

No.: N/13/16

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 1st August, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

OP No.10 / 2016

BETWEEN:

Hare Krishna Metalics Private Limited,
T-11/2, Jairam Complex, II Phase, 3rd Floor,
Nevgi Nagar, Mala,
PANJIM, Goa

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Power Company of Karnataka Limited,
Room No.15, KPTCL Building
Cauvery Bhavan,
Race Course Road,
Bengaluru – 560 001.
- 2) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.
- 3) Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage,
Mysuru – 570 019.
- 4) Gulbarga Electricity Supply Company Limited,
Station Road,
Kalaburagi – 585 101.

- 5) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 6) Mangalore Electricity Supply Company Limited,
MESCOM Bhavana,
Kavoor Cross Road,
Bejai,
Mangaluru – 575 004.

.. **RESPONDENTS**

[Respondents – 1 to 6 are represented by Just Law, Advocates]

ORDERS

- 1) In the above Petition, the Petitioner has prayed for the following reliefs:
- “(a) To declare the deduction of compensation charges of 49,28,980/- vide Pre-audited Proforma Bills 4807-13 dated 11.11.2013 and 5664-70 dated 20.12.2013) as illegal and unauthorized;
- (b) To set aside letter dated 19.03.2014 issued by Respondent No.1 to all ESCOMs to recover the difference between the PPA tariff and UI rate per unit for the short injection to declared schedule and declare such recovery as invalid as the same is violation of the power purchase agreement;
- (c) To direct all the respondents collectively and severally liable to refund the petitioner sum of 68,34,810/- (Rupees Sixty Eight Lakh Thirty Four Thousand Eight Hundred Ten only) as the same is illegally and unauthorized deducted from Petitioner invoices;
- (d) To direct the respondents to pay due surcharges of 9,09,537/- including interest as per the power purchase agreement, from the date when the payments fell due and interest upto 18% upto the date of actual payment as more fully indicated in Annexure- P18;
- (e) To pass such other orders to meet the ends of justice.”

- 2) The material facts as contended by the Petitioner relevant for resolving the controversies involved in the present case, may be stated as follows :
- (a) The Petitioner is a generating company having its registered Office in Goa and having its Coal-based Thermal Power Generating Station of 10 Mega Watts (MW) capacity, situated at Hirebaganal, Koppal District in Karnataka. The Petitioner was one of the successful bidders in the bidding process conducted by the 1st Respondent-Power Company of Karnataka Limited (PCKL) on behalf of the Electricity Supply Companies (ESCOMs) (Respondents 2 to 6). Accordingly, a Letter of Intent (LoI) dated 30.8.2013 was issued to the Petitioner for supply of 7 MW of RTC power from September, 2013 to June, 2014, on the terms and conditions noted in the said LoI. Accordingly, the Petitioner entered into a Power Purchase Agreement (PPA) on 6.9.2013 (ANNEXURE – P3) with the ESCOMs, for sale of electricity in bulk to the ESCOMs for the contracted capacity for 7 MW, in accordance with the terms and conditions of the said PPA. The Petitioner was scheduling 7 MW of RTC power on a daily basis, with due intimation to the State Load Despatch Centre (SLDC) and the ESCOMs, till 15.10.2013.
- (b) There was an unprecedented problem which occurred in the turbine of the generating unit on 15.10.2013, thereby the Petitioner had to stop the generating unit and did not schedule power to the ESCOMs or to

any other party. The Petitioner communicated the event through its letter dated 15.10.2013 to the 1st Respondent (PCKL) and assured to provide an alternative source of generation to meet with the obligation for supply of power to the ESCOMs till the restoration of its generating unit.

- (c) By letter dated 16.10.2013, the Petitioner suggested to the 1st Respondent (PCKL) an alternative source of power from one Koganti Power Limited, to supply 6.5 MW of RTC power, with effect from 00:00 hours on 17.10.2013. The letter of confirmation of Koganti Power Limited, to supply energy was also sent to the 1st Respondent (PCKL) as well as the SLDC. In response to this letter, the 1st Respondent (PCKL), by its letter dated 21.10.2013 (ANNEXURE – P7), conveyed its approval in accordance with the provisions contained in article 5.1.4 of the PPA, for supply of 6.5 MW RTC power from 19.10.2013 to 31.10.2013, from the alternative source of Koganti Power Limited.
- (d) Upon receipt of the said approval for supply of power from the alternative source of Koganti Power Limited, the power supply was started from 00:00 hours on 23.10.2013.
- (e) The Petitioner found that, the refurbishment and repair of its turbine would take some more time, therefore, by letter dated 26.10.2013 (ANNEXURE–P8) and letter dated 28.10.2013 (ANNEXURE–P9) requested the 1st Respondent (PCKL) to extend the approval for the same

alternative source of Koganti Power Limited, by another 15 days from 1.11.2013 to 15.11.2013.

- (f) The request of the Petitioner to extend the approval for the same alternative source of Koganti Power Limited was not considered by the 1st Respondent (PCKL) and on persistent follow up, it was given to understand that the Koganti Power Limited had been declared as 'defaulter' by the 4th Respondent-Gulbarga Electricity Supply Company Limited (GESCOM), therefore the Koganti Power Limited could not be considered as an alternative source for supply of power. This was not informed, in writing, to the Petitioner.
- (g) Thereafter, the Petitioner suggested the Shantha Projects Limited as the other alternative source for supply of 7 MW RTC power on behalf of the Petitioner, from 6.11.2013 to 15.11.2013. Even for this, the Petitioner did not receive any communication, much less the approval.
- (h) Subsequently, the Petitioner's generating unit was repaired and usual energy schedules commenced from 28.11.2013.
- (i) In view of the above facts, the Petitioner claims that, it was not liable to pay any Liquidated Damages, from 17.10.2013 to 22.10.2013 (6 days) and from 1.11.2013 to 27.11.2013 (27 days). The Petitioner has contended that, the 1st Respondent (PCKL) had committed undue delay in giving the approval for the alternative source of the Koganti

Power Limited through its letter dated 21.10.2013 and that, the 1st Respondent (PCKL) was at fault subsequently, in rejecting the alternative source of the Koganti Power Limited, as well as the Shantha Projects Limited. Therefore, the Petitioner has contended that, the recovery of `49,28,980/- under Article 6.2.4 of the PPA, is illegal and unauthorized.

(k) The Petitioner has contended that, the 1st Respondent had directed all the ESCOMs to recover the difference between the price of the shortfall of energy at the PPA tariff and the UI charges received, and accordingly, the deduction to the tune of `7,05,830/- was made by the ESCOMs and the 6th Respondent-Mangalore Electricity Supply Company Limited (MESCOM) deducted a sum of `12,00,000/- from the Petitioner's Bills relating to a different PPA, for the month of March, 2015. Therefore, the Petitioner has contended that, the total amount of `68,34,810/- recovered by all the ESCOMs is illegal and unauthorized.

(l) The Petitioner has further contended that, the ESCOMs (except HESCOM) have not paid the Surcharge as per the terms of the PPA, for the delayed payments. The Petitioner has claimed a sum of `9,09,537/- towards the balance of the Surcharge, payable under the terms of the PPA, for the delayed payments. Therefore, the Petitioner has filed the present Petition.

- 3) Upon Notice, the Respondents have appeared through their counsel and filed a common Statement of Objections. The substance of the Respondents' contentions may be stated as follows :
- (a) The execution of the PPA between the ESCOMs and the Petitioner is not disputed and the supply of power till 15.10.2013 by the Petitioner is also not disputed.
- (b) The Respondents have contended that, the break-down of the generating unit of the Petitioner from 16.10.2013 does not fall within the *Force Majeure* clause of the PPA. The Respondents have denied that, there was any delay on the part of the 1st Respondent (PCKL) with respect to approval of the alternative source of Koganti Power Limited, in response to the request made by the Petitioner.
- (c) The Respondents have contended that, the non-acceptance of the alternative source of Koganti Power Limited, for the suggested supply period from 1.11.2013 to 15.11.2013, was on valid grounds, as the Respondents subsequently found an adverse material against the Koganti Power Limited. The Respondents have further contended that, the other alternative source of Shantha Projects Limited was also rejected by them for valid and justifiable reasons.

- (d) The Respondents have contended that, during the months of October and November, 2013, the Petitioner had given the energy schedules at 75.35% and 6.2%, respectively, as against the requirement of 85% of the contracted energy during each of these months. Therefore, the Respondents have contended that, as per Article 6.2.4 of the PPA, the compensation was calculated and the same was deducted from the tariff invoices raised by the Petitioner.
- (e) The Respondents have further contended that, during some months, the actual energy supplied was less than the scheduled energy and the deviation was more than 5%, the details of which are as under :

Month	Oct., 2013	Nov., 2013	Mar., 2014	May, 2014
Deviation	53%	40.75%	8.83%	7.20%

The Respondents have contended that, they have paid for the scheduled energy at the rate of `5.50 per unit, however, the Petitioner has not complied with the Dispatch Schedule and had injected less quantum of energy as a result of which, the ESCOMs were deprived of drawing the entire scheduled energy during these months and had over drawn from the Central Grid or had carried out load shedding, in order to maintain the Grid frequency within its limits. Further that, as per the instructions of the 1st Respondent (PCKL), vide letter dated 19.3.2014, the Respondents 2 to 6 had deducted a sum of `19.03 Lakhs being the difference between the price of the short supplied energy

and the UI charges. Therefore, the Respondents have contended that, the amounts deducted by them were in order.

- (f) The Respondents have denied their liability to pay Surcharges / interest, as there was no delay in making payments due to the Petitioner. Therefore, the Respondents have prayed for dismissal of the Petition.
- 4) The Petitioner has filed Rejoinder to the Statement of Objections of the Respondents, and the Respondents, in turn, have filed their reply to the Rejoinder of the Petitioner.
- 5) We have heard the submissions made by the learned counsel for the contesting parties in the case.
- 6) From the pleadings on record and the rival contentions raised by the parties and also by considering the Order dated 20.6.2006 passed by this Commission in the matter of: 'Implementation of Intra-State ABT' (hereinafter referred to as the 'Intra-State ABT Order') and the CERC (Unscheduled Interchange Charges and Related Matters) Regulations, 2009 (hereinafter referred to as the 'UI Regulations, 2009'), the following issues would arise for our consideration:
- (1) To what extent the Intra-State ABT Order dated 20.6.2006 passed by this Commission or UI Regulations, 2009 is applicable in the present case?

- (2) What are the liabilities of the Petitioner under the terms of the PPA for the variation between the Scheduled Energy and the actual energy delivered, i.e., for short-delivery of energy?
 - (3) Whether the Respondents are justified in not accepting the alternative sources of power offered by the Petitioner? If not, what are the rights and liabilities of the parties under Articles 6.2.3 and 6.2.4 of the PPA?
 - (4) Whether the Respondents have proved that, the non-compliance of the Dispatch Schedules by the Petitioner amounted to 'gaming' in the present case?
 - (5) If Issue No.(4) above is answered in the affirmative, what should be the compensation payable to the Respondents?
 - (6) Whether the Petitioner proves that, the Respondents 2 to 6 are liable for Surcharge of `9,09,537/- as per the terms of the PPA?
 - (7) What Order?
- 7) After considering the oral submissions of the parties and the pleadings and evidence placed on record, our findings on the above Issues are as follows :
- 8) **ISSUE No.(1)** : *To what extent the Intra-State ABT Order dated 20.6.2006 passed by this Commission or UI Regulations, 2009 is applicable in the present case?*

- (a) The object of the UI mechanism is to encourage the Grid security by the Grid participants and also to balance the rights and liabilities of the parties purchasing the power from a Generator or Seller. One of the ingredients for the applicability of the Intra-State ABT Order or the UI Regulations, 2009 is a two-part tariff of the power to be purchased. The applicability of the Intra-State ABT Order or the UI Regulations, 2009 would depend upon whether it is an Intra-State or Inter-State transaction. In the present case, there is no two-part tariff, but it is a single-part tariff, for each unit of energy supplied, consisting of capacity charge, energy charge, trading margin and other taxes and duties. Therefore, the provisions of the ABT Order or the UI Regulations, 2009 cannot be made applicable, in its entirety, in order to determine the rights and liabilities of the parties.
- (b) It is no longer in dispute that even in the case of procurement of power with a single-part tariff, the parties may agree to abide by the 'UI principles' in order to achieve the objective of the Grid security for procurement of power through Regional / State Grid. When the parties agree to abide by the UI principles while procuring the power, the terms of the Agreement should be carefully drafted to balance, judiciously, the rights and liabilities of the parties, in the case of breach of any of the terms of the Agreement. In the present case, the terms of the PPA are drafted on the basis of the Guidelines issued in the Resolution dated 15.5.2012 of the Ministry of Power, for purchase of power on a short-term basis with a single-part tariff. Therefore, we hold

that, the Intra-State ABT Order or the UI Regulations, 2009 is not applicable, in its entirety, in the present case, but the UI principles, as understood in the said Order / Regulations, should be made applicable. Therefore, we answer Issue No.(1), accordingly.

9) **ISSUE No.(2)** : *What are the liabilities of the Petitioner under the terms of the PPA for the variation between the Scheduled Energy and the actual energy delivered, i.e., for short-delivery of energy?*

(a) The execution of the PPA is not in dispute. That there is a shortfall in the energy supplied as against the scheduled energy in different months, is also not in dispute. Therefore, the Petitioner is liable to pay:

- (i) the UI charges for the variation between the scheduled energy and the actual energy injected, as per Article 4.2.3 of the PPA;
- (ii) the Liquidated Damages, as per Article 6.2.4 of the PPA; and
- (iii) the Open Access charges to the extent of the quantum of the shortfall in energy supplied, in excess of the permitted deviation, not availed by the Procurer, as per Article 6.2.4 of the PPA.

(b) Regarding : UI Charges:

The Petitioner has not disputed its liability to pay the UI charges. Article 4.2.3 of the PPA provides that, any deviation in the scheduled energy and the actual energy supplied should be accounted for, as per the UI charges. The applicable UI charges for a block would be as provided

in the UI Regulations, 2009, which was applicable at the relevant point of time. The Petitioner is liable to pay the UI charges to the UI Account maintained by the SLDC.

(c) Regarding : Liquidated Damages :

(i) So far as the Liquidated Damages are concerned, the Petitioner has admitted its liability to account for it to the ESCOMs, except for the periods of 6 days and 27 days considered under Issue No.(3) below.

(ii) The relevant portions of Articles 6.2.3 and 6.2.4 of the PPA would read thus:

"6.2.3 Payment for Liquidated Damages for failure to supply the Instructed Capacity.

- *Both the parties would ensure that actual scheduling does not deviate by more than 15% of the Contracted power as per the approved open access on monthly basis.*
- *In case deviation from Procurer side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Procurer shall pay compensation at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract."*

"6.2.4 In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Seller shall pay compensation to Procurer at 20% of Tariff per KWh

*for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer.
If Seller fails*"

(iii) The reading of the relevant portion of Article 6.2.4 of the PPA would make it clear that, for the purpose of payment of compensation to the Procurer at 20% of the tariff per KWh, the quantum of shortfall in excess of the permitted deviation of 15% in the energy supplied, should be taken into consideration. Therefore, the difference between 85% of the contracted energy and the energy actually injected into the Grid should be taken into consideration for the purpose calculation of the Liquidated Damages under Article 6.2.4, provided the Open Access has been allocated on monthly basis for the 85% of the contracted energy. However, the Respondents appears to have taken into consideration, for the purpose of calculating the Liquidated Damages, the difference between the scheduled energy and the actual energy injected into the Grid. In the present case, the actual energy supplied during the months of October 2013, November, 2013, March 2014 and May, 2014 was less than the scheduled energy. The ESCOMs had entered into PPAs with different persons for procuring short-term power, in order to meet the gap between the demand and supply for the relevant period. Therefore, it cannot be assumed that, the ESCOMs had, at any time, reduced the generation schedule furnished by the Petitioner, while issuing the 'Dispatch Instructions'. It is also not the case that, Open

Access was obtained, at any time, for the quantum of power less than 85% of the contracted energy. Therefore, we are of the considered view that, for the purpose of calculation of the Liquidated Damages, the difference between 85% of the contracted energy and the energy actually injected into the Grid, should have been taken into account.

(iv) In reality, the Liquidated Damages, provided under Article 6.2.4 of the PPA, is towards the non-availability of the Plant. In a two-part tariff, the fixed cost (capacity charge) and the variable cost (fuel cost) are treated, separately, for implementing the Unscheduled Interchange principles (UI principles), in injecting energy into the Grid and drawing energy from the Grid. The payment of Capacity Charge is dependent on the 'Availability of the Plant', i.e., whether the Plant is available for MW generation or not, on a day-to-day basis. The amount payable to the Generator as 'Capacity Charge' depends on the average availability of the Plant over an year. For 'zero' availability, the Capacity Charge payable would be 'nil' and for the specified maximum availability, the Capacity Charge payable would be 100%. The amount payable to the Generator towards the Fuel Charge is based on the injection schedule and not on the actual quantum of energy generated. Any deviation in the injection schedule is accounted for, as per the UI Charge prevailing in a given time block. Therefore, the Generator has to account for the non-availability of the Plant, if it could not make available the specified Plant Availability and has to account for any deviation of the

schedule, as per the UI Charge and not on the basis of the actual energy injected. Likewise, the Procurer is at liberty to draw the power upto the scheduled energy and any deviation would be accounted for, as per the UI Charge. When the UI principles are applied in a single-part tariff, there would be a notional division of the 'Capacity Charge' and 'Fuel Charge', and the 'Capacity Charge' is accounted for, depending on the short-supply of energy as against the permitted deviation of the contracted capacity. Similarly, the variation between scheduled energy and the actual energy injected into the Grid is accounted for, through the UI Charge. Therefore, in our considered opinion, the compensation payable under Article 6.2.4 of the PPA really represents the payment towards the non-availability of the Plant on a monthly basis. Therefore, in case, the deviation from the Seller's side is more than 15% of the contracted energy, the Seller shall pay compensation to the Procurer at 20% of the tariff per KWh, for the quantum of short-fall in excess of the permitted deviation of 15% in the energy supplied, but not on the difference between the scheduled energy and the actual energy injected into the Grid. The compensation becoming due under Article 6.2.4 of the PPA, for short-delivery of energy, is not towards the damages payable for breach of the agreement for sale of energy, as understood under the Contract Act or Sale of Goods Act.

(d) Regarding : Open Access Charges :

(i) As regards reimbursement of the Open Access charges, both the parties are silent. The ESCOMs have not claimed any amount towards reimbursement of the Open Access charges. The last part of Article 6.2.4 of the PPA would make it clear that, the Petitioner should compensate the Open Access charges to the extent not availed by the Procurer.

(ii) The terms regarding the payment of Open Access charge and its reimbursement are stated in Articles 6.2.5 and 6.2.6 of the PPA, which read thus :

"6.2.5 The payment of Short term Open Access Charges including RLDC / SLDC charges to the CTU / STU from the Delivery Point to Procurer(s) Periphery shall be paid by the Seller which would be reimbursed by the Procurer."

"6.2.6 The open access transaction shall be made in the name of BESCO, for the purpose of open access charges beyond delivery point, the ESCOMs of Karnataka and KPTCL system are internalized."

(iii) In the case of intra-State transmission of power, the 'Delivery Point' is defined as the 'interconnection point of the Seller with STU'. The above provisions in the PPA would make it clear that, for the quantum of shortfall of energy between the contracted capacity and the injected energy, the Petitioner would be liable to reimburse the Open Access charges to the ESCOMs. The present transaction is an intra-State transaction of sale and purchase of power.

(iv) Regulation 2 of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004 (hereinafter referred to as the 'Open Access Regulations, 2004') defines 'Existing Customer' as, 'a person already availing the open access to the transmission system and/or distribution system of a licensee in the State under an existing agreement or GoK policy on the date of coming into force of these Regulations'.

(v) Regulation 5.1 of the Open Access Regulations, 2004 makes the following provision with regard to the existing Distribution Licensees :

"5. Provision for existing entities:

(1) Existing Distribution Licensees:

The existing distribution licensee/s shall be deemed to be the long term open access customer/s to the intra State transmission system/s and/or the distribution system/s for the term specified under the existing agreement/s or arrangement and shall make payment of transmission charges, wheeling charges and other charges, as applicable, and as may be determined by the Commission from time to time."

(vi) The ESCOMs are the 'existing Distribution Licensees' as on the dates of coming into force of the Open Access Regulation, 2004. Already, there is an existing Agreement or arrangement between the ESCOMs and the State Transmission Utility (STU) for availing of the transmission capacity for Open Access and for making payment of transmission charges. The ESCOMs pay the transmission charges to the

STU as per the transmission tariff determined by this Commission under Section 62 of the Electricity Act, 2003. The transmission charges payable by the ESCOMs represent the Open Access charges for availing of the required capacity for transmission of power. As the Distribution Licensees are deemed to be the long-term Open Access customers of the intra-State transmission system, there is no practice of filing an application for obtaining the Open Access for each transaction, as provided under the Open Access Regulations, 2004.

(vii) The ESCOMs have paid the transmission charges to the STU for FY-14, as per the tariff determined by this Commission. The transmission tariff would be determined considering the Annual Revenue Requirement (ARR) and the transmission capacity of the STU. The transmission tariff of the year FY-14 of the STU was `95,442/- per Mega Watt per month, which works out to 39.74 paise per unit. The STU is required to develop the transmission capacity as per the requirements of the ESCOMs and other Open Access consumers. The ESCOMs are required to pay the transmission tariff to the STU, irrespective of their making use of the transmission capacity, fully or partially, in a tariff period. Therefore, the shortfall in the supply of energy in a short-term power purchase transaction would preclude the ESCOMs from making use of the transmission capacity to the extent of the shortfall. Therefore, as per the last part of Article 6.2.4 of the PPA, the Petitioner is liable to reimburse to the ESCOMs, the transmission charges, for the capacity not made available due to short delivery by the Petitioner.

This short-delivery of power is to be calculated, being the difference between the contracted energy, for which Open Access charges are computed and the actual energy injected into the Grid. When there is a specific term in the PPA for reimbursement of the Open Access charges for short-delivery of energy, the Petitioner is bound to account for it to the ESCOMs concerned.

- (e) The Respondents have contended that, the Petitioner is liable to repay at the agreed tariff for the quantum of short-supply of energy as against the scheduled energy. There is no specific term in the PPA for such a claim. Therefore, we hold that, the claim of the contesting Respondents in this regard is not maintainable in terms of the PPA. Hence, we answer Issue No(2), accordingly.

- 10) **ISSUE No.(3)** : *Whether the Respondents are justified in not accepting the alternative sources of power offered by the Petitioner? If not, what are the rights and liabilities of the parties under Articles 6.2.3 and 6.2.4 of the PPA?*

- (a) The Petitioner's generating unit had faced certain mechanical problems on 15.10.2013, forcing the Petitioner to stop the generation of electricity till the unit was repaired. By its letter dated 15.10.2013 (ANNEXURE – P4), the Petitioner intimated the same to the 1st Respondent (PCKL), stating that, for a week from 16.10.2013, the power could not be generated and that arrangement for alternative source of power was being made. By letter dated 16.10.2013 (ANNEXURE – P5), the Petitioner informed the 1st Respondent (PCKL)

that, alternative source of 6.5 MW RTC power from the Koganti Power Limited in Karnataka was arranged and to do the needful and to communicate to the SLDC and the procurer. The said letter also states that, the power from the alternative source would be injected from 00:00 hours on 17.10.2013 till further information and necessary schedules were being communicated to all the parties concerned as per the normal practice. The Petitioner requested to confirm acceptance of the power from the alternative source arranged by it. Along with this letter (ANNEXURE - P6) the letter of consent (ANNEXURE - P6) of the Koganti Power Limited was attached. In response to the letter dated 16.10.2013 (ANNEXURE - P5), the 1st Respondent (PCKL), by its letter dated 21.10.2013 (ANNEXURE - P7), informed the Petitioner as under :

“....

Hence, in accordance with the provisions in clause 5.1.4 of PPA, I am directed to communicate the approval for supply of 6.5 MW RTC power from 19.10.2013 to 31.10.2013 from alternate source of Koganti Power Ltd. instead of Hare Krishna Metallics Plant.

...”

- (b) By letter dated 26.10.2013 (ANNEXURE - P8), the Petitioner informed the 1st Respondent (PCKL) that, it would take some more time for refurbishment and repairs of its generating unit and for that reason, it requested the 1st Respondent (PCKL) to extend the approval of the alternative source of Koganti Power Limited by another fifteen days, from 1.11.2013 to 15.11.2013. By its letter dated 26.10.2013 (ANNEXURE - P8), the Petitioner sent the letter of consent of Koganti

Power Limited for supply of 6.5 MW power, on firm basis, for the period from 1.11.2013 to 15.11.2013. The Petitioner has contended that, its letter dated 26.10.2013 was not responded to, thereby again it wrote another letter dated 28.10.2013 requesting to extend the approval of the alternative source of Koganti Power Limited. The Petitioner has contended that, the 1st Respondent (PCKL) did not respond for extending the approval of the alternative source as requested and it was given to understand that the alternative source of Koganti Power Limited was not likely to be accepted, as the 4th Respondent (GESCOM) had declared the Koganti Power Limited as a 'defaulter.

- (c) Thereafter, the Petitioner, by its letter dated 5.11.2013 (ANNEXURE-P10), suggested to accept another alternative source, viz., Shantha Projects Limited, which is within Karnataka, for supply of 7 MW of RTC power, from 6.11.2013 to 15.11.2013. The Petitioner has stated that, even for the alternative source of Shantha Projects Limited, there was no response from the 1st Respondent (PCKL). The Petitioner, in its letter dated 27.11.2013 (ANNEXURE - P12), informed that, its generating unit would be resuming generation of electricity from 28.11.2013 and schedule to that effect had been released to the SLDC and the ESCOMs. In the same letter, it was also brought to the notice of the 1st Respondent (PCKL) that, in the absence of a communication regarding approval of the alternative source of power till that date penalty charges against the contracted quantum of power should not

be levied for the durations, i.e., from 17.10.2013 to 22.10.2013 (6 days) and from 1.11.2013 to 27.11.2013 (27 days).

- (d) The 1st Respondent (PCKL) has not denied the various communications regarding the offer of the Petitioner for the alternative source of power supply and their not specifically replying to the said communications, by either accepting or rejecting the Petitioner's offer for the alternative source of power from 1.11.2013 onwards. The 1st Respondent (PCKL) has contended that, after verifying the details pertaining to the termination of the PPA, by letter dated 21.10.2013 approval was communicated for supply of power from the Koganti Power Limited, from 19.10.2013 to 31.10.2013. The 1st Respondent (PCKL) has further contended that, there was no delay in communicating its approval vide letter dated 21.10.2013, as it had to verify certain documents. Further, it is contended that, subsequent to the grant of approval by letter dated 21.10.2013, it was learnt that the Koganti Power Limited had filed cases against the 4th Respondent (GESCOM) before the Hon'ble High Court of Karnataka pertaining to the long-term PPA and the said cases were pending, therefore the approval for the period subsequent to 1.11.2013 was not granted. Further, it is contended that, so far as the Shantha Projects Limited is concerned, the said Shantha Projects Limited had already agreed with Tata Power Trading Company Limited, another successful bidder for supply of short-term power, earlier to the offer of this alternative source of power made by the Petitioner.

- (e) In the Rejoinder filed by the Petitioner and in the reply to the Rejoinder filed by the Respondents, the parties have attempted to justify their respective stands.
- (f) We have gone through the respective contentions, pleadings, documents and the submissions of the parties on this issue. We are of the considered view that, there was no justification for the 1st Respondent (PCKL) not to accept the alternative source of Koganti Power Limited for the supply of power from 1.11.2013 onwards. However, we find enough material to hold that, the Shantha Projects Limited was already tied up with the Tata Power Trading Company Limited, which was another successful bidder for supply of power to the ESCOMs therefore the non-acceptance of this alternative source of power by the 1st Respondent (PCKL) was justified. Article 5.1.4 of the PPA, regarding offering alternative source of power supply, reads thus :

“5.1.4 If the Seller is unable to provide supply of power to the Procurer(s) up to the Contracted Capacity from the Delivery Point except due to Force Majeure Event, the Seller is free to supply power up to the Contracted Capacity from an alternative generation source to meet its obligations under this Agreement. Such power shall be supplied to the Procurer(s) at the same Tariff as per the terms of this Agreement. In case the Open Access Charges and other incidental charges, including but not limited to application fees for open access, RLDC / SLDC charges, etc., applicable from the alternative source of power supply are higher than the applicable Open Access Charges from Delivery Point to

Procurer(s) Periphery, the Seller would be liable to bear such additional charges."

- (g) The break-down of the Petitioner's generating unit was not due to a *Force Majeure* Event, as provided under Article 7.1 of the PPA. Therefore, the Petitioner was free to supply power upto the Contracted Capacity from an alternative source, to meet its obligations under the PPA. This Article or any other Article of the PPA does not authorize the Respondents either to accept or reject the alternative source offered by the Petitioner. At best, it may be said, whether the alternative source had the capacity to inject power into the Grid, not covered under any subsisting PPAs with others. So far as the Koganti Power Limited is concerned, it is not the case of the Respondents that, it had no capacity to inject power, as it had some PPAs with others. Certain litigations which are relied upon by the Respondents for not accepting the Koganti Power Limited, are related to the disputes under Section 11 of the Electricity Act, 2003, for the year 2012. Admittedly, as on the date of offering the Koganti Power Limited as an alternative source of power, it had not entered into any PPA with the Respondents or any other person, for the capacity it had offered as alternative source of power. Therefore, the non-acceptance of the alternative source of power of the Koganti Power Limited offered by the Petitioner, for the period from 1.11.2013 onwards, is not justifiable.

- (h) The contention of the Petitioner that, there was an inordinate delay initially in approving the alternative source of Koganti Power Limited for supply of power for the period from 17.10.2013 to 22.10.2013 appears to be correct. As already noted by us, there was no question of the 1st Respondent (PCKL) or any other Respondent not accepting the alternative source of power offered by the Petitioner.
- (j) From the above findings, we hold that, the Petitioner was not liable to pay any Liquidated Damages under Article 6.2.4 of the PPA, to the extent of 6.5 MW of power offered by it out of the contracted energy, for the above-mentioned periods.
- (k) The above conclusion leads us to examine, whether the Respondents are liable to pay the Liquidated Damages to the Petitioner under Article 6.2.3 of the PPA for this period. Article 6.2.3 reads thus:

“Payment of Liquidated Damages for failure to supply the Instructed Capacity

- *Both the parties would ensure that actual scheduling does not deviate by more than 15% of the Contracted power as per the approved open access on monthly basis.*
- *In case deviation from Procurer side is more than 15% of contracted energy for which open access has been allowed on monthly basis, Procurer shall pay compensation at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract.”*

For the purpose of examination of the liability to pay the Liquidated Damages under Article 6.2.3 of the PPA, the other relevant Article of the PPA applicable is Article 5.1.3 which reads thus :

“5.1 Commencement of Supply of Power to Procurer(s)

5.1.1	XXX	XXX	XXX
5.1.2	XXX	XXX	XXX

“5.1.3 Right to Contracted Capacity and Scheduled energy

5.1.3.1 Subject to provisions of this Agreement, the entire Contracted Capacity shall be for the exclusive benefit of the Procurer(s) and the Procurer(s) shall have the exclusive right to purchase the entire 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 Contracted Capacity and/or Scheduled Energy.

Further notwithstanding Article 5.1.3.1 the Seller shall be permitted to sell power, being a part of the Contracted Capacity to third parties, if:

- i) there is a part of Available Capacity corresponding to the Contracted Capacity which has not been Dispatched by the Procurer, ordinarily entitled to receive such part ('Concerned Procurer'); and
- ii) such part has first been offered, at the same Tariff, to the other Procurer(s) (by the Seller), who were not ordinarily entitled to receive such part and they have chosen to waive or not to exercise their first right to receive such part of the Available Capacity within two (2) hours of being so

offered the opportunity to receive such part subject to the provisions regarding scheduling as per IEGC

5.1.4. Alternate source of power supply.

XXX

XXX

XXX”

- (l) The offer of the alternative source of power would amount to scheduling of the power by the Seller to the extent of the alternative source of power offered. If that schedule is not honoured by the Procurer, for any reason, the Procurer is bound to account for the deviation as per Article 6.2.3 of the PPA. This liability is subject to the provisions contained in Article 5.1.3.1 of the PPA. In any event, the Procurer has not made use of the contracted capacity / scheduled energy or any part thereof. Therefore, the Seller shall be permitted to sell the power, being a part of the contracted capacity, to any third party. In that event, the Procurers are not liable to pay the Liquidated Damages under Article 6.2.3 of the PPA, to the extent the Seller is permitted to sell the power to a third party.
- (m) In the present case, the Petitioner has not claimed any Liquidated Damages against the Respondents under Article 6.2.3 of the PPA. There is nothing on record to show that, the Koganti Power Limited, which was offered as the alternative source of power supply, had not sold that quantity of power to any third party. The Liquidated Damage can be claimed against the Respondents, only if it is shown that, the Koganti Power Limited was not allowed to sell its capacity of

power to others. The rejection of the offer of the alternative source of power supply by the Respondents, though not justifiable, did not prevent the Koganti Power limited to sell the power to others. One can reasonably infer that, because of the rejection of the offer by the Respondents, the Koganti Power Limited must have sold the power to others. Therefore, we are of the considered opinion that, the Respondents are not liable to pay any Liquidated Damages under article 6.2.3 of the PPA, though the rejection of the offer of the Petitioner for alternative source of power supply was not justifiable. However, it is made clear that, the Petitioner is liable for payment of Liquidated Damages under Article 6.2.4 of the PPA, for the balance capacity of 0.5 MW for the above periods of 6 days and 27 days. Therefore, we answer Issue No.(3), accordingly.

11) **ISSUE No.(4)** : *Whether the Respondents have proved that, the non-compliance of the Dispatch Schedules by the Petitioner amounted to 'gaming' in the present case?*

(a) For proving 'gaming', the Respondents have relied upon the deviations of more than 5% between the scheduled energy and the actual energy injected into the Grid, for the following months :

Month	Oct., 2013	Nov., 2013	Mar., 2014	May, 2014
Deviation	53%	40.75%	8.83%	7.20%

(b) As already noted above, for the months off October and November, 2013, the deviations must have occurred as the Respondents had failed to issue the 'Dispatch Instructions' (energy schedule). In the

case of the purchase of power on Unscheduled Interchange principles, the scheduled energy need not be arithmetically equal to the energy injected into the Grid. Considering the amount of deviation and there being no other material on record, we hold that, the Respondents have failed to prove the charge of 'gaming' against the Petitioner. Therefore, we answer Issue No.(4) in the negative.

- 12) **ISSUE No.(5)** : *If Issue No.(4) above is answered in the affirmative, what should be the compensation payable to the Respondents?*

As Issue No.(4) is answered in the negative, Issue No.(5) does not arise for our consideration. Therefore, we answer Issue No.(5), accordingly.

- 13) **ISSUE No.(6)** : *Whether the Petitioner proves that, the Respondents 2 to 6 are liable for Surcharge of 9,09,537/- as per the terms of the PPA?*

- (a) Article 6.3.3 of the PPA, which provides for payment of Surcharge states that, "*The payment made after 30 days from the date of receipt of invoice the surcharge shall be payable at 15% per annum for the outstanding amount.*" The question of payment of Surcharge would not arise, if there were timely payments of the invoices. The details in this regard are not forthcoming. Therefore, we are of the considered opinion that, the parties may be directed to ascertain the liability to pay Surcharge as provided under the terms of the PPA. Therefore, we answer Issue No.(6), accordingly.

14) **ISSUE No.(7)** : *What Order?*

(a) From the various findings arrived at by us, as noted above, the proper course of action is, to direct the parties to settle the accounts in terms of the said findings and make necessary payments for adjusting their rights and liabilities.

(b) For the foregoing reasons, we pass the following :

ORDER

- (i) The parties [Respondent-1 (PCKL) and Respondents-2 to 6 (ESCOMs)] are directed to settle the accounts, in terms of the findings given above on different issues, in respect of the energy supplied in terms of the PPA dated 6.9.2013, within 8 (eight) weeks from the date of this Order and make necessary payments / adjustments as per the said settlement of accounts; and,
- (ii) Once the accounts are settled with the Petitioner, the ESCOMs are at liberty to apportion their respective rights and liabilities as per the share of energy and payment allocation made by the Government of Karnataka.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER