

No.: N/36/15

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

**Dated : 1<sup>st</sup> August, 2017**

**Present:**

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

**OP No.18 / 2015**

**BETWEEN:**

Tata Power Trading Company Ltd.,  
C-43, 3<sup>rd</sup> Floor, Sector 62,  
Noida – 201 307

..

**PETITIONER**

*[Represented by J. Sagar Associates, Advocates]*

**AND:**

- 1) Power Company of Karnataka Limited,  
Room No.501, 5<sup>th</sup> Floor, KPTCL Building  
Cauvery Bhavan,  
Bengaluru – 560 009.
- 2) The Chief Engineer,  
State Load Despatch Centre,  
Karnataka Power Transmission Corporation Limited,  
28, Race Course Road,  
Bengaluru.
- 3) Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
Bengaluru – 560 001.
- 4) Mangalore Electricity Supply Company Limited,  
MESCOM Bhavana,  
Kavoor Cross Road,  
Bejai,  
Mangaluru – 575 004.

- 5) Chamundershwari Electricity Supply Corporation Limited,  
No.29, Kaveri Grammeena Bank Road,  
Vijayanagar, 2<sup>nd</sup> Stage,  
Mysuru – 570 019.
- 6) Hubli Electricity Supply Company Limited,  
P.B. Road, Navanagar,  
Hubballi – 580 025.
- 7) Gulbarga Electricity Supply Company Limited,  
Station Road,  
Kalaburagi – 585 101.
- 8) Shantha Projects Limited,  
S-9, 1<sup>st</sup> Floor, Shantha Skyline Apartment,  
M.J. Nagar,  
Hospet – 583 203,  
Ballari District.

*[Respondents - 1, 2, 3, 4, 5 & 7 represented by Just Law, Advocates,  
Respondent - 8 represented by Siddharth & Associates, Advocates]*

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### **ORDERS**

- 1) In the present Petition, the Petitioner has prayed for the following reliefs:

“(a) Admit the Petition;

(b) Declare that the recovery of `1,56,44,949/- made by the Third Respondent on 7.5.2015 from the amount payable to the Petitioner against its invoice is illegal, contrary to law and against the terms of the Power Purchase Agreements dated 14.11.2014 and 27.2.2015;

(c) Direct the Third Respondent to refund the sum of `1,56,44,949/- deducted / recovered from the Petitioner along with surcharge at 15% per annum;

- (d) *Declare that recovery of ₹1,42,00,422/- made by the Respondents from the amounts payable to the Petitioner is illegal, contrary to law and against the terms of the Power Purchase Agreement dated 6.9.2013;*
- (e) *Direct the Third to Seventh Respondents to refund the sum of ₹1,42,00,422/- deducted / recovered from the Petitioner along with surcharge at 15% per annum;*
- (f) *Direct the Third to Seventh Respondents to refund the sum of ₹49,91,937/- recovered as compensation charges for the period November, 2013 and December, 2013 when there was a force majeure event resulting in short supply;*
- (g) *Declare that the Third to Seventh Respondents are not entitled to recover any sums from the Petitioner for the power sourced by the Petitioner other than the deductions permitted under the Power Purchase Agreements between the parties;*
- (h) *Award cost of this Petition; and*
- (i) *Pass any such other and further orders / directions as this Hon'ble Commission may deem fit in the facts and circumstances of the case."*
- 2) The material facts stated by the Petitioner in support of the above reliefs may be stated as follows :
- (a) The Petitioner is a licenced trader in electricity. The 1<sup>st</sup> Respondent (PCKL) is a Nodal Agency of the Distribution Licensees in the State of Karnataka. The 2<sup>nd</sup> Respondent is the State Load Despatch Centre (SLDC). The 3<sup>rd</sup> to 7<sup>th</sup> Respondents are the Distribution Licensees in the State of Karnataka. The 8<sup>th</sup> Respondent (Shantha Projects Limited) is a coal-based thermal power generator of 10 MW capacity.

(b) In the month of July, 2013, the 1<sup>st</sup> Respondent (PCKL), on behalf of the Distribution Licensees, had invited a tender for procurement of 500 MW of RTC firm power for the period from 1.9.2013 to 30.6.2014, on a short-term basis. The Petitioner was one of the successful bidders who was awarded a contract for supply of 57 MW capacity aggregated power from different generation sources identified by the Petitioner. Accordingly, the Distribution Licensees, viz., the 3<sup>rd</sup> to 7<sup>th</sup> Respondents, and the Petitioner entered into a Power Purchase Agreement (PPA) dated 6.9.2013 (ANNEXURE – P2). The 1<sup>st</sup> Respondent (PCKL) issued Letters of Intent (LoI), vide letters dated 30.8.2013, 8.11.2013 and 23.11.2013, to the Petitioner, on behalf of the Distribution Licensees approving procurement of RTC firm power for the supply period and the contracted quantum in Mega Watts stated therein, at the firm price of `5.50 per unit for the entire contract period, the details of which are as follows :

<b>LOI Date</b>	<b>Generator</b>	<b>Quantum</b>	<b>Period</b>
30.8.2013	Core Green Sugars	15 MW	2.9.2013 to 31.3.2014
8.11.2013	Shantha Projects Ltd.	10 MW	11.11.2013 to 31.3.2014
23.11.2013	Hiranyakeshi Sahakari Sakkare Karkhane Niyamit	18 MW	1.12.2013 to 15.2.2014
23.11.2013	Vishwanath Sugars Ltd.	14 MW	1.12.2013 to 31.3.2014

- (c) The present Petition relates to the power supplied from the 8th Respondent (Shantha Projects), in terms of the Lol dated 8.11.2013 for the period from 11.11.2013 to 31.3.2014, as per the terms of the PPA (ANNEXURE – P2).
- (d) The Petitioner was also one of the successful bidders in the short-term power procurement bids conducted in October, 2014 and December, 2014, and it had executed the PPAs dated 14.11.2014 (ANNEXURE – P20) and dated 27.2.2015 (ANNEXURE – P21) with the Distribution Licensees in the State.
- (e) The substance of the case of the Petitioner, as made out in paragraph-18 of the Petition, is as follows :

*“The Respondents have deducted / recovered a total sum of 3,48,37,308/- out of the invoices raised by the Petitioner under the Power Purchase Agreement dated 6.9.2013 as well as Power Purchase Agreements dated 14.11.2014 and 27.2.2015. Out of the total amount mentioned above, an amount of 49,91,937/- has been recovered as Compensation charges for the supply period November, 2013 and December, 2013 when there was a Force Majeure event; a sum of 1,42,00,422/- has been deducted over and above the compensation charges provided under the PPA, dated 06.09.2013 and 1,56,44,949/- has been deducted towards payment of UI charges and back up charges (due) by the Eighth Respondent.”*

According to the Petitioner, the above deductions / recoveries were illegal and unauthorized and against the terms of the PPA dated 6.9.2013 (ANNEXURE – P2).

(f) The grounds urged by the Petitioner to contend that, the above deductions / recoveries were illegal and unauthorized, are as follows :

(i) Regarding the amount of `49,91,937/- :

The said amount was recovered towards compensation payable due to short-supply of power by the 8<sup>th</sup> Respondent (Shantha Projects) during the months of November, 2013 and December, 2013. During the said period, there were many instances of Grid disturbance as noted in the letter dated 18.1.2014 (ANNEXURE-P6) of the KPTCL which led to frequent tripping of the Generating Unit of the 8<sup>th</sup> Respondent (Shantha Projects), resulting in non-supply / short-supply of power to the Grid. The said instances of Grid disturbance amounted to a *Force Majeure* event, which would relieve the Petitioner from any liability for the short-supply of power as per Article 7 of the PPA (ANNEXURE-P2). Therefore, the Respondents could not have recovered the amount of `49,91,937/-.

(ii) Regarding the amount of `1,42,00,422/- :

The details of the deduction of the above amount of ₹1,42,00,422/- are stated below :

<b>ESCOM</b>	<b>Deductions (₹)</b>	<b>Remarks</b>
BESCOM	67,79,520	Encashed on 30.05.2014 through Performance Bank Guarantee vide BESCOM letter No.1574-81, dt.16.05.14
	15,10,180	Deducted on 12.03.2015 from Bill for the month of January 2015 (PPA dated 14.11.2014)
MESCOM	13,00,001	Deducted on 16.04.2014 from Bill for the month of March 2014 (PPA dated 06.09.2013)
	8,17,855	Deducted on 03.03.2014 from Bill for the month of March 2014 (PPA dated 06.09.2013)
HESCOM	17,04,796	Deducted on 20.02.2015 from Bill for the month of December 2014 (PPA dated 14.11.2014)
GESCOM	20,85,327	Deducted on 03.05.2014 from Bill for the month of March 2014 (PPA dated 06.09.2013)
CESCL	2,743	Deducted on 30.04.2014 from Bill for the month of March 2014 (PPA dated 06.09.2013)
	<b>1,42,00,422</b>	

The Respondents 1 to 7 have recovered / deducted the above-said amount over and above the Liquidated Damages provided under Article 6.2.4 of the PPA (ANNEXURE-P2). The PPA has not provided for recovery of this amount of ₹1,42,00,422/-, which was claimed to be the price towards the short-supply of power. The Respondents 1 to 7 were entitled to Liquidated Damages only, as per Article 6.2.4 of the PPA, for the

breach of any terms of the PPA (ANNEXURE-P2) and that, these Respondents cannot base their claim on any other grounds.

(iii) Regarding the amount of `1,56,44,949/- :

This amount was claimed by the 2<sup>nd</sup> Respondent (SLDC) towards the Unscheduled interchange (UI) charges and back-up power supply charges due from the 8<sup>th</sup> Respondent (Shantha Projects). However, the said amount was deducted from the March, 2015 bill of the Petitioner, due under the PPA dated 27.2.2015. The details of the said amount are as follows :

1	UI Bills for (11.11.13 to 31.03.14)	` 1,06,56,414
2	Interest on UI Bills calculated upto 28.02.15	` 10,32,889
3	Back-up power supply charges for (Nov, 13 to Mar, 14)	` 35,19,668
4	Interest on Back-up power supply calculated upto 28.02.15	` 4,35,978
	<b>Total amount due :</b>	<b>` 1,56,44,949</b>
	<b>(One Crore Fifty Six Lakhs Forty Four Thousand Nine Hundred and Forty Nine only)</b>	

The Petitioner was not liable to pay the said amount due from the eight Respondent. The 2<sup>nd</sup> Respondent (SLDC) should have initiated proceedings against the 8<sup>th</sup> Respondent for the recovery of the said amount. There was no privity of contract between the Petitioner and the 2<sup>nd</sup> Respondent (SLDC) for the recovery of the said amount.

(g) For the above reasons, the Petitioner is praying for allowing the above Petition.



(h) Additional Claims :

By way of an Application dated 3.3.2016, the Petitioner has claimed for recovery of `9,00,000/- and interest at the rate of 15% per annum, in addition to the reliefs already claimed. In support of the said claim, the Petitioner has stated that, after filing of OP No.18/2015, the 4<sup>th</sup> Respondent (MESCOM) had sent a letter dated 15.6.2015, referring to the letter bearing No.PCKL/A12/504A/2013-14/490-94 dated 7.5.2015 of the first Respondent (PCKL), wherein it was stated that, deductions to the tune of `9,00,000/- were to be made from the amounts payable to the Petitioner due to the quantum of energy short-supplied by the eighth Respondent (Shantha Projects) and that, in response to the letter dated 15.6.2015, the Petitioner had sent a detailed reply dated 30.6.2015 objecting to such deduction and inspite of it, a sum of `9,00,000/- was deducted without any authority.

- 3) Upon Notice, except the sixth Respondent (HESCOM), the other Respondents have entered appearance through their counsel. Respondents 1 to 5 and 7 have been represented by Just Law, Advocates and Respondent No.8 is represented by Shri Siddharth, H.M., Advocate. The 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent have filed separate Statement of Objections. The other Respondents, including the 8<sup>th</sup> Respondent (Shantha Projects), have not filed any Statement of Objections.

- 4) The 1<sup>st</sup> Respondent (PCKL) is the Nodal Agency for procurement of short-term and long-term power to meet the demand and supply gap of the Electricity Supply Companies (ESCOMs) in Karnataka. It is not in dispute that, in the month of July, 2013, the 1<sup>st</sup> Respondent (PCKL), on behalf of the Distribution Licensees, had floated a Tender for procurement of 500 MW of RTC firm power for the period from 1.9.2013 to 30.6.2014, on a short-term basis and that, the Petitioner was one of the successful bidders who was awarded with a Contract for supply of 57 MW capacity aggregated power from different generation sources identified by the Petitioner. It is not in dispute that, the 1<sup>st</sup> Respondent (PCKL) issued Letters of Intent as stated by the Petitioner and the PPA dated 6.9.2013 (ANNEXURE-P2) was executed between the Petitioner and the Respondents 3 to 7. It is also not in dispute that, the Petitioner was one of the successful bidders in the short-term power procurement bids conducted in October, 2014 and December, 2014 and it had executed the PPAs dated 14.11.2014 (ANNEXURE-P20) and dated 27.2.2015 (ANNEXURE-P21) with the Distribution Licensees in the State.
- 5) The substance of the Statement of Objections filed by the Respondents 1 and 3 may be stated as follows :
- (a) Regarding the amount of `49,91,937/- :

It is denied that, the non-supply / short-supply of power by the 8<sup>th</sup> Respondent (Shantha Projects) during the months of November, 2013 and December, 2013, was due to a *Force Majeure* event. These Respondents have contended that, the grounds urged by the Petitioner to infer a *Force Majeure* event during the said period were insufficient to establish any *Force Majeure* event. Therefore, they contended that, the amount of `49,91,937/- claimed towards the compensation (Liquidated Damages under Article 6.2.4 of the PPA) payable due to short-supply of power during the months of November, 2013 and December, 2013 was valid.

(b) Regarding the amount of `1,42,00,422/- :

The Respondents 1 and 3 have contended that, the amount of `1,42,00,422/- represents the amount to be recovered from the Petitioner due to short-supply of power, as against the scheduled quantum of power. These Respondents have contended that, the ESCOMs have paid the amount to the Petitioner as per the scheduled energy in a month, however, the Petitioner failed to supply the quantum of the scheduled energy and during each month from November, 2013 to March, 2014, there was a shortfall in the supply of the agreed quantum of energy. Therefore, these Respondents have determined the value of the deficit quantum of power at `3,37,44,398, considering the rate at `5.50 per unit, which was the agreed tariff. Out

of this, these Respondents have deducted the amount of `1,22,44,120 received towards the UI charges. Thereby, these Respondents have contended that, they have suffered a loss to the tune of `2,15,00,278, as a consequence of short-supply of power for the period from 11.11.2013 to March, 2014. These Respondents have contended that, they have deducted the said amount from the Petitioner's subsequent Bills for supply of power. These Respondents have denied the contention of the Petitioner that, the PPA (ANNEXURE-P2) does not provide for recovery of the amounts towards short-supply as claimed by these Respondents. These Respondents have contended that, the terms of the PPA provide for the recovery of amounts towards short-supply of power and the said terms do not prohibit such recovery. These Respondents have given the particulars in the Table, which is extracted below :

<b>M/s/ Tata Power Trading Company Limited</b>						
<b>Sl. No.</b>	<b>SHANTHA PROJECTS (Period from Nov-13 to Mar-14)</b>					
	<b>Particulars</b>	<b>Nov-13</b>	<b>Dec-13</b>	<b>Jan-14</b>	<b>Feb-14</b>	<b>Mar-14</b>
1	Contracted Capacity (10 MW)	48,00,000	74,40,000	74,40,000	67,20,000	74,40,000
2	Energy scheduled to Bilateral transactions (MUs)	0	0	0	0	0
3	Energy scheduled to Power Exchange (MUs)	7,62,270	0	0	0	0
4	Energy scheduled to ESCOMs (MUs)	24,38,375	34,47,500	5,49,000	45,14,000	74,40,000
5	Total power scheduled (to be supplied by firm) in MUs(2+3+4)	32,00,645	34,47,500	5,49,000	45,14,000	74,40,000

6	Actual Energy pumped to Grid (as per JMR) in MUs	16,14,200	26,93,900	0	31,23,200	55,84,500
7	Short generation in MUs (4-6)	8,24,175 (15,86,445)*	7,53,600	5,49,000	13,90,800	18,55,500
8	Cost involved in Rs. (7*quoted tariff, i.e.Rs.5.50)	45,32,962.5	41,44,800	30,19,500	76,49,400	1,02,05,250
9	% Deviation to ESCOMs w.r.t. Scheduled energy Vs Actual energy	<b>33.80</b> <b>(65.06*)</b>	<b>21.86</b>	<b>100.00</b>	<b>30.81</b>	<b>24.94</b>
10	Amount received through UI	33,88,584	11,70,033	16,71,470	17,53,875	42,60,158
11	Net Difference (8-10)	11,44,378.5 (53,36,864*)	29,74,767	13,48,030	58,95,525	59,45,092

*[\*Note: The arithmetical errors committed by the contesting Respondents in the Column relating to 'Nov.13' is corrected by us. The figures in the brackets are as claimed by the contesting Respondents.]*

Therefore, these Respondents have contended that, the recovery of the amount towards this head by the ESCOMs on different dates, is valid.

(c) Regarding the amount of `1,56,44,949/- :

The Respondents 1 and 3 have contended that, the Petitioner was liable to pay the UI charges to the 2<sup>nd</sup> Respondent (SLDC) towards deviation between the scheduled energy and the actual energy injected. They have denied the contentions of the Petitioner that, it was not liable to pay the UI charges and back-up power supply charges and that the 8<sup>th</sup> Respondent (Shantha Projects), the generator, alone was liable for it. They have contended that, this amount was initially claimed by the 2<sup>nd</sup> Respondent (SLDC) towards

the UI charges and back-up power supply charges from the 8<sup>th</sup> Respondent (Shantha Projects) and as the 8<sup>th</sup> Respondent (Shantha Projects) failed to pay the said amount, the same was demanded from the Petitioner. The Petitioner has disputed the claim of these Respondents, therefore the amount of `1,56,44,949/- was recovered by way of deduction in the March, 2015 bill raised by the Petitioner towards the energy supplied under the subsequent PPA. The 3<sup>rd</sup> Respondent (BESCOM) has contended that, out of the total deduction of `1,56,44,949/- it had retained its share of `70,91,312/- and remitted the balance amount of `77,83,637/- to the 2<sup>nd</sup> Respondent (SLDC) for payment of the same to the other ESCOMs concerned. Therefore, it is contended by these Respondents that, the recovery under this head is valid and legal.

(d) Regarding the Additional Claim :

The 1<sup>st</sup> Respondent (PCKL), in its objection to the Application for including the claim of `9,00,000/- deducted by the 4<sup>th</sup> Respondent (MESCOM), has contended that, this amount was payable by the Petitioner towards the short-supply of energy against the scheduled energy, as stated in paragraph-5(b) above and that the objection of the Petitioner for deduction of this amount was untenable. Therefore, these Respondents have prayed for dismissal of the Petition and the additional claim of the Petitioner.

- (e) The contesting Respondents have contended that, the conduct of the Petitioner in not revising the declared availability, within a reasonable time, the acute short-supply of energy, receiving the entire amount of the scheduled energy and other circumstances, have amounted to the Petitioner indulging in gaming with a view to have unlawful enrichment. Therefore, they have contended that, the Procurer should not be made to suffer any loss in the present transaction.
- (f) The contesting Respondents have contended that, at any rate, as per Article 5.1.4 of the PPA, it was the duty of the Petitioner to supply power from any alternate source in case of non-availability of power from the Generating Station of the 8<sup>th</sup> Respondent (Shantha Projects).
- 6) We have heard the submissions made by the learned counsel for the contesting parties in the case.
- 7) 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 there was *force majeure* event during the months of November and December, 2013 as contended by the Petitioner? If so, for what duration and for what reliefs the Petitioner is entitled to?
- (4) Whether the contesting Respondents have proved that, the conduct of the Petitioner in not taking timely steps for revising the energy schedule (Dispatch Instructions) 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 contesting Respondents?
- (6) Whether the deductions made by the ESCOMs (Respondents - 3 to 7) and the encashment of the Bank Guarantee by the 3<sup>rd</sup> Respondent (BESCOM) are valid in law?
- (7) Whether the deduction of `1,56,44,949/- made by the 3<sup>rd</sup> Respondent (BESCOM) from the payments to be made to the Petitioner against its energy Bill for March, 2015, relating to the subsequent PPA, is valid in law?
- (8) What Order?



- 8) After considering the oral and written submissions made by the learned counsel for the parties and the pleadings and evidence placed on record, our findings on the above Issues are as follows :
- 9) **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 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.

- 10) **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 contended that, it was not liable to pay the UI charges. The only ground urged in support of its contention is that the SLDC had initially raised a claim towards the UI charges as against the Generator (8<sup>th</sup> Respondent – Shantha Projects) and therefore, the recovery proceedings should be filed only against the 8<sup>th</sup> Respondent (Shantha Projects). In view of Article 4.2.3 of the PPA it is clear that, the UI charges payable on account of the short-supply of energy due to variation in the scheduled energy and the actual energy supplied should be borne by the Petitioner itself. The 8<sup>th</sup> Respondent (Shantha Projects) is not a party to the PPA and in no way it can be made liable to pay the UI charges. The Petitioner can protect its interest by entering into a back-to-back Agreement with the 8<sup>th</sup> Respondent (Shantha Projects), in this regard. Any act / omission of the 8<sup>th</sup> Respondent (Shantha Projects) in furnishing the generation schedule and in injecting the scheduled energy (Dispatch Instructions) into the Grid, would amount to an act / omission of the Petitioner, as the 8<sup>th</sup> Respondent (Shantha Projects) acts as an Agent of the

Petitioner. Therefore, the ultimate liability is that of the Petitioner. In view of the above, we reject the contention of the Petitioner that, it was not liable to pay the UI charges. The applicable UI charges for a block should 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 2<sup>nd</sup> Respondent (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 concerned. The defence taken by the Petitioner, in this regard, is that, for the months of November and December, 2013, it was not liable to pay the Liquidated Damages due to *force majeure* event. We shall deal with the *force majeure* event, separately, in the subsequent issue, hereunder.

(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 contesting Respondents have taken into consideration, for the purpose of calculating the Liquidated Damages, the difference between the scheduled energy to the ESCOMs concerned and the actual energy injected into the Grid. In the present case, in all the months, except for the month of March, 2013, the energy scheduled to the ESCOMs is

less than the 85% of the contracted 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, as provided in the PPA. 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 contesting 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.

11) **ISSUE No.(3)** : *Whether there was force majeure event during the months of November and December, 2013 as contended by the Petitioner? If so, for what duration and for what reliefs the Petitioner is entitled to?*

(a) The Petitioner has contended that, the short-supply of energy during the months of November and December, 2013 was on account of

*force majeure* events, for which the Respondents were not entitled to any compensation under Article 6.2.4 of the PPA. The Petitioner has stated in his Petition that, on account of the trippings of 100 MVA transformer in the Kushtagi 220 kV R/s KPTCL Sub-Station for eleven number of instances during November and December, 2013, as noted below, the 8<sup>th</sup> Respondent (Shantha Projects) was unable to supply 10 MW of power as per the terms of the PPA and that the Grid disturbances were sudden, which led to frequent trippings of the Generating Unit(s) of the 8<sup>th</sup> Respondent (Shantha Projects) (Generator), which was beyond the control of the 8<sup>th</sup> Respondent (Shantha Projects) and thus the said Generator could not regularly supply power, as per the schedule. Further that, the Petitioner had requested that these events be treated as a *force majeure* event in terms of the PPA and also requested not to impose Liquidated Damages for short-supply of energy. Further that, a sum of `49,91,973/- was deducted as Liquidated Damages for short-supply of energy for the months of November and December, 2013 and the same should be refunded. The details of the 100 MVA transformer trippings in Kushtagi 200 KV Substation, stated by the Petitioner, are as follows :

Sl. No.	Date	Timings		Duration	Reason	Details
		Grid Failed	Grid Resu-med			
1	12.11.2013	4:35 PM	5:05 PM	30 mins	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	No interruption at station end.
2	22.11.2013	9:45 AM	9:50 AM	5 mins	100 MVA Transformer Trip in Kushtagi 220	Hand tripped 100 MVA, 1&2 for GOS

					KV Substation.	arrangement Lingapur 220 KV.
3	22.11.2013	12.03 PM	12.42 PM	30 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	Hand tripped 100 MVA, 1&2 for GOS arrangement Lingapur 220 KV.
4	26.11.2013	12.19 PM	12.44 PM	25 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	100 MVA 1&2 transformer tripped, EFT & Master trip.
5	28.11.2013	5.42 AM	9.42 AM	4 Hrs	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	No interruption at station end.
6	30.11.2013	6.29 PM	7.54 PM	25 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	100 MVA 1&2 transformer tripped, EFT & Master trip R&B Phase.
7	04.12.2013	12.29 PM	12.33 PM	4 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	No interruption at station end.
8	07.12.2013	6.56 AM	7.30 AM	34 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	220 KV Lingapur line fault transformer tripped OCR REFR RELAY.
9	07.12.2013	5.15 PM	6.20 PM	1 Hr 5min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	220 KV Lingapur line fault transformer tripped OCR REFR RELAY.
10	08.12.2013	2.03 PM	2.45 PM	42 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	220 KV Lingapur line fault transformer tripped OCR REFR RELAY.
11	16.12.2013	2.50 PM	3.50 PM	60 min	100 MVA Transformer Trip in Kushtagi 220 KV Substation.	Due to 110 KV Yalburga line fault 100 MVA Transformer Trip in Kushtagi 220 KV Substation.

(b) The contesting Respondents have denied the grounds urged by the Petitioner to claim a *force majeure* event and they have also contended that, those events would not amount to a *force majeure* event. Further, it is contended that, the Grid connectivity standards specified by the Central Electricity Authority provide that, all

Generating Companies at the time of connectivity to the Grid shall provide the requisite protection for safeguarding its system, not only from the faults within the Units and within the Station, but also from the faults in the transmission lines. Further that, the Petitioner did not have the requisite protection system and the failure of the generating turbine cannot be considered as a *force majeure* event. Therefore, the Respondents have contended that, the Petitioner has failed to establish the *force majeure* event, as alleged by it.

- (c) The trippings of the 110 MVA transformers in the Kushtagi Substation can be accepted, as the same is supported by the letter dated 18.1.2014 (ANNEXURE-P6) issued by the KPTCL. However, the Petitioner has not established that the Generating Unit of the 8<sup>th</sup> Respondent (Shantha Projects) tripped, due the trippings of the above-said 110 MVA transformer, except producing a few letters addressed by the 8<sup>th</sup> Respondent (Shantha Projects) to the 1<sup>st</sup> Respondent (PCKL) and others, stating that the trippings of the 110 MVA transformer in the Substation had led to the tripping of the Generating Unit. These letters were not written soon after the said trippings, but were written only in reply to the claim made by the ESCOMs during January, 2014 for Liquidated Damages towards the short-supply of energy for the months of November and December, 2013, requesting to waive off the said Liquidated Damages. The Petitioner has not denied that, the Generator was required to provide the requisite protection for safeguarding its system, not only from the faults arising within the Units

and the Station, but also from the faults in the transmission system. Therefore, the facts on record do not establish that, the trippings in the 110 MVA transformer in the Substation led to trippings of the Generating Unit(s).

- (d) Articles 7.1 and 7.2 of the PPA deal with the *force majeure* events and the consequence arising therefrom. The said provisions read thus :

**“7.1 Force Majeure**

- i) *Any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of Transmission / Grid constraint shall be treated as Force Majeure without the liability on either side.*
- ii) *Any of the events or circumstances, or combination of events and circumstances such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system.*
- iii) *The contracted power will be treated as deemed reduced for the period of Transmission Constraint. The non / part availability of transmission corridor should be certified by concerned RLDC/SLDC.”*

**“ 7.2 Duty to Mitigate**

*To the extent not prevented by a Force Majeure event, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.”*

- (e) Admittedly, Clause (i) of Article 7.1 of the PPA does not apply to the present case, as the 2<sup>nd</sup> Respondent (SLDC) has not imposed any restriction in scheduling of power due to break-down of the transmission or Grid constraints.
- (f) The causes stated by the Petitioner would not amount to any of the events or circumstances stated in Clause (ii) of Article 7.1 of the PPA. The bare reading of the said Clause (ii) would show that, the break-down of the 110 MVA transformer in the Substation or the trippings of the Generating Units as a consequence of it, do not fall under any of the *force majeure* events and circumstances stated in the said Clause. Therefore the disruption, if any, in the Generating Units due to tripping of 100 MVA transformer in the Substation, cannot be considered as a *force majeure* event. The events or circumstances, causing disruption of the Generating Units, should be akin to the events enumerated in the said Clause (ii), in order to claim a *force majeure* event under this Clause.
- (g) Now, it should be seen, whether the case of the Petitioner would fall under Clause (iii) of Article 7.1 of the PPA. As already noted , the trippings in the Substation for eleven number of times during November and December, 2013 could be accepted. When there were such transmission constraints for different periods on different dates, it cannot be denied that, the Generating Units could not



generate and transmit the energy to the Grid during the said period. The last part of Clause (iii) states that, the non / part availability of transmission corridor should be certified by the concerned RLDC / SLDC. It appears that, such Certificate is necessary to establish that the Generating Unit is capable of generating energy, had there not been any such tripping or interruption. The Petitioner has not produced any such Certificate from the 2<sup>nd</sup> Respondent (SLDC). During the months of November and December, 2013, there was generation from this Generating Unit. Therefore, insisting on the production of a Certificate by the 2<sup>nd</sup> Respondent (SLDC) appears to be too technical and the production of the same may be dispensed with.

- (h) Due to the above-noted interruptions, the Petitioner claims that, the entire amount of Liquidated Damages payable for the short-supply of energy for the months of November and December, 2013 should be exonerated. The said claim of the Petitioner appears to be unacceptable. The Petitioner can be granted reliefs only to the extent of the duration for which it could not inject energy to the Grid due to such break down of the transmission line or tripping of the transformer in the Sub-Station. For this purpose, it may be noted that, the generating unit in question is a 10 MW capacity Coal-based Thermal Power Generating Unit. This generating unit is connected to the 110 KV Bus of the 220 / 110 KV Substation at Koppal for power evacuation. The duration of each interruption ranged from four

minutes to four hours. As per the Central Electricity Authority (Technical Standards for Construction of Electrical Plants and Electrical Lines) Regulations, 2010, the definitions for the 'Cold Start' and 'Hot Start' are as follows :

*“**Cold Start**’, in relation to Steam Turbines, means start up after a shutdown period of exceeding **72 hours** (Turbine metal temperatures below approximately 40% of their full load values).”*

*“**Hot Start**’, in relation to Steam Turbine, means start up after a shutdown period of less than **10 hours** (Turbine metal temperatures approximately 80% of their full load values).”*

In the above circumstances, it may be said that, the Petitioner could re-start the generating unit when it was in a 'Hot Start' condition and attain the full load values of the Generating Unit, at the most, within an hour after the re-start, when the shut-down periods were between one hour and four hours. When the shut-down period is below one hour, the Generating Unit can re-start, immediately, attaining the full load values of the Generating Unit. Considering the duration of the interruptions during the relevant period, we are of the considered view that, the time required for attaining the full load values of the generating unit may at best, be estimated at six hours each in November and December, 2013. Therefore, the contracted power will be treated as "deemed reduction" for a period of six hours in each of the above months. The rights and liabilities shall be worked out, accordingly, on the basis of the "deemed reduction" of the

contracted power for the months of November and December, 2013.

Therefore, we answer Issue No.(3), accordingly.

12) **ISSUE No.(4)** : *Whether the contesting Respondents have proved that, the conduct of the Petitioner in not taking timely steps for revising the energy schedule (Dispatch Instructions) amounted to 'gaming' in the present case?*

(a) In the context of the present case, the word 'gaming' shall be construed to mean 'intentional act' in not taking timely steps by the Petitioner for revising the energy schedule, in order to make an undue commercial gain.

(b) The relevant part of Article 6 of the PPA provides that, the Procurer shall pay the Seller the fortnightly tariff at the rate of `5.50 per unit for the energy scheduled in the previous fortnight. Therefore, the quantum of fortnightly tariff payment depends on the quantum of scheduled energy for that previous fortnight. In case, the seller could not inject the energy to the Grid as per the Schedule furnished to it, there is a duty cast upon the Seller to revise the schedule. The timely revision of the schedule, in case of need, should be carried out by the Generator or the Seller, as allowed in the procedure. While scheduling by adopting the UI principles, it is expected that, any change in the Plant availability should be declared, faithfully. As long as the actual average availability of Plant during a day is close to the declared availability for that day, there would be no substantial deviation in the scheduled energy and the actual energy pumped into the Grid. The

real time revision of scheduling should promptly be carried out by the Seller. The SLDC gives effect to the revision of the schedule as per the prevailing practice. The duty to revise the schedule, whenever required, is an integral part of the UI principles. The Grid Code also casts such a duty upon the Generator or the Seller and the breach of it may lead to penal consequences, as provided under the Electricity Act, 2003.

- (c) In the present case, the Petitioner did not inject energy as per the schedule. The energy scheduled in a month and the actual energy supplied to the Grid in different months, are as detailed below :

<b>M/s/ Tata Power Trading Company Limited</b>					
<b>SHANTHA PROJECTS (Period from Nov-13 to Mar-14)</b>					
<b>Particulars</b>	<b>Nov-13</b>	<b>Dec-13</b>	<b>Jan-14</b>	<b>Feb-14</b>	<b>Mar-14</b>
Energy scheduled to ESCOMs (MUs)	2438375	3447500	549000	4514000	7440000
Actual Energy pumped to Grid (as per JMR) in MUs	1614200	2693900	0	3123200	5584500
Short generation in MUs	824175	753600	549000	1390800	1855500
% Deviation to ESCOMs w.r.t. Scheduled energy Vs Actual energy	<b>33.80</b>	<b>21.86</b>	<b>100.00</b>	<b>30.81</b>	<b>24.94</b>

The above facts would reveal that, the Petitioner has failed to make revision of the scheduled energy, as and when it was required.

- (d) If the scheduled energy is revised within a reasonable time, the deviation is accounted for as per the prevailing UI charges. On the other hand, if there is deliberate or intentional lapse on the part of the Seller to take steps for revision of the scheduled energy within a reasonable duration, it would lead to an inference of 'gaming' by the Seller. Therefore, the deviation between the scheduled energy and the actual energy pumped into the Grid may lead to different consequences, depending upon the action or inaction of the Seller in taking steps to effect the revision of the scheduled energy in a given situation.
- (e) In each case, it is a question of fact as to whether the deviation has to be accounted for as per the UI charges alone or it should also be further dealt with, treating it as 'gaming'. In the present case, the contesting Respondents have pleaded a charge of 'gaming' against the Petitioner. Therefore, the burden of proving that fact is on the contesting Respondents.
- (f) As noted above, the percentage of deviations seems to be abnormal for all the months. In each of the months, except for January, 2014, the Petitioner went on increasing the schedule, though it could not reach anywhere near the schedule. During January, 2014, though the energy scheduled was 5,49,000 units, nothing was injected into the Grid. During March, 2014, the schedule furnished was for the entire quantum of contracted capacity of 74,40,000 units. This would

establish without any further proof that, the day ahead schedules given for this month were not at all revised on any day by the Petitioner. On the other hand, the actual energy injected into the Grid for this month was 55,84,500 units, leaving a wide gap between the scheduled energy and the actual energy injected. It could also be seen that, for the month of March, 2014, the Petitioner was not even liable for payment of Liquidated Damages under Article 6.2.4 of the PPA, for the shortfall of energy to the extent of the permitted deviation of 15% of the contracted energy, as the terms of the PPA do not provide for any such contingency. 85% of the contracted energy would work out to 63,24,000 units. The actual energy injected into the Grid during that month was 55,84,500 units, which is far below the 85% of the contracted energy of 74,40,000 units. Therefore, during this month, the Petitioner cannot be made liable for payment of Liquidated damages, to an extent of 11,14,000 units, for which the Petitioner had received the tariff at `5.50 per unit. The Petitioner has taken undue advantage of the lacuna in the terms of the PPA and has furnished the schedule to the extent of the contracted energy. Such acts of the Petitioner would lead to the conclusion that, the ESCOMs have placed sufficient material on record to discharge their initial burden of proving the charge of 'gaming'.

- (g) Therefore, in our view, the above facts would shift the onus on the Petitioner to establish that, it had taken timely steps for the revision of the scheduled energy. In its Rejoinder, the Petitioner has produced

the schedules of energy relating to 14.11.2013, 20.11.2013, 22.11.2013, 8.12.2013, 10.12.2013, 19.12.2013, 12.1.2014, 13.1.2014, 4.2.2014, 5.2.2014 and 7.2.2014. These schedules would show that, the Petitioner had revised the schedules, once or twice, on these dates. However, from these schedules, it cannot be inferred that, the revisions were made within a reasonable time. Apart from it, the Petitioner has not produced any documents to establish that, it had injected the energy into the Grid as per these revised schedules without necessitating any further revision. If there were timely revisions of the schedule and injection of energy into the Grid as per the revised schedule, there would not have been such vast variations. Therefore, the material produced on record by the Petitioner is not sufficient to rebut the inference of 'gaming', to be drawn from the abnormal percentage of the deviations in different months with respect to the scheduled energy versus the actual energy supplied. The Petitioner should have produced the material to show that, inspite of the Petitioner taking timely steps for revision of the schedules and injecting the energy as per the revised schedules, the deviation had occurred and therefore, the 'gaming' cannot be inferred. Therefore, we hold that, the charge of 'gaming' made against the Petitioner is proved. Therefore, we answer Issue No.(4) in the affirmative.

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

- (a) Before dealing with this Issue on merit, it is necessary to decide the contention of the Petitioner that, the ESCOMs are not entitled to claim any amount other than the reliefs provided under the PPA. According to the Petitioner, when the Liquidated Damages are provided in the PPA for any deviation between the scheduled energy and the actual energy supplied, for the same cause, any other relief cannot be granted. In other words, the relief for any deviation in supply of energy is covered under the Liquidated Damages, there cannot be another claim on the basis of 'gaming' for the same deviation. That contention of the Petitioner could have been accepted, if the facts leading to the deviation would not have given rise to two causes of action. The relief for the Liquidated Damages under Article 6.2.4 of the PPA is towards the deviation from the Seller's side in respect of the short-supply of energy, when there is timely revision of the schedules, as required under the UI principles. The cause of action for 'gaming', though based on the deviation in the supply of energy, requires further fact to be established that, the deviation was deliberate or intentional, with a view to making unlawful gains. Therefore, the relief for deviation, as provided in Article 6.2.4 of the PPA, is for the deviation in supply of energy which was not deliberate or intentional. But, the relief for the deviation in supply of energy, which is deliberate or intentional, with a view to making unlawful gains, is not covered under the said Article. Articles 10.8, read with 10.11 of the PPA, relied upon by the Petitioner in support of its contention, does not restrict the claim for separate reliefs, for separate causes of action. For the above reasons,



we hold that, the provisions contained in Articles 6.2.4 and 10.11 of the PPA, for payment of Liquidated Damages for failure to supply the scheduled energy, do not implicitly or explicitly take away the right of the Procurer to claim relief on the basis of 'gaming'. In this regard, paragraphs 20 and 24 of the Judgment of the Hon'ble Supreme Court of India, reported in **(2001) 10 SCC 63**, in the case of *Steel Authority of India Limited –Vs- Gupta Brother Steel Tubes Limited*, may be noted, in this regard, which read thus :

*“20. The question that needs to be determined by us is whether the breaches alleged by the respondent are covered by the stipulations contained in Clause 7.2. If the answer is in the affirmative, obviously compensation cannot be awarded beyond what is provided therein. On the other hand, if breaches are not covered by Clause 7.2, cap provided therein with regard to liquidated damages will not be applicable at all.”*

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

(Clause 7.2 of the above-mentioned case related to the award of Liquidated Damages for breach of a particular term of the contract concerned in that case.)

- (b) The compensation for 'gaming' may be awarded on the basis of the losses suffered by the contesting Respondents due to short-supply of energy, apart from the Liquidated Damages provided under the PPA. The contesting Respondents are entitled to receive the Unliquidated Damages, which would represent the compensation towards the other consequences of the short-supply of energy, which is suffered in the usual course of business. The contesting Respondents have, in essence, claimed compensation for the short-supply of energy, at the agreed tariff. They have given up their claim towards the UI charges and the Open Access charges, but have retained the Liquidated Damages calculated on the difference between the scheduled energy and the actual energy injected.
- (c) In the facts of the present case, it appears to be just and reasonable to award compensation, in favour of the contesting Respondents, to the extent of the difference between the price for the quantum of short-supply of energy at the agreed tariff and the amount received towards the UI charges and the Liquidated damages. It is made clear that, the reimbursement of the Open Access charges on account of the short-supply of energy, payable by the Petitioner to the contesting Respondents, would be a separate liability under a different head. Hence, that amount cannot be deducted along with the UI charges and the Liquidated Damages. Therefore, we answer Issue No(5), accordingly.

- 14) **ISSUE No.(6)**: *Whether the deductions made by the ESCOMs (Respondents - 3 to 7) and the encashment of the Bank Guarantee by the 3<sup>rd</sup> Respondent (BESCOM) are valid in law?*
- (a) The ESCOMs have totally deducted a sum of `1,42,00,422 from the monthly energy bills raised by the Petitioner under the present PPA and also the subsequent PPA, and also by encashing the Bank Guarantee to an extent of `67,79,520/- as detailed in the Table in Paragraph 2(f)(ii) above, apart from a sum of `9,00,000/- deducted from the monthly tariff bills pertaining to the subsequent PPA. The said amounts were claimed by the ESCOMs towards the value of the energy short-supplied.
- (b) The Petitioner has contended that, the Bank Guarantee could not have been encashed, as the said Bank Guarantee was furnished in respect of the obligation to supply energy from a different Generator, other than the 8<sup>th</sup> Respondent (Shantha Projects). A copy of the said Bank Guarantee is not produced, in order to ascertain the terms and conditions for its encashment. Therefore, it can be presumed that, the Bank Guarantee was validly encashed, as per its terms, towards the arrears due to the 3<sup>rd</sup> Respondent (BESCOM). In respect of the other deductions, the ESCOMs have claimed that, the Petitioner was due to them in different amounts towards the price for short-supply of energy and thereby, they have deducted the same out of the amounts payable to the Petitioner towards the subsequent monthly energy bills

of the Petitioner, though some of them related to the subsequent PPA. We find no fault in the actions of the ESCOMs in deducting the amounts, due to them, from the amounts payable to the Petitioner on any account. Therefore, we answer Issue No.(6) in the affirmative.

15) **ISSUE No.(7)** : *Whether the deduction of `1,56,44,949/- made by the 3<sup>rd</sup> Respondent (BESCOM) from the payments to be made to the Petitioner against its energy Bill for March, 2015, relating to the subsequent PPA, is valid in law?*

(a) The amount of `1,56,44,949/- consists of the UI charges as well as the back-up power supply charges. The details of the said amount are as follows :

1	UI Bills for (11.11.13 to 31.03.14)	` 1,06,56,414
2	Interest on UI Bills calculated upto 28.02.15	` 10,32,889
3	Back-up power supply charges for (Nov, 13 to Mar, 14)	` 35,19,668
4	Interest on Back-up power supply calculated upto 28.02.15	` 4,35,978
	<b>Total amount due :</b>	<b>` 1,56,44,949</b>
	<b>(One Crore Fifty Six Lakhs Forty Four Thousand Nine Hundred and Forty Nine only)</b>	

As already noted, the Petitioner is liable to pay the UI charges and also the interest thereon. However, the back-up power supply charges, and the interest becoming due on it, cannot be recovered from the Petitioner, as it was not an amount payable by the Petitioner under any of the terms of the PPA. The claim for back-up power supply charges should be against the 8<sup>th</sup> Respondent (Shantha Projects) by

the ESCOM concerned. The Petitioner has not undertaken to pay the charges for such back-up power supply to the ESCOM concerned. Therefore, we hold that, the charges for back-up power supply cannot be treated as a component of the UI charges.

- (b) The contention of the Petitioner is that, as the 2<sup>nd</sup> Respondent (SLDC) has claimed the UI charges from the 8<sup>th</sup> Respondent (Shantha Projects), the 2<sup>nd</sup> Respondent (SLDC) should have filed a case for recovery of the same against the 8<sup>th</sup> Respondent (Shantha Projects). Merely because the 2<sup>nd</sup> Respondent (SLDC) has made a wrong claim of the UI charges against the 8<sup>th</sup> Respondent (Shantha Projects) relating to the present transaction, the liability of the Petitioner to pay the UI charges does not get extinguished. Therefore, such contention is to be rejected.
- (c) The Petitioner has also contended that, the UI charges was payable to the 2<sup>nd</sup> Respondent (SLDC) therefore, the 3<sup>rd</sup> Respondent (BESCOM) could not have recovered this amount by way of deduction from the monthly tariff invoices of the Petitioner relating to a different PPA. The contesting Respondents have stated in reply that, whatever charges are payable by the Petitioner to the 2<sup>nd</sup> Respondent (SLDC), were in turn payable to the ESCOMs by the 2<sup>nd</sup> Respondent (SLDC), therefore the real beneficiaries for the UI charges were the ESCOMs. Therefore, the contesting Respondents have contended that, the deduction effected by the 3<sup>rd</sup> Respondent (BESCOM) from the amounts payable

by it to the Petitioner towards the monthly tariff invoices raised under the subsequent PPA is correct. We note that, the ESCOMs are entitled to share the UI charges collected by the 2<sup>nd</sup> Respondent (SLDC). Therefore, on equitable principles, we find that, there is nothing wrong on the part of the 3<sup>rd</sup> Respondent (BESCOM) in deducting the UI charges, upon the request of the 2<sup>nd</sup> Respondent (SLDC). We also note, the Petitioner or the 8<sup>th</sup> Respondent (Shantha Projects) had not paid the UI charges and the back-up power supply charges, though demanded by the contesting Respondents on several occasions.

- (d) The deduction towards the back-up power supply charges and the interest payable on it is not valid. The ESCOM concerned is at liberty to take such action for recovery of the same against the 8<sup>th</sup> Respondent (Shantha Projects), as provided under law. Therefore, we answer Issue No.(7) in the above terms.

16) **ISSUE No.(8)** : *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-3 to 7 (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