

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M.Chandrasekar

.... **Chairman**

and

Thiru. K.Venkatasamy

.... **Member (Legal)**

D.R.P.No.25 of 2012

PTC India Limited
2nd Floor, NBCC Towers
15, Bhikaji Cama Place
New Delhi – 110 066.

... Petitioner
(Thiru Ravi Kishore
Advocate for the Petitioner)

Vs

1. Auro Mira Energy Company Private Limited
Auro Mira House
Old No.11, New No.29
Shaffee Mohammed Road
Thousand Lights
Chennai – 600 006.

2. Tamil Nadu Generation and Distribution
Corporation Limited
(a subsidiary of TNEB Ltd.)
MLDC Block, Ground Floor
No.144, Anna Salai
Chennai – 600 002.

....Respondents
Thiru M.Gopinathan for R2
(Standing Counsel for the Respondent)

Dates of hearing : **28-11-2012; 04-04-2014; 22-04-2014;**
28-07-2014; 25-09-2018; 08-11-2018;
11-12-2018; 30-07-2019; 13-08-2019;
24-09-2019; 22-10-2019; 26-11-2019 and
11-02-2020

Date of Order : 02-02-2021

The D.R.P.No.25 of 2012 came up for final hearing on 11-02-2020. After hearing the learned Counsels for both the parties and after perusing the records, the Commission passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.25 of 2012:-

The prayer of the Petitioner in the above D.R.P.No.25 of 2012 is to allow the present petition by declaring that the Respondent No.1 i.e. Auro Mira Energy Company Private Limited (“Auro Mira”) has not fulfilled its contractual obligations in respect of the supply of power to be scheduled to Tamil Nadu Electricity Board (“TNEB”) through PTC from 1st February, 2011 to 30th April, 2011 and consequently direct Respondent No.1 to make payment of Rs.1,19,31,776/- as compensation with further interest at Rs.26,76,248/- till date of payment and pass any other orders as this Commission may deem fit in the interest of justice.

2. Facts of the Case:-

The present petition has been filed to declare that the Respondent No.1 (Auro Mira Energy Company Private Limited) has not fulfilled its contractual obligations in respect of the supply of power to be scheduled to Tamil Nadu Electricity Board through PTC from 1st February, 2011 to 30th April, 2011 and consequently direct Respondent No.1 to make payment of Rs.1,19,31,776/- as compensation with further interest thereon.

3. Contentions of the Petitioner:-

3.1. On 01-12-2010, Respondent No.2 i.e. TANGEDCO (a subsidiary of TNEB) invited offers from CERC approved traders for procurement of 1000 MW of Round The Clock (“RTC”) power for the months of February 2011 to April 2011 and 600 MW of RTC power for the month of May 2011 on firm basis by way of issuing a Notice Inviting Tender (“NIT”).

3.2. Two separate LoI's were entered into between Auro Mira and PTC on 25-01-2011 and 03-03-2011 for supply of power to TANGEDCO from different power plants. Despite having acted upon and agreeing to be bound by the same, Auro Mira is now mischievously denying to be bound by the LoI dated 25-01-2011 which is evident in light of the facts detailed herein above.

3.3. Despite being aware of the TNEB's LoA and PTC's LoI terms and conditions and in complete derogation of its unequivocal undertaking to supply the contracted quantum, Auro Mira, vide its letter dated 31-01-2011, informed PTC that they would not be in a position to supply power during February 2011. It is to be noted that, at this stage, Auro Mira was fully aware that the said action would result into triggering of the compensation clause. The relevant portion of the letter dated 31-01-2011 has been reproduced herein below:-

“We are in receipt of your letter dated 25th January 2011 intending for power purchase from us. While thanking you for the same, we would like to inform you that, we had originally planned for achieving COD by last week of January 2011. Unfortunately the same has been delayed by at least 6 weeks due to reasons mentioned below:

- (1) *Delay in Erection of Transmission Tower Structure of the Transmission line due to unforeseen problems in the land acquisitions.*
- (2) *Collapse of main Raw water storage tank, due to flooding of the plant in the last monsoon, causing interruption in the DM plant commissioning.*

(3) Grid connectivity to TNEB is delayed due to delay in the completion of Evacuation and Inspection.

We are putting all our efforts in commissioning the plant latest by 2nd week of March 2011 by an early resolution of the issues mentioned above.

We will keep you informed about the developments at the site. In the meanwhile we regret to inform you that we will not be in a position to supply power during February 2011. Kindly request you to note the above for your records.”.

3.4. It is pertinent to note that the aforesaid reasoning tendered by Auro Mira does not by any stretch of imagination fall within the strict definition assigned to 'Force Majeure' under the LoI dated 25.01.2011. Also, it is evident that Auro Mira overtly agreed to be bound by the terms of the LoI dated 25.01.2011 and only expressed its restriction to supply power only for the month of February 2011.

3.5. It is further to be noted that Auro Mira, at a belated stage and as an afterthought, is trying to build up a case of impossibility to perform which is not permissible under law. The force majeure clause under the various LoAs, is an exhaustive and not an exclusive one. This being the position, Auro Mira's case does not fall within the said clause. Assuming but not admitting that even if force majeure has occurred in light of which compensation is not payable, even then, Auro Mira's contention regarding the same will not hold good as the specific procedure contemplated by the force majeure clause has not been followed by Auro Mira.

3.6. That the compensation clause entailed in both the agreements dated 25.01.2011 and 03.03.2011 is in the nature of liquidated damages and is as such enforceable against Auro Mira.

3.7. That the Commission has jurisdiction under the Electricity Act, 2003 and in light of the various judgments of the Hon'ble Supreme Court of India and the Hon'ble Appellate Tribunal for Electricity.

4. Contentions of the Second Respondent:-

4.1. The averments stated by the Petitioner is totally false and misleading. The second Respondent has been unnecessarily impleaded as a party to the above proceedings with an intention to harass and attain unlawful gains.

4.2. The Petition filed by the Petitioner has no relevance to the second Respondent and there is no privity of contract between the Petitioner and the second Respondent and hence the second Respondent can be discharged from the Dispute Resolution Petition.

4.3. The averment contained in the above petition is totally irrelevant to the second Respondent since the correspondences relate to a dispute between the Petitioner and the 1st Respondent.

4.4. The Petitioner had not claimed any relief as against the second Respondent and thereby the Petition is liable to be dismissed in limine.

4.5. If the above Petition is against this Respondent is entertained, second Respondent would be put to severe loss and hardship. The balance of convenience is in the favour of this Respondents.

5. Contentions of the First Respondent:-

5.1. All the averments and allegations contained in the present petition, save those facts that are specifically admitted in are denied and the Claimant to strict proof of all averments and allegations that are not expressly admitted.

5.2. The alleged Letter of Acceptance dated 25.01.2011 has not been accepted by the 1st Respondent and there is no concluded contract/binding contract between the Petitioner and the 1st Respondent in terms of Clause 15 of the Letter of acceptance dated 25.01.2011. By mere issue of the alleged letter of acceptance dated 25.01.2011, the Petitioner had not acquired any vested rights as against the 1st Respondent.

5.3. The petition is admittedly for compensation under the alleged Letter of Acceptance dated 25.01.2011. In fact, the parties never intended to act upon the said LOA due to constraints communicated by the 1st Respondent's letters dated 31.01.2011, 09.03.2011, 23.09.2011. Only when there is a concluded/binding contract between the parties, any claim for compensation under the Letter of Acceptance dated 25.01.2011 can be claimed. In absence of any concluded/ binding contract, the petition is not maintainable and consequently, there is no debt due and payable to the Petitioner.

5.4. Before there is a concluded contract, it is open to the parties to withdraw from the sale / supply of power. Immediately on receipt of the alleged Letter of Acceptance dated 25-01-2011, the 1st Respondent on 31-01-2011 replied, through its Director, its inability to supply power due to the reasons beyond its control, to

which, the Petitioner had not even replied or raise any demur against the 1st Respondent. Therefore, the Petitioner cannot at this belated stage claim compensation for non-supply of power under a non-binding Letter of Acceptance dated 25.01.2011.

5.5. Without prejudice to the preliminary objection set out above, the Petitioner is not entitled to the relief sought in the present petition. The claim made in this petition is an afterthought conceived to falsely deny the Respondent's claim for and action in respect of its undisputed dues of Rs.33,32,416/- under Letter of Acceptance dated 03.03.2011. Consequently, the petition is an abuse of process of law and is liable to be dismissed.

5.6. The Petitioner has not come to the Commission with clean hands and the balance of convenience lies with the 1st Respondent.

5.7. With regard to force majeure, it has been held by the Hon'ble Supreme Court and various High Courts that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. Consequently, the 1st Respondent cannot be held liable to compensate the Petitioner for non-supply of power due to the constraints suffered by the 1st Respondent, which were beyond its control. Therefore, the claim for compensation made in the present petition is liable to be dismissed in limine.

5.8. To the alleged Letter of Acceptance bearing Reference No.PTC/MTFG/AMECPL/13850 dated 25.01.2011 (hereinafter referred to as "LOA dated

25-01-2011") issued by the Petitioner to the 1st Respondent for supply of power to TNEB through Petitioner under Intra-State Open Access from 01-02-2011 to 30-04-2011, the 1st Respondent on 31-01-2011 replied, through its Director, its inability to supply power due to the reasons beyond its control. As pointed out to the Petitioner by, *inter alia*, 1st Respondent's letter dated 31.01.2011 and also by its later correspondences dated 09.03.2011, 23.09.2011, the non-supply of power to the Petitioner from the month of February to April, 2011 was due to want of clearance from the Tamil Nadu Pollution Control Board (TNPCB) for commencement of operations (Consent to operate). Among other reasons, the non-supply was also due to certain problems in the laying of the Transmission lines in lands, collapse of main raw water storage tank due to unseasonal heavy rains causing interruption in the DM plant commissioning, and also due to grid connectivity issues with the Tamil Nadu Electricity Board (TNEB). Hence, the non-supply of power was not due to default on the part of the 1st Respondent. Besides, immediately on receipt of the alleged LOA dated 25.01.2011 by the 1st Respondent by fax on 25-01-2011, the 1st Respondent vide its letter dated 31.01.2011 clearly pointed out its inability to supply for which the Petitioner had not even replied or raise any demur against the 1st Respondent. In fact, it is amply clearly that the parties never intended to act upon the said LOA dated 25-01-2011 due to above said constraints and therefore there is no concluded contract / binding contract between the Petitioner and the 1st Respondent enabling the Petitioner to claim a sum of Rs.1,19,31,776/- as compensation from the 1st Respondent.

5.9. While so, pursuant to the discussions and negotiations between the Petitioner and the 1st Respondent, the Petitioner had, under the Letter of Intent Reference No.

PTC/MTFG/AMECPL /15360 dated 03.03.2011, required the 1st Respondent to supply power to TNEB through the Petitioner from the Petitioner's biomass plant in Pudukkottai and Madurai under Intra-State Open Access from 04.03.2011 to 30.04.2011.

5.10. The 1st Respondent, based on the letter of acceptance dated 03.03.2011, commenced the supply of power to the Petitioner. The 1st Respondent supplied 9.6 MW off-peak power for the month of March 2011 in accordance with the letter of acceptance dated 03.03.2011 and raised invoice Nos.269/2010-11 and 287/2010-11 both dated 31-03-2011 on the Petitioner for amounts aggregating to Rs.21,90,000/- and Rs.2,36,10,000/-, out of which the Petitioner has paid a sum of Rs.1,75,34,624/-, and leaving a outstanding balance of Rs.77,49,376/-.

5.11. In respect of the perceived default for supply of off-peak power during the month of April 2011, the 1st Respondent is willing to compensate the Petitioner to the tune of Rs.44,16,960/- (Rupees Forty Four Lakhs Sixteen Thousand Nine Hundred and Sixty Only) in accordance with the terms of the Letter of Acceptance dated 03.03.2011.

5.12. In view of the above stated facts, the 1st Respondent is not liable to make any payments of the Petitioner under LOA dated 25.01.2011 and in fact, the Petitioner is liable to pay the 1st Respondent a sum of Rs.33,32,416/- under LOA dated 03.03.2011 after deducting the compensation of Rs.44,16,960/- out of the total sum of Rs.77,49,376/- owed by the Petitioner. As such, the Petitioner admittedly was

required to make balance payment as per the Letter of Acceptance dated 03.03.2011 but has failed to do so.

6. Reply to the Counter Affidavit of 1st Respondent:-

6.1. As binding contract came into existence even before the issuance of the LOI by the Petitioner. The Petitioner had been in touch with the Respondent about the potential sale to Respondent No.2 from the Respondent No.1's generating plant, which was still to be commissioned. The Respondent No.1 in spite of fully knowing that the sale power was to commence very close to the date of commissioning of the plant chose to offer the quantity as mentioned in its e-mail dated 24 December 2010. Respondent No.1 was fully aware of the conditions of the bid as the bid documents were forwarded to it under Petitioner's Request-For-Proposal dated 2 December 2010. Respondent No.2 was particularly aware of the stringent clause relating to compensation for short supply. As a matter of fact, it was in the light of such discussions that the Respondent No.1 decided to reduce the quantity originally offered in the e-mail dated 5, January 2011. It was on the basis of this offer made by the Respondent No.1 that the Petitioner submitted its bid to the Respondent No.2, which created a binding commitment on the Petitioner. The law in this regard is well settled that once acceptance to an offer is communicated either expressly or by conduct before the offer is withdrawn, a concluded contract comes into existence. Respondent No.1 was fully aware that Petitioner had bound itself in a contract on the basis of its offer and cannot take shelter behind clause 15 of the LOA to evade its contractual obligation; respondent No. 1 was fully aware that clause 15 was only a formal clause.

6.2. There was full intention to enter into a binding contract without which the Petitioner would have bid the quantity in the tender issued by the Respondent No.2. The Respondent No 1's letters dated 31.01.2011, 09.03.2011 and 23.09.2011 were issued after the acceptance of the offer made the Respondent No.1. A binding contract was concluded immediately on the Petitioner committing itself by making a bid in the tender floated by the Respondent No.2.

6.3. A concluded contract ensued on the Petitioner putting in the bid and the Respondent No.2 had not withdrawn it offer till then.

6.4. The Petitioner denies that it owes Rs.33,32,416 to the Respondent No.1

6.5. The contentions made by the Respondent No.1 is without any concrete basis and the force majeure clause clearly does not include situations where the party itself has failed to perform its contractual obligation. Respondent No.1 by invoking the force majeure clause, accepted that there was a concluded contract between the parties.

6.6. Failure to commission the station on the appointed date is a failure of the Respondent No.1 and it cannot absolve it of its contractual obligations. All the impediments cited by it could not have arisen all of a sudden and Respondent No.1 should have foreseen them while making the offer so close to the commencement of the transaction.

6.7. The Petitioner has already adjusted an amount of Rs.77,49,376 from the compensation amount and the claim of Rs.1,19,31,776/- made in the petition is not of this amount. The Respondent No.1, having known this fact from the Petitioner's legal notice dated 16-03-2012 has deliberately tried to mislead the Commission.

6.8. The terms of the Notice Inviting Tender were forwarded to all the generators vide Petitioner's letter dated 2 December 2010. Assuming without admitting that the terms were not known to the Respondent No.1, the Respondent No.1 has not provided any communication in which it had tried to enquire about the terms. It is incomprehensible that a savvy commercial organization will engage itself in a commercial transaction without being aware of the terms. Hence, this contention of the Respondent No.1 must be rejected.

6.9. The Petitioner had all the intention to create a legally binding contract. The Respondent has always referred to conversation with the representatives of the Petitioner in its e-mails dated 24.12.2010 and 05.01.2011. The petitioner submitted its bid on 05.01.2011 on the same day on which the Respondent No.1 sent its communication revising the quantity offered.

6.10. The Petitioner was all along keeping the Respondent No.1 in confidence through telephonic communication and had always informed it about the developments. Even after the receipt of the Lol dated 25-01-2011, the Respondent took six days to inform the Petitioner about its inability to supply for the reason that its plant was not ready; the Respondent never ever indicated the fact that it was not aware of the terms of the supply nor did the contest any of the terms of the Lol.

7. Written Submissions filed on behalf of the 1st Respondent:-

7.1. With reference to the Letter of Acceptance bearing Reference No.PTC/MTFG/AMECPL/13850 dated 25-01-2011 issued by the Petitioner to the 1st Respondent for supply of power to TNEB through Petitioner under Intra-State Open Access from 01-02-2011 to 30-04-2011, the 1st Respondent on 31-01-2011 replied, through its Director, and pointed out its inability to supply power due to reason beyond its control. As pointed out to the Petitioner (by, inter alia, 1st Respondent's letters dated 31.01.2011 and also by its later correspondences dated 09.03.2011, 23.09.2011), the non-supply of power to the Petitioner from the month of February to April, 2011 was due to want of clearance from the Tamil Nadu Pollution Control Board (TNPCB) to commence supply of power. Among other reasons, the non-supply was also due to certain land acquisition problems, collapse of main raw water storage tank due to flooding of the plant causing interruption in the DM plant commissioning, and also due to grid connectivity issues with the Tamil Nadu Electricity Board (TNEB). Hence, the non-supply of power was not due to any default on the part of the 1st Respondent. Besides, immediately on receipt of the alleged LOA dated 25.01.2011 by the 1st Respondent by Fax on 25.01.2011, the 1st Respondent vide its letter dated 31.01.2011 clearly pointed out its inability to supply for which the Petitioner had not replied or raised any demur against the 1st Respondent. It is amply clearly that the parties never intended to act upon the said LOA dated 25.01.2011 due to above said constraints and therefore there was no concluded contract/binding contract between the Petitioner and the 1st Respondent enabling the Petitioner to claim a sum of Rs.1,19,31,776/- as compensation from the 1st Respondent.

7.2. While so, pursuant to the discussions and negotiations between the Petitioner and the 1st Respondent, the Petitioner had, under the Letter of Intent Reference No. PTC/MTFG/AMECPL/15360 dated 03.03.2011, required the 1st Respondent to supply power to TNEB through the Petitioner from the Petitioner's biomass plant in Pudukkottai and Madurai under Intra State Open Access from 04.03.2011 to 30.04.2011.

7.3. The 1st Respondent, based on the letter of acceptance dated 03.03.2011, commenced the supply of power to the Petitioner. The 1st Respondent supplied 9.6 MW off-peak power for the month of March 2011 in accordance with the letter of acceptance dated 03.03.2011 and raised invoice Nos. 269/2010-11 and 287/2010-11 both dated 31.03.2011 on the Petitioner for amounts aggregating to Rs.21,90,000/- and Rs.2,36,10,000/-, out of which the Petitioner has paid a sum of Rs.1,75,34,624/-, and leaving a outstanding balance of Rs.77,49;376/-.

7.4. In respect of the perceived default for supply of off-peak power during the month of April 2011, the 1st Respondent is, as already stated and without prejudice to its rights, willing to compensate the Petitioner to the tune of Rs.44,16,960/- (Rupees Forty Four Lakhs Sixteen Thousand Nine Hundred and Sixty Only) in accordance with the terms of the Letter of Acceptance dated 03.03.2011.

7.5. In view of the above stated facts, the 1st Respondent is not liable to make any payments to the Petitioner under LOA dated 25.01.2011. In fact, the Petitioner is liable to pay the 1st Respondent a sum of Rs.33,32,416/- under LOA dated 03.03.2011 after deducting the compensation of Rs.44,16,960/- out of the total sum

of Rs.77,49,376/- owed by the Petitioner. As such, the Petitioner admittedly was required to make balance payment as per the Letter of Acceptance dated 03.03.2011 but has failed to do so.

7.6. There is no concluded contract between the parties: The issues and grounds sought to be raised in this petition pertain to the alleged Letter of Acceptance dated 25-01-2011 issued by the Petitioner to the 1st Respondent. The alleged Letter of Acceptance dated 25.01.2011 has not been accepted by the 1st Respondent and there is no concluded contract / binding contract between the Petitioner and the 1st Respondent until the letter of acceptance is accepted by the 1st Respondent in terms of Clause 15 of the Letter of acceptance dated 25.01.2011. Merely by issuing the alleged letter of acceptance dated 25.01.2011, the Petitioner had not acquired any rights (vested or otherwise) as against the 1st Respondent.

7.7. Further, as admitted by the Petitioner in the petition (1st Respondent's email dated 05-01-2011), the parties were only "in discussion", and at no point in time there was any admission by the 1st Respondent regarding levy of penalty or compensation. The petition is admittedly for compensation under the alleged Letter of Acceptance dated 25-01-2011. Therefore, in the absence of any admission / concluded contract regarding levy of penalty and compensation, the Petitioner cannot unilaterally impose penalty upon the 1st Respondent.

7.8. The 1st Respondent only communicated its quote for supply of power vide its email dated 24.12.2010 and 05.01.2011, as requested by the Petitioner, and had not at any point in time agreed to any of the terms and conditions with the Petitioner or

with that of TNEB and the Petitioner has not filed any substantial documentary evidence to prove otherwise. Further, the 1st Respondent has specifically denied that the Petitioner communicated to the 1st Respondent over a telecom on the consequences of compensation clause between the Petitioner and TNEB and the Petitioner has not produced any proof to substantiate the averments.

7.9. In fact, the parties never intended to act upon the said LOA due to the constraints communicated by the 1st Respondent's letters dated 31.01.2011, 09.03.2011, 23.09.2011. Only when there is a concluded / binding contract between the parties, that any claim for compensation under the Letter of Acceptance dated 25.01.2011 can be claimed. In the absence of any concluded / binding contract, this petition is not maintainable and consequently, there is no debt due and payable to the Petitioner.

7.10. Before there is a concluded contract, it is open to the parties to withdraw from the sale / supply of power. Immediately on receipt of the alleged Letter of Acceptance dated 25.01.2011, the 1st Respondent on 31.01.2011 replied, through its Director, pointing out its inability to supply power due to reasons beyond its control, to which, the Petitioner had not even replied to the 1st Respondent. Therefore, the Petitioner cannot at this belated stage, claim compensation for non-supply of power under a non-binding Letter of Acceptance dated 25.01.2011.

7.11. The Petitioner is not entitled to the relief sought in the present petition for the reason that the claims made in this petition are an afterthought conceived to falsely

deny the Respondent's claim for and action in respect of its undisputed dues of Rs.33,32,416/- under Letter of Acceptance dated 03.03.2011.

7.12. The 1st Respondent had communicated to the Petitioner immediately on 31.01.2011 and also by its later correspondences dated 09.03.2011, 23.09.2011, the non-supply of power to the Petitioner from the month of February to April, 2011 was due to want of clearance from the Tamil Nadu Pollution Control Board (TNPCB) to commence supply of power. Among other reasons, the non-supply was also due to certain land acquisition problems, collapse of main raw water storage tank due to flooding of the plant causing interruption in the DM plant commissioning, and also due to grid connectivity issues with the Tamil Nadu Electricity Board (TNEB). The above clearly falls within the ambit of force majeure.

7.13. The 1st Respondent had agreed to the supply of power as specified in Letter of Acceptance dated 03.03.2011 and commenced the supply of power to the Petitioner. In fact, the 1st Respondent raised invoices for supply effected. In view of the fact that the admitted liability of the Petitioner is undisputed, i.e. the Petitioner defaulted in payments of monies due to the 1st Respondent for power supplied to it from 04.03.2011 to 30.04.2011. After reckoning the compensation due to the Petitioner for default for the month of April 2011, the Petitioner was liable to pay a sum of Rs.33,32,416/- to the 1st Respondent towards unpaid bills under LOA dated 03-03-2011. The 1st Respondent called upon the Petitioner to pay the aforesaid dues on various occasions. However, the Petitioner did not come forward to pay the amount claimed inspite of the emails referred to above. In response to the said demand, the Petitioner vide its lawyer's notice dated 16-03-2012, for the first time,

made claims for an aggregate sum of Rs.1,19,31,776/- as compensation under the alleged LOA dated 25-01-2011. By its reply dated 02-05-2012, the Respondent strongly denied the allegations in the notice dated 16-03-2012.

7.14. The alleged Letter of Acceptance dated 25-01-2011 has not been accepted by the 1st Respondent and there is no concluded contract / binding contract between the Petitioner and the 1st Respondent for supply of power from the Tirunelveli plant until the Letter of Acceptance is accepted by the 1st Respondent in terms of clause 15 of the Letter of Acceptance dated 25-01-2011.

8. Written Submissions dated 18-08-2014 on behalf of the Petitioner:-

8.1. On 02-12-2010, PTC India Ltd., informed all the generators in the State of Tamil Nadu about the NIT issued by 2nd Respondent by way of a letter, further requesting them to intimate the Petitioner regarding the quantum of RTC power, if any, available during the period February-May 2011, so as to enable it to participate in the tender process.

8.2. On 24-12-2010, Auro Mira Energy Company Pvt. Ltd. vide an e-mail confirmed the quantum of power to be quoted in the tender form, wherein it was stated that its plant at Tirunelveli was in its advanced stage of commissioning with COD expected on 31-01-2011. In this e-mail, the 1st Respondent stated that it is RTC (00.00 hrs. to 24.00 hrs.) quantum of surplus for the said period of February 2011, March 2011, April 2011 would be 10 MW, 13 MW and 11 MW respectively.

8.3. On 30.12.2010, pursuant to the confirmations by Respondent No.1 as well as other suppliers, the Petitioner submitted its bid.

8.4. Vide letter dated 04.01.2011, the Respondent No.1 requested the Petitioner to match L1 negotiated rate and further specified that for the Captive Power Plants in Tamil Nadu, it is obligatory for the Petitioner to schedule 100% LOA quantum. The same was communicated to Respondent No.1 by the Petitioner over telecon.

8.5. On 05.01.2011, Respondent No.1 being mindful of the strict compensation clause and to avoid liability towards compensation, sent an email to the Petitioner thereby changing the quantum of power to be supplied by it for the months of February 2011, March 2011 and April 2011 to 7 MW, 7MW and 11 MW respectively.

8.6. On the basis of the confirmation by 1st Respondent, the Petitioner sent a confirmation to Respondent No.2, and accordingly Respondent No.2 issued an LOA to the Petitioner.

8.7. The Petitioner issued an LOI to Respondent No.1 on the same terms and conditions mentioned in the LOA issued by the 2nd Respondent.

8.8. By way of a letter, 1st Respondent informed the Petitioner that it would not be in a position to supply power in the month of February 2011.

8.9. The Petitioner sent a letter to Respondent No.1 that Petitioner had obtained the LOI from Respondent No.2 based on the confirmation by Respondent and thus

requested Respondent No.1 to supply the confirmed amount as soon as possible. The Petitioner further informed Respondent No.1 that it had informed Respondent No.2 about the difficulties being faced by Respondent No.1.

8.10. The 2nd Respondent floated another NIT for short term procurement of 700 MW of RTC power etc. on firm basis from CERC approved trader / private generators having surplus power within Tamil Nadu and also in the Southern region for the month of March-April 2011.

8.11. On 22.02.2011, Respondent No.1 issued an authorisation letter to the Petitioner to participate in the tender process. The power was to be supplied by Respondent No.1 from its Pudokkottai and Madurai plants and on 03-03-2011, the Petitioner issued an LoA to Respondent No.1

8.12. On 09.03-2011, Respondent No. 2 informed the Petitioner that the power scheduled in the February 2011 was less than 80% of the contracted energy, therefore Rs.63,84,000/- was deducted from the bills raised by the Petitioner.

8.13. On 10.03.2011, by way of a letter, the Petitioner informed Respondent No.1 about the above mentioned deduction and the Petitioner asked Respondent No.1 to release the compensation amount by way of a letter.

8.14. On 23-09-2011, the Respondent No.1 wrote a letter to the Petitioner, wherein it stated that the non-supply for the month of February 2011 was as a result of delay in environmental clearance and Respondent No.1 and requested the Petitioner to

take up the matter with the Respondent No.2 to condone the same. The Respondent No.1 also accepted liability for month of April 2011 for Pudukkottai and Madurai plants.

8.15. On 16-03-2012, the Petitioner sent a legal notice to Respondent No.1 and on 30-03-2012 vide a letter Respondent No.1 sought for time to reply to the above notice.

8.16. On 02-05-2012, Respondent No.1 replied to the above notice, stating that the parties never intended to give effect to the 1st LoI issued by the Petitioner on 25-01-2011 but accepted its liability under the 2nd LoI to the tune of Rs.44,16,960/- . Hence, the present petition u/s 86(1) (f) of the Electricity Act.

8.17. In the present case, pursuant to the NIT issued by the Respondent No.2, the Petitioner herein had invited offers from the Generators in the State of Tamil Nadu vide letter dated 02-12-2010. That pursuant to this Respondent No.1 had given an offer on 24-12-2010 which was further modified vide an email dated 05-01-2011. Therefore in the present case Respondent No.1 was the “offerer” and the Petitioner was “offeree”. Hence the acceptance was required to come from the Petitioner and not from Respondent No.1.

8.18. The signing of the LoI by Respondent No.1 was a mere formality, as the conduct of both the Petitioner and Respondent No.1 shows that both of them had reached an agreement/consensus *ad idem* based on which third party contract(s)

were made. In fact, the LoI merely reiterates and puts in words what was intended by the parties by way of their actions.

8.19. The Petitioner herein is a trader in terms of the Electricity Act, 2003, and it had invited offers from CPPs for supply of electricity to Respondent No.2 through the Petitioner. Therefore, all the CPPs including Respondent No.1 were aware that pursuant to the offer, the Petitioner will be submitting its bid to Respondent No.2 and if successful, would have been bound by the LoI issued by Respondent No.2 thereby altering its position based on the offers given by CPPs including Respondent No.1.

8.20. Having been fully aware of the fact that the Petitioner will be altering its position based on its offer and allowing the Petitioner to do so, subsequently after such alteration of position by the Petitioner, the Respondent No.1 cannot contend that it was not bound by the contract.

8.21. Once the Petitioner has altered its position based on the offer given by Respondent No.1, whereby the Petitioner may incur liability if Respondent No.1 fails to perform its promise, Respondent No.1 is estopped from going back.

8.22. Therefore in light of the law laid down by the Hon'ble Supreme Court, Respondent No.1 was bound by its offer and could renege since the petitioner had acted on it and had altered its position and thus the principle of Promissory Estoppel came into effect, thereby stopping Respondent No.1 from revoking its offer.

8.23. That the Petitioner, as a result of the failure on part of Respondent No.1 to fulfil its promise of supplying power, has incurred financial liability as Respondent No.1 has imposed penalty on the Petitioner and has recovered it. Therefore Respondent No.1 is liable to pay the amount as claimed in the present Petition.

8.24. That the imposition of the penalty by Respondent No.2 was communicated to Respondent No.1 vide letter dated 10.03.2011, and vide letter dated 14.09.2011, the Petitioner asked Respondent No.1 to pay the penalty. But, instead of paying the penalty, Respondent No.1 vide letter dated 23-09-2011, requested the Petitioner to in turn request Respondent No.2 to condone the penalty. This clearly shows that Respondent No.1 accepted that the contract had in fact been concluded and it was bound by it and therefore liable to pay the compensation.

8.25. That the contention raised by Respondent No.1 that there was no concluded contract is an afterthought and was taken in order to evade the liability which was already accepted by Respondent No.1 as can be seen from the letter dated 23.09.2011.

8.26. That Respondent No.1 raised the ground of force majeure provided under the LoA only in order to evade the liability, and by raising this ground, Respondent No.1 has accepted that the conditions of the LoA are binding on the parties/contract has concluded.

8.27. That Respondent No.1 has raised the ground of force majeure for the first time in the reply to the legal notice sent by the Petitioner vide letter dated 02.05.2012. This clearly shows that this was an afterthought.

8.28. That Respondent No.1 in its letter dated 02.05.2012, talks about problems such as land acquisition problems, collapse of main raw water storage tank due to flooding of the plant causing interruption in the DM plant commissioning, Grid connectivity issues with the TNEB and lack of clearance from Tamil Nadu Pollution Control Board to commence supply of power, as the reasons for its failure to supply power. Except the lack of clearance from Tamil Nadu Pollution Control Board, all the other reasons were given for the first time after more than a year of it incurring the liability and it clearly shows that it was an afterthought.

8.29. The fact that the, above mentioned reasons given by Respondent No.1 for its failure to supply electricity is an afterthought can be gathered from the fact that in its letter dated 23.09.2011, wherein it requested for condoning the penalty, Respondent No.1 stated that it could not supply power only because of delay in obtaining the environmental clearance from Tamil Nadu Pollution Control Board.

8.30. That Respondent No.1 in order to evade the liability has taken contrary stands. On one hand it says that the contract had not concluded therefore it is not liable and on the other hand it is taking new grounds for the first time to claim the benefit of the Force Majeure Clause under the very contract which Respondent No.1 claims never got concluded.

8.31. That the ground taken by Respondent No.1 in letter dated 23.09.2013, for its failure to fulfil the obligation which is lack of environment clearance, is not covered by the Force Majeure Clause and therefore it tried to bring unsubstantiated facts on record for the first time vide letter dated 02.05.2012 in order to bring its case under Force Majeure.

8.32. That if the reasons given by it in letter dated 02.05.2012, were the correct/real reasons behind its failure to supply electricity, it would have communicated it at the earliest point in time, or else it would have communicated it at least in the letter dated 23.09.2011, when it had requested for condoning the penalty, in order strengthen its case. This clearly shows that it is an afterthought and should be rejected outright. In any case, the reasons given by Respondent No.1 would not fall within the ambit of force majeure as stated in the LoA.

8.33. That as, far as the 2nd LoA is concerned, although Respondent No.1 has accepted part liability, it is liable to pay entire amount as per the-terms of the LoA.

9. Application filed on 24-09-2019 by the Petitioner:-

9.1. On 13-08-2019, the Commission directed the petitioner to file a Memo on the stage of Insolvency Bankruptcy Code proceedings and fixed the matter for 24-09-2019.

9.2. The petitioner through <https://www.ibbi.gov.in/> and <https://nclt.gov.in/> came to learn about the proceeding pending adjudication before National Company Law Tribunal, Chennai and informed the Commission about such proceeding which was

duly recorded in the order dated 11-12-2018. The Commission vide the same order dated 11-12-2018 also passed an order directing the registry to send the notice to the IRP instead of respondent No.1

10. Findings of the Commission:-

10.1. This petition has been filed to declare that the Respondent No.1 namely M/s. Auro Mira Energy Company Private Limited ("Auro Mira") has not fulfilled its contractual obligations in respect of the supply of power to be scheduled to the erstwhile Tamil Nadu Electricity Board (TNEB) through PTC from 1st February 2011 to 30th April 2011 and consequently direct said Respondent to make payment of Rs.1,19,31,776/- as compensation with further interest at Rs.26,76,248/- till the date of payment.

10.2. The factual matrix of the case is that on 01-12-2010, Respondent No.2 i.e. TANGEDCO (subsidiary of TNEB) invited offers from CERC approved traders for procurement of 1000 MW of RTC power for the months of February 2011 to April 2011 and 600 MW of RTC power for the month of May 2011 on firm basis by way of issuing a Notice Inviting Tender (NIT).

10.3. Vide letter dated 02-12-2010, PTC informed all generators located in the State of Tamil Nadu regarding the NIT issued by TANGEDCO (R2). A request was made to intimate PTC regarding quantum of RTC power, if any available during the period of February 2011 to May 2011 so as to enable PTC to participate in the Tender Respondent 1 Auro Mira vide its email dated 24-12-2010 confirmed the quantum of power to be quoted by PTC in the TNEB Tender for the period from February 2011

to May 2011. Pursuant to the above, petitioner herein namely, PTC submitted the bid to TNEB on 30-12-2010. Vide letter dated 04-01-2011, TANGEDCO requested PTC to match with L1 negotiated rate. In this letter, again, it was specified regarding compensation clause, that for CPP in Tamil Nadu it is obligatory for PTC to schedule 100% LoA quantum. The same was informed to Auro Mira over a telecon. Auro Mira vide its email dated 05-01-2011, changed the quantum of power offered by them initially as follows.

February 2011	: 7 MW	@	Rs.3.66/kWh
March 2011	: 7 MW	@	Rs.4.69/kWh
April, May 2011	: 11 MW each	@	Rs.5.10/kWh

10.4. On the basis of confirmation from Auro Mira, PTC further confirmed the same to TANGEDCO. TANGEDCO issued the Letter of Acceptance (LoA) on 10-01-2011 for February 2011 to May 2011.

10.5 After getting a Letter of Acceptance issued from TANGEDCO in consultation with Auro Mira, PTC on the same terms and conditions (which have been time and again informed to Auro Mira and unequivocally ratified by them), issued a Letter of Intent (LoI) to Auro Mira on 25-01-2011. In other words, there is a back to back contract i.e. the petitioner is receiving electricity from 1st Respondent through a contract and supply the same to the TNEB through another contract with TNEB.

10.6 While so, the Respondent No.1, Auro Mira by its letters dated 31-01-2011, 09-03-2011, 20-03-2011, informed the petitioner that due to the reasons beyond its control it would not be in a position to supply power in terms of LoI issued by the

petitioner on 25-01-2011. The reason cited by Auro Mira is the delay in obtaining the environmental clearance from Tamil Nadu Pollution Control Board and on the said ground, now claims exemption from its obligation under the Force Majeure clause. It has been further contended that there is no concluded contract between Auro Mira and the petitioner and therefore it is not liable to pay the compensation as claimed by the petitioner.

10.7. Per contra, the petitioner contends that there is a concluded contract between the petitioner and the respondent Auro Mira and based on the confirmation given by the respondent Auro Mira only, it has altered its position and entered a contract with the Respondent No.2, TANGEDCO for supply of power. The petitioner has, therefore, got legitimate expectation that the respondent No.1 Auro Mira would honour its commitments. Due to the failure in fulfilling of its obligations by the Respondent Auro Mira, the petitioner has suffered a loss to which it is entitled to be compensated.

10.8 In this case, TANGEDCO (a subsidiary of TNEB Ltd.) has been arrayed as Second Respondent in this case. No claim or averment has been made against this respondent by either party and this respondent is only a formal party. As such, this respondent is discharged from any liability in this case, since no claim has been made against this respondent by either party.

10.9. The following issues arise for consideration by this Commission based on the perusal of the material records submitted by the parties:-

- (1) Whether there existed a concluded contract between the petitioner and the Respondent No.1, Auro Mira?
- (2) Whether the Respondent No.1, Auro Mira is entitled to claim the protection under Force Majeure clause?
- (3) Whether the petitioner is entitled to any relief and if, so, to what extent?

10.10 Issue No.1

Whether there existed concluded contract between the petitioner and the Respondent No.1, Auro Mira?

10.10.1. In order to adjudicate the above issue, it is necessary to refer to clause 15 of the LoA which reads as follows:-

"This LoA is being issued to AMECPL in duplicate. It is requested to AMECPL to return one copy of the LoA duly signed and stamped on each and every page as a token of AMECPL unequivocal acceptance to the same by 29th January 2011. Your acceptance of this LoI shall be construed as a binding contract."

10.10.2. While the petitioner contends that the said clause binds the 1st respondent and the contract became concluded once the receipt of the same is acknowledged by the first respondent, on the other hand, the first respondent contends that there was no acceptance from its side so as to constitute a valid agreement. The first respondent has also referred to its letter dated 31-01-2011 and submitted that the difficulty in fulfilling the COD originally planned by the last week of January 2011 was communicated to the petitioner in the said letter and hence there was no full-fledged contract as contended by the petitioner. In this connection, it is

also necessary to refer to the relevant portion of the said letter dated 31-01-2011 of the 1st respondent to the PTC India Ltd. for the purpose of resolving the issue on hand, which is extracted below:-

“AMEBPIL/PTC/001/11

Dated 31st January 2011

*Mr.Harish Saran
Sr. Vice President
(Marketing & Transaction Facilitation Group)
PTC India Limited
Bhikaji Cama Place
New Delhi 110 066.*

Subject: LOA for Power Sale from out 18 MW Plant

Dear Sir,

“we are in receipt of the letter dated 25-01-2011 intending for power projects from us.” However, in the said letter, it has stated that due to the following reasons, it was not in a position to supply power during February 2011:-

- (i) Delay in the erection of Transmission Tower Structure of the Transmission line due to foreseen problems in the land acquisitions;*
- (ii) Collapse of main Raw water storage tank, due to the flooding of the plant in the last monsoon, causing interruption in the DM plant commissioning;*
- (iii) Grid connectivity to TNEB is delayed due to the delay in the completion of Evacuation and Inspection.*

We are putting all our efforts in commissioning the plant latest by 2nd week of March 2011 by an early resolution of the issues mentioned above.

We will keep you informed about the developments at the site. In the meanwhile we regret to inform you that we will not be in a position to supply power during February 2011. Kindly request you to note the above for your records.

Thanking You,

Yours faithfully,

For Auro Mira Bio Power India Private Limited,

*VIJAYARAGHAVAN VK
Director”*

10.10.3. On a careful consideration of clause 15 of the LoA and the letter dated 31-01-2011 of the first respondent extracted above, we are of the considered view that no contract was concluded as the pre-requisite of element of acceptance is not present. Needless to say in order to constitute a valid contract or agreement, there must be an offer followed by acceptance which should be unequivocal. In the present case, we find that there is a valid offer but the acceptance falls short of the requirements prescribed in the very clause 15 of the LoA itself which is relied upon by the petitioner. This can be further seen from the letter dated 31-01-2011 which sets out the difficulties experienced by the first respondent in accepting the offer of the petitioner. Hence, we are of the well considered view that no contract emerged and the offer of the petitioner is not followed by a firm acceptance on the part of the first respondent. In view of the same, we have to necessarily hold that the claim of the petitioner is not maintainable. In the result, the issue is decided against the petitioner.

10.11 Issues No. 2 and 3:-

Having decided that there existed no concluded contract between the petitioner and the 1st respondent in the instant case, we find that it is not necessary to discuss these issues as the said issues are incidental to the main issue of validity of contract and can be taken up only when there is a valid contract. Hence, we have to hold that the claim made by the petitioner fails on these grounds as well.

In view of the aforesaid stated reasons, the petition is dismissed. There will be no order as to costs.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

/True Copy /

(Sd.....)
(M.Chandrasekar)
Chairman

Secretary
Tamil Nadu Electricity
Regulatory Commission