purchase Agreement. The RFP and the bid documents which preceded the Power Purchase Agreement cannot be totally made out of context in view of the fact that upon acceptance of the bid document, the contract followed and the two could not be in derogation from each other and the bid document had necessarily to be in consonance with the RFP so much so that it does not become difficult for the Tribunal to find out the date wherefrom the legal obligation of the APL to supply power in terms of the contract would commence and whether such obligation has to be from the COD or the SCOD. That the RFP and the bid documents form part of the agreement would appear from the fact that they have been taken cognizance of in the Power Purchase Agreement with the expression of the term 'Project Documents'. Again, that the RFP documents are part of the Power Purchase Agreement or for that matter, the Power Purchase Agreement is inter-related to the RFP can be well understood when we find the RFP documents to mean and include the Power Purchase Agreement in the definition clauses. Therefore, RFP, bid documents and Power Purchase Agreement have to be read together and only when any inconsistency would arise in relation to them amongst one another that a proper construction would be necessary, and finally the recitals and schedules are also comprised within the agreement. The learned Commission did not, rightly to our mind, use the two expressions namely COD and SCOD interchangeably but at the same time it has to be mentioned that the two are inter-related to each other although they may not imply one and the same identical meaning at all the times. As we have noticed, the Commission upon interpretation of the agreement came to the opinion that the APL's legal obligation to supply power to

the GUVNL arises 60 months after the effective date and that effective date would be the SCOD.

14. Admittedly, the power project set up by the respondent No.2 has the total capacity of 1320 MW comprising two generating units of 660 MW each under Phase-III of Mundra Power Station and in terms of Annexure-9 of the bid document, the GUVNL was entitled to 500 MW from each of the two units as Contracted Capacity. Before coming to the analysis of the Power Purchase Agreement, it is better to refer to the clauses 3.3, 3.4.1, 3.4.2 and 3.4.3. It goes without saying that the supply by the APL to the GUVNL has to be at the delivery point as defined in the Power Purchase Agreement, meaning the points of delivery for fulfilling the obligation of the seller to deliver the contracted electrical output, and more specifically the said delivery point has to be the Generator – Gujarat State Transmission Utility inter-connection point, of course, only when the generator is connected to the Gujarat State Transmission Utility. Now, that the RFP is not in discordance with the Power Purchase Agreement would appear from the fact that all along the parties had intended that the seller shall be required to achieve Scheduled Commercial Operation Date of the entire Contracted Capacity within 60 months from the date of signing of the Power Purchase Agreement. A question may arise as to whether there has been put a legal compulsion upon the seller to declare commercial operation date or legal obligation to supply on commercial basis the electrical energy to the GUVNL in respect of a particular unit before the SCOD only when that unit passes off successful testing by the Independent Engineer. If at all, it is only when the Power Purchase Agreement associated with the RFP and bid documents would make it

really clear that the moment a particular unit passes off successful testing in relation to contracted capacity of that unit then the seller shall be under legal duty to automatically supply electrical output to the procurer. Then, in that event, COD and SCOD would lose all its thin distinction. Article 3.4.2 of the RFP gives an option, not mandate, that a bidder can provide a unit-wise time schedule for commencing supply of contracted capacity to the procurer. Again, Clauses 3.4.1 & 3.4.2 of the RFP have a rider to the effect that the procurement of power earlier than 60 months as envisaged under Article 3.4.2 would be subject to Gujarat STUs' ability to evacuate power from the delivery point. Emphasis is put by the appellant to Article 11.1.1 and Clauses 1.2.9 of the Schedule 6 of the Power Purchase Agreement. It must not be forgotten that Article 11 relates to billing and payment, while Article 11.1.1 speaks of payment of monthly tariff when there occurs COD of the first unit. This Article cannot be construed to mean in isolation of the other clauses of the agreement that the seller is bound to supply electrical output in relation to the contracted capacity of a unit only when the unit becomes a commissioned unit. Again, Clause 1.2.9 of Schedule speaks of tariff prior to SCOD as it also speaks of tariff beyond 25 years. This has significance in this that as the seller has liberty to supply electrical output before the SCOD; it has also liberty to supply beyond the 25th year of the COD. That all the clauses of the agreement have to be read harmoniously has been well indicated in Article 1.2.13 where it has been made very clear that different parts of the agreement are to be taken as mutually explanatory and supplementary to each other and in the event of any inconsistency being experienced in course of interpretation of the contract, it is the harmonious manner in which interpretation has to be rendered. We have earlier noticed that in terms of this agreement, which we are interpreting in relation to COD and SCOD, the RFP

documents have to be kept in mind because they are also part of the Power Purchase Agreement. It is now necessary to refer to Article 2.1 which deals with the term of the agreement. In terms of this Article, the agreement is effective from the date of signing thereof. This Article uses two terms “Effective Date” & “Expiry Date”. Effective Date is the date of the signing of the agreement by last of all the parties, while the Expiry Date means the 25th anniversary of the commercial operation date in relation to the Contracted Capacity. The import of the term Expiry Date has been annotated with an illustration to the effect that if, for example, COD in relation to the Contracted Capacity occurs on 1.6.2013, then the 25th anniversary of the SCOD in relation to the Contracted Capacity shall occur on 1.6.2038. The use of the expression “COD” before the words “in relation to the Contracted Capacity occurs on 1.6.2013” is very much significant in this that here COD has not been qualified with the COD of any particular unit and again Contracted Capacity does not mean the contracted capacity equivalent to a unit only. The definition of the “Expiry Date” is absolutely in consonance with the definition of the words “Scheduled COD”. The latter means 60 months from the “Effective Date” in respect to the entire Contracted Capacity. The use of the words “Scheduled COD in relation to the Contracted Capacity” before the expression “25th anniversary” implies and entail three things, namely a) COD in relation to a unit must not be beyond SCOD, b) legal obligation to supply electricity starts 60 months after the Effective Date, and c) the said obligation is in relation to the entire Contracted Capacity of 1000 MW, and not in relation to a fragment of the Contracted Capacity. In Article 3.1.2 of the agreement it has been made very explicit that obligation of one party to the other, or to put it in legal parlance, the rights and duties of each other begins 12 months from the Effective Date. That is to say, the obligation of the seller to sell and the

obligation of the buyer to purchase commence 60 months from the Effective Date. "Effective Date and "Expiry Date" are always in correlation to "SCOD" ,and there is no separate effective date or separate expiry date in relation to a particular unit and there has not been provided in the Power Purchase Agreement different effective dates for different units ;on the contrary the Effective Date and the Expiry Date are in relation to the Contracted Capacity as defined in the definition clauses and the said Contracted Capacity means the Contracted Capacity of all the units which is why the word "entire " has been qualified with the words "Contracted Capacity" when it is used in the definition of the words "Scheduled COD" It is worth-noting the Clause VIII of Article 3.1.2 wherein it has been stipulated that the seller shall have sent a written notice to the procurer indicating that the Scheduled COD of the Contracted Capacity shall be as per the original Schedule COD or that it intends to pre-poned the Scheduled COD along with Unit wise COD. This pre-ponement can be in relation to COD of a unit or it can be in relation to SCOD but this lies with the seller as an option and such option can be exercised when the transmission facility is available which is the responsibility of the procurer but having read the Power Purchase Agreement and the RFP document as a whole, it comes to this that availability of the transmission facility has to be made ready and available to the seller when commercial supply commences. Thus, we find that COD and SCOD have two different connotations but such difference is in the context of the unit and the units as a whole. When we speak of units in plural we mean the units representing the Contracted Capacity of 1000 MW. It is proper to remember in this connection that Contracted Capacity whenever we will use the term means 1000 MW net capacity at the delivery point. Contracted Capacity does not mean in the context of the definition of that term itself in the

definition chapter contracted capacity of a particular unit. Now, COD has itself two connotations – it may mean in relation to a particular unit and it may also mean in relation to Contracted Capacity. When it means in relation to a unit, it means the date on which electrical output commences on commercial basis in relation to the contracted capacity of that unit. If we closely analyse the definition of COD, we find that the word Contracted Capacity has been used twice but differently. When Contracted Capacity is spoken of as contracted capacity of a unit, then it becomes COD of that unit equivalent to contracted capacity of that particular unit, but COD also occurs when supply of electrical output to the procurer commences on commercial basis in relation to the Contracted Capacity of all the units. That is to say, in terms of this definition COD is conceivable in relation to a unit and when it is in relation to a unit, contracted capacity becomes commensurate to that unit only. COD is also conceivable when commercial operation runs in respect of all the units and when it runs in respect of all the units, the said COD can be termed as COD in relation to the Contracted Capacity as defined in the definition clause. With this reading, we find no inconsistency between the COD and SCOD. The terms COD and SCOD have to be understood again in the context of the definition of 'Effective Date' and 'Expiry Date'. SCOD as defined in the definition clauses means 60 months from the effective date in respect of the 'entire Contracted Capacity'. We have noticed that the entire Contracted Capacity means 1000 MW of net capacity at the delivery point; while Effective Date means the date of signing of the agreement. Therefore, all these definitions along with the articles of the Power Purchase Agreement and the clauses of the RFP when put together make it unmistakably clear that the legal obligation on the part of the seller begins 60 months from the Effective Date. Article 3.5.5 clearly implies

that COD of any unit must not be achieved beyond SCOD and in that case, in terms of Article 4.5.1, the procurer shall have the right to encash the performance guarantee and appropriate liquidated damages. Therefore, COD in respect of a unit must not be beyond SCOD although it may be ahead of SCOD. SCOD is always referable and relatable to the entire Contracted Capacity. This has been again made clear in Article 4.1.1. Under Article 4.1.1, it is the seller's obligation to achieve COD of each of the units and to achieve COD of the entire Contracted Capacity as a whole but not later than SCOD and not earlier than 48 months from the effective date. On the other hand, under Article 4.2, it is the obligation of the procurer to procure inter-connection and transmission facilities to enable the evacuation of the Contracted Capacity from the delivery point to the Procurer's customers' network not later than the SCOD and all these are summarised in Article 3.4.1 where it has been laid down that subject to the terms and conditions of the agreement, the seller undertakes to sell to the procurer and the procurer undertakes to pay tariff for all of the available capacity upto the Contracted Capacity throughout the term of the agreement. Article 4.4.1 implies two things – a) right of the procurer to obtain power to the extent of the entire Contracted Capacity, and b) prohibition to the seller to sell to any third party. In this Article, there is use of the expression 'Contracted Capacity' and 'Commercial Operation'. When these two expressions are harmonised and put together, it means procurer's right to avail itself of the entire contracted capacity of 1000 MW of all the units when COD of all the units are complete. Right of the seller to effect third party sell has been subsequently dealt with in Article 4.4.2. That there is no legal obligation on the part of the seller to supply electrical output in relation to a unit equivalent to the contracted capacity of that unit before SCOD becomes clear when again in Article 4.6, it has been laid down

that if a unit does not achieve COD by SCOD, then liquidated damages is payable by the seller to the procurer for such delay. Of course, there is provision of revised SCOD and even when a unit does not achieve COD by its revised SCOD, then also liquidated damages is payable to the procurer against the seller.

15. Now, it has been argued very assiduously by the learned counsel for the appellant that COD occurs in relation to a unit as soon as commissioning is effected. This is another grey area in respect of which analysis is needed and the doctrine of harmonious construction, when applied, there is presented before us no problem. "Commissioning" means, in relation to a unit, that the unit has passed Commissioning Tests successfully. This Commissioning may take place in respect of all the units also. Now, Commissioning Test means the test as provided in Schedule 4. Schedule 4 deals with parameters or performance test, and when an Independent Engineer is satisfied that a unit has performed or achieved all the parameters of the test as laid down in Schedule 4 then happens successfully the test of Commissioning. Now, according to Mr. Ramachandran, when commissioning happens, the COD occurs because according to him, "Commissioned Unit" means the unit in respect of which COD has occurred. Mr. Ramachandran pushes his argument further with reference to Article 6.2.6 where it has been stipulated that a unit shall be commissioned on the day after the date when the procurer receives a final test certificate of the Independent Engineer in terms of Schedule 4. The words "on the day" as occur after the words "after the date", according to Mr. Ramachandran, clearly show that the commercial operation has to start on the day after the date when the procurer receives the final test certificate. Charming though the

argument is, we are unable to endorse the argument when the doctrine of harmonious construction is invoked. For the Article 6.2.6 cannot be divorced from Article 6.4. The latter deals with commercial operation. The Independent Engineer's certificate has to be made available to the procurer by the seller. It is not that it is the Independent Engineer who will directly furnish the certificate to the procurer because in Article 6.4, there is a reference to the Article 6.2.6 with these words that the seller shall indicate a date as the COD of the concerned unit, and more particularly and expressly it has further been laid down that the unit for the purposes of this agreement shall achieve COD on the date indicated in such letter or the date on which such supply of power actually commences after commissioning of the unit whichever is later. Thus mere forwarding to the buyer a certificate of the Independent Engineer will not do. The seller has to issue a letter indicating a date when supply on commercial basis is intended. Again, between the date indicated in the letter and the date when actual supply on commercial basis commences it is the later that will count for the purpose of determining as to when COD has occurred. The words 'on the day' as they occur at the beginning of Article 6.2.6, if to be reconciled with Article 6.4 wherein there is reference to the Article 6.2.6, has to be read simply as meaning after the date when the procurer receives a final test certificate of the Independent Engineer together with a letter of the seller indicating a date for the purpose of commencement of supply. With this provision, we may now refer to the definition of the word "Commissioned Unit" which means the unit in respect of which COD has occurred. Therefore, mere "commissioning" does not invariably indicate that the unit has been commissioned commercially. Therefore, even when a unit has passed commissioning test there does not arise automatically the legal obligation on the part of the seller to commence supply to the procurer.

At no point of time the provision of Article 6.4 can be obliterated. Article 6.4 to be read with 6.2.6 must not be beyond the SCOD. Again, clause 3.4.1 of the RFP is consistent with the different relevant Articles of the Power Purchase Agreement. Here also the seller has been mandated to achieve the SCOD of the entire Contracted Capacity within 60 months from the date of signing of the PPA. Furthermore, in RPF, clause 3.4.2., a bidder may offer SCOD for whole or part of the capacity offered before expiry of 60 months from the date of signing of the PPA. The bidder in that case has to declare such schedule at the time of bid submission. Thus a bidder can provide unit wise time schedule for commencing supply of the Contracted Capacity. Under clause 3.4.3 of the RPF when the COD of any unit is achieved by the procurer the same would be subject to availability of the Gujarat STU to evacuate power from the delivery point. It is not in dispute that the evacuation facility by the STU was not made ready from the delivery point. In a word, the legal obligation commences from the SCOD which means COD of all the units, and which means COD in relation to the entire Contracted Capacity. Thus construed, the legal obligation on the part of the APL commences 60 months from the effective date which is 2.2.2012. Article 14 of Power Purchase Agreement is also helpful in this regard. That this was the intention of the parties would be clear from the GUVNL's letter dated 9.11.2011 addressed to the GETCO wherein GUVNL reminds the GETCO with the words *"Further, it is pertinent to mention that the Scheduled Commercial Operation Date (SCOD) for 1000 MW contracted capacity under bid specification no.02/LTPP/2006 from the APL Power Ltd. (APL) is 1st February, 2012*" Again, the GUVNL's letter to GETCO dated 16.4.2007 reminds the GETCO that the 'Scheduled Commercial Operation Date in relation to Unit No.1 and Unit No.2 would be 60 months from 2.2.2007'.

16. It has been argued by the learned advocate for the appellant that it cannot be argued that COD has occurred but not qua the GUVNL. It is argued that when the APL makes sale of power to third party instead of implementing the terms of the Power Purchase Agreement, it has to be taken to mean that COD has already occurred and if COD occurs in the case of sale to a third party, it cannot be argued that COD has not occurred in terms of the Power Purchase Agreement and qua the GUVNL. This argument is intended to be bolstered with reference to Article 18.4 of the Power Purchase Agreement under which the Power Purchase Agreement is intended by the parties as the final expression of their intention. This argument emanates from the specific clause in the Power Purchase Agreement that the total Contracted Capacity shall only be available to GUVNL and third party sale would be permissible only when the GUVNL would not be in a position to receive the Contracted Capacity. We could not be regretfully impressed by the argument because our moot question was as to what point of time the legal obligation on the part of the APL to supply contracted capacity would commence in terms of the Power Purchase Agreement. It is 60 months from the effective date. When the Effective Date coincides with the Expiry Date and when the SCOD is commensurate to the Effective Date, then the legal obligation on the part of the APL commences, accordingly, 60 months from the Effective Date. If meanwhile, the APL chose to effect sale to any third party during the intervening period, it cannot be said that the terms and conditions of the contract are violated. It is only when SCOD commences, it is only when supply of the contracted capacity to the APL commences on commercial basis in terms of Clauses 6.2.6 and 6.4 of the Power Purchase Agreement, then,

suspension to third party sale would become a mandate for the APL. Upon the considerations as above, we are to answer the issue against the appellant.

17. Given the proposition that the COD in respect of a unit equivalent to the contracted capacity of that unit may occur ahead of the SCOD, it is to be said that occurrence must be in accordance with the Article 6.2.6 and the Article 6.4 of the PPA. The APL first wrote a letter on 07.12.2010 to the GUVNL. That letter, no doubt, says that the first unit might come in operation around 25.12.2010 but the APL was not liable to supply power to the GUVNL prior to the SCOD. Obviously and by no means this cannot be said to be a communication in compliance with the aforesaid two Articles of the PPA. By this letter the APL disputes the very right of the GUVNL to receive supply before the SCOD, which the GUVNL strongly refuted by its reply dated 20.12.2010. Secondly, the APL's letter to the GUVNL dated 27.1.2011 does not serve any legal purpose to the benefit of the GUVNL, for by that letter the APL referred to the Appeal no 184 of 2010 saying that the GUVNL would be liable to pay excess realization along with interest on account of sale of power to third party in case the dispute was adjudicated upon in favour of the APL. Be it remembered that the earlier appeal at the instance of the APL following the Commission's order rejecting the APL's stand that it was free to terminate the contract. The exact nature of the dispute that has arisen in this appeal was not the subject matter before the Commission or before the Tribunal in Appeal no.184 of 2010. Again, in this letter it has been made clear by the APL that the supply of power from the unit no 5 would be subject to the outcome of the Appeal No.184 of 2010 and further without prejudice to adjudication upon the disputed claim of the

GUVNL's right to avail itself of power before the SCOD. The unit no 5 was commissioned, not on commercial basis, on 26.12.2010. Therefore, the APL's letter dated 7.12.2010 was of no legal consequence. Article 4.1.1(b) also provides that the COD should not be achieved prior to 48 months. It has been submitted that in the bid document it has been stated that the date of commencement of supply to be 60 months from the effective date for the unit no 1 and 2. In the circumstances, the Commission, in our mind, was not legally unjustified in that in the present case there is no document in terms of the PPA, RPF and the bid documents , which in our opinion are not inconsistent with one another , that would unmistakably show that in compliance with the Articles 6.2.6 and 6.4 of the PPA there has been COD in respect of the unit no 1. Further, under Article 3.4.3 of the RPF and the relevant provisions of the PPA make it crystal clear that procurement of power earlier than 60 months and declaration of the SCOD before 60 months are subject to the STU's ability to receive power from the Delivery Point. .

18.. The next question that arises for consideration, though not of too much importance at this moment, but has assumed relevance because of the point having been raised by the respondent No.2 in great details, is whether there was identification of a particular transmission line and whether such transmission line meant for evacuation of power from the APL's generation project was ready and available to the APL prior to SCOD. The Commission observed not unjustifiably in the impugned order that the obligation under the Power Purchase Agreement on the part of the APL is subject to Gujarat State Transmission Utility's ability to evacuate power from the delivery point, and when the Commission was hearing the matter, the 400 KV DC Mundra-Zerda line was yet to be

completed but according to the learned advocate for the appellant, the alternative lines namely 220 KV Mundra- Nanikhakhar D/C, 220 KV Mundra-Tapper D/c, 400 KV Mundra-Versana-Hadala D/C transmission lines of GETCO and 400 KV Mundra-Dehgam D/C line of the APL were available for evacuation of power. Mr. M.G. Ramachandran argued that the Power Purchase Agreement or any other document does not stipulate that for the power to be evacuated, it was only the 400 KV D/C Mundra-Zerda transmission lines that alone were to be used and no other line was open for evacuation to the APL. Since the power is to be delivered by the APL at the bus bar of the Mundra generating station, the APL is not concerned with which particular transmission line supply to GUVNL should be made. Mr. Ramachandran has in his written note of argument given a schematic diagram in support of his contention. A chart has also been given in the written note of argument showing the maximum injection of power month-wise in any time block with scheduling to GUVNL and the APL's power surplus and also the maximum supply at any time block month wise to GUVNL from units 1-6 during the period from March, 2011 to January, 2012 in order to show that the existing transmission capacity of the GETCO excluding the Mundra-Dehgam Line of the APL Power was sufficient for evacuation of quantum of power declared available by the APL to GUVNL. This argument, of course, admits the fact that Mundra-Zerda line of GETCO was not ready for evacuation of power from the APL to GUVNL. It is argued that since 2.3.2012 and 3.3.2012, the APL has been supplying power to GUVNL from unit no.5 and 6 respectively, with the same transmission capacity of GETCO existing as in March-2011 (maximum flow of 1780 MW on GETCO lines) and there has been no constraint in regard to the same. The Mundra-Zerda Line has not been commissioned till the above time. Now, it is true that in terms of Article

4.2 (a) and (c) of the Power Purchase Agreement, the GUVNL had responsibility to make all necessary arrangements for evacuation of power. It cannot be disputed that the GUVNL had itself intended Mundra-Zerda line for evacuation of power under bid no.2 from unit no.5 & 6 and on 10.11.2007, GUVNL wrote to the APL concerning progress report of the implementation of the evacuation facilities. The Commission upon the petition of the GETCO being Petition No.936 of 2008 concerning approval of RFQ has made it clear in its order dated 17.11.2008 that the line identified by GETCO / GUVNL for procurement of power from the APL under Bid No.2 is the Mundra-Zerda transmission line and the 220 KV Mundra-Nanikhakhar was not the appropriate delivery point for evacuation of 2000 MW from the APL. Then, followed several progress reports dated 20.1.2009 and 29.6.2010. GUVNL's letter to GETCO dated 7.9.2011 concerning evacuation of power emphasizes upon the utmost priority for commissioning the 400 KV Mundra-Zerda D/C line. By letter dated 25.10.2011, the Commission forwarded a minute of the meeting dated 16.11.2011 urging the GETCO to ensure commissioning of the evacuation projects. Now, GUVNL's letter to GETCO dated 9.11.2011 which we have mentioned earlier is very pertinent in two respects. Firstly, this letter acknowledges the situation that in respect of bid no.2, the APL's obligation to supply power in respect of 1000 MW would start from 1.2.2012 which is the SCOD and secondly it urges the GETCO to arrange for the evacuation line. Then, by a letter dated 24.1.2012, it has been mentioned that there has been a change in the Schedule of completion of 400 KV Mundra-Zerda DC line from February, 2012 to September, 2012 and the GETCO should expedite the construction. In the APL's letter to the GUVNL dated 20.2.2007, the APL had earlier informed that they have carried out all the preliminary works relating to Mundra-Nanikhakhar transmission lines

and as regards the providing of inter-connection between APL generating bus and Nanikhakhar- State Transmission Utility, the agreed delivery point, the route lengths involved in laying of each of 400 KV as well as 220 KV transmission lines are about 18-20 KMs only. Similarly, requirement of substation equipment would also be limited one and as such they were very confident to complete the inter-connection between generating bus and delivery point well before commissioning of power stations. Again, the GUVNL's letter to the GETCO dated 16.4.2007 had made the GUVNL aware that the SCOD would be 60 months from 2.2.2007 and augmentation of the line on the part of the GETCO would be necessary. There are correspondences also between the APL and GETCO dated 6.7.2009, 16.7.2009, 18.1.2010 & 27.9.2010 that made it clear that it was the Mundra-Zerda Line II which was intended by the GUVNL to be arranged for evacuation of power from the APL. But, the erection of the line was kept in abeyance for a period of 8 months. On 11.12.2010, the State Load Despatch Centre requested the APL to backdown generation in view of grid security, while on 17.3.2011, GUVNL wrote to GETCO reminding that the delay in commissioning the evacuation system would have financial implications on the part of GUVNL. On 31.5.2011, the State Load Despatch Centre communicated to the APL that because of network constraints evacuation in respect of unit no. 6 might not be done. Then, the two correspondences between the GUVNL and the APL and vice-versa will be relevant. On 20.6.2011, APL wrote to the GUVNL inter alia stating that Mundra-Dehgam line was not meant for supplying power under bid no. 1 and 2 and the transmission constraints exist in spite of there being available spare transmission capacity of the APL's Mundra-Dehgam dedicated transmission line. This letter was replied to by the GUVNL to the APL stating that the actual quantum of power flow on 400 KV Mundra-

Dehgam D/C line is less when compared to its thermal capacity. Therefore, the understanding of APL that though there is spare capacity of 400 KV Mundra-Dehgam D/C line, the State Load Despatch Centre was depriving APL of using the spare capacity is not correct. The letter further says “moreover, the power system operation is based on integrated available network and not on any specific contract path method as contemplated by M/s APL.” Meanwhile, correspondences were exchanged for a number of times, say, by letters dated 5.7.2011, 15.7.2011 etc. between GUVNL and GETCO whereby the GUVNL continued to remind the GETCO of the necessity of expediting the transmission line meant for evacuation of power from the APL. On 1.8.2011, GETCO wrote to the APL that as there was evacuation problem and as GUVNL had sought some clarification the State Load Despatch Centre was not consenting to the commissioning unit no. 6. On 3.2.2012, the APL wrote to the GUVNL declaring 3.2.2012 as commercial operation date in respect of unit no.6 identified under the Power Purchase Agreement. On 8.2.2012, the APL wrote to the Central Electricity Authority in these lines *“keeping in view substantial delay in completion of 400 KV D/C Mundra-Zerda lines (I & II) and to avoid bottling of power, another studies, in which Centre Transmission Utility, Central Electricity Authority, WRPC, WRLDC, GETCO / State Load Despatch Centre, Gujarat & Adani were associated, were carried out in August, 2011 to enhance power evacuation on existing lines (copy enclosed. Based on these studies, it was found that power up to 2400 MW (without N-1 criteria) can be transmitted as an interim arrangement till such time Mundra-Zerda lines are commissioned by providing special measures. Since then all the arrangements as suggested in studies have been implemented. In view of the above submission and to plan optimum generation / sale of power, we would seek Central Electricity*

Authority advice on transfer of power through Mundra-Dehgam line". On 9.2.2012, the Central Electricity Authority by communication approved this arrangement to the APL. So far, this is the last correspondence. Of course, GETCO wrote to the APL on 23.4.2012 complaining that the APL was generating power beyond schedule.

19. While recording these correspondences which form part of evidence in support of the affidavit- in- reply of the APL, we find that a) Mundra-Zerda line was intended for evacuation of power; b) the said line was not completed for evacuation; c) the GUVNL had been consistently urging the GETCO for completion of the line; d) at a certain point of time the State Load Despatch Centre was not agreeable for commissioning of the unit no. 6; and e) the APL at long last expressed its intention to supply through 400 kV D/C Mundra- Dehgam dedicated transmission line.

20. It is true, as we find from Article 4.2(a) of the Power Purchase Agreement, the procurer was responsible for procuring the interconnection and transmission facilities to enable the evacuation of the Contracted Capacity from the Delivery Point to the procurer's customers network not later than the Scheduled Connection Date. The Interconnection and Transmission facilities means the Interconnection Point for receiving and metering Electrical Output including all other transmission lines and associated equipment , transformers, and also the facility for receiving power at the Delivery Point where the transmission line from the Power Station Switchyard end is injecting power into the transmission network. So far as the Mundra- Zerda Line

is concerned, this could not be doubtlessly made ready. But the Power Purchase Agreement or the RFP did not specifically particularize that this was the only line to be made ready and used with no variation for evacuation of power. That is to say, supply of power to the extent of contracted capacity 60 months from the effective date i.e. within SCOD was not made conditional upon the GETCO's ability to specifically make this Mundra-Zerda evacuation line ready and available for evacuation of contracted power. There is also a point of law. Before the Commission the APL in Petition No.1093 of 2011 made three prayers, namely a) for a declaration that the APL was under no obligation to supply contracted capacity to the GUVNL prior to the SCOD, i.e.60 months from the execution of the Power Purchase Agreement dated 02.02.2007, b) for declaration that the APL was free to sell the power outside the Power Purchase Agreement to any third party prior to the SCOD, and c) for declaration that the APL was free to sell power to any third party prior to the SCOD. In spirit, this was a declaratory suit within the meaning of section 34 of the Specific Relief Act with no prayer for a declaration to the effect that the APL was under no legal obligation to supply power to the extent of the Contracted Capacity unless and until the very 400 kV D/C Mundra- Zerda line was made ready and available to the APL. The Commission in paragraph 11 confined its decree to the prayer a) and did not grant anything more, though during analysis it observed that declaration of the SCOD before 60 months is subject to Gujarat State Transmission Utility's ability to evacuate power from the Delivery Point. Since this is GUVNL' appeal there cannot be any more declaration which was not prayed for before the Commission. But we can only observe that the contractual obligations were mutual and they were two-way traffic.

21. It has been argued that the conduct of the GUVNL is reprehensible in this that in November, 2011 when the appeal was first listed for hearing; GUVNL had claimed that there was acute shortage of power in the State of Gujarat but GUVNL's correspondences would show that it was selling surplus power to outside the State of Gujarat. It is not necessary for the purpose of this appeal to go in details to the correspondences in this respect or the chart primarily because of the fact that the principal point which is decisive in this appeal has gone in favour of the respondent no.2 and any finding on this point is really not necessary.

22. In ultimate analysis, the appeal does not succeed. It is dismissed without cost.

(V.J. Talwar)
Technical Member

(P.S. Datta)
Judicial Member

Reportable/Not reportable

Pratibha