

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 30th June, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 228 of 2013

Jindal Power Limited
Mandir Hasaud; Raipur
PIN 429 101

... Appellant

Versus

- 1. Chhattisgarh State Electricity Regulatory Commission,
Irrigation Colony, Shanti Nagar,
Raipur-492 001**
- 2. Chhattisgarh State Power Distribution Co. Ltd.
Vidyut Seva Bhawan,
4th Floor, PO: Sunder Nagar,
Daganiya, Raipur-492 013**

Respondent(s)

Counsel for the Appellant : Mr. M G Ramachandran
Ms. Ranjitha Ramachandran
Ms. Saman Ahsan
Ms. Swagatika Sahoo

Counsel for the Respondent (s): Ms. Swapna Seshadri
Mr. Anand K Ganesan for R-1
Ms. Suparna Srivastava for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

1. **Which is the party liable to bear the UI Charges for the sale of power by the Appellant (Generator) to the Respondent (Distribution Company) for the period from 21.4.2008 to 7.12.2008?**
2. This is the question posed before this Tribunal in this Appeal.
3. Jindal Power Limited, the Appellant filed a Petition before the Chhattisgarh State Commission for issuing a direction to the Distribution Company (Chhattisgarh State Power Distribution Company Limited) for the re-imbusement of unscheduled Interchange charges (UI Charges) for the supply of 70 MW of power made by the Appellant to the Distribution Company for the period from 21.4.2008 to 7.12.2008.
4. The State Commission dismissed the said Petition by the Order dated 12.7.2013 holding that the Appellant is not entitled for the reimbursement of the said UI Charges.
5. Aggrieved over this Order, the Appellant has presented this Appeal.

6. The relevant facts are as follows:

(a) The Jindal Power Limited, the Appellant is a Generating Company. Chhattisgarh State Power Distribution Company which is a successor Company of the State Electricity Board is the 2nd Respondent.

(b) The Appellant and the Distribution Company entered into a Power Purchase Agreement on 23.3.2007. Through this PPA, the Appellant offered to sell power up to 300 MW to the Distribution Company (R-2) through its independent power plant.

(c) The Distribution Company (R-2) agreed to purchase the same as per the terms stipulated. As per the PPA, the Distribution Company will make all out efforts so that their 220 KV dedicated transmission line is ready by July/August, 2007. In case, the 220 KV dedicated line is not ready by the time, then in that case, the possibility of availing power by the Distribution Company would be explored through the 220 KV lines of the Appellant routed through its Group Company.

(d) The adjustment of losses would be done as per the mutual agreement. Though the Distribution Company was to make all out efforts to complete its 220 KV dedicated transmission line within the time

frame, it failed to do so. Therefore, it was agreed that the power would be supplied by the Appellant to the Distribution Company (R-2) through the 220 KV lines of JSPL, its Group Company.

(e) Due to severe technical constraints, the Appellant was unable to supply more than 230 MW of power through the transmission lines. In view of the acute shortage of power faced by the Distribution Company, the Appellant has offered to supply the power to the extent possible but limited to 70 MW of power through the inter-state transmission system of Power Grid(CTU) through inter-state open access.

(f) The Appellant sent a letter to the Distribution Company on 8.4.2008 clarifying that since the power would be supplied to the Distribution Company through the Appellant's own transmission lines, the parties would have to mutually workout the cost of the implication of the same.

(g) In view of the said letter, a meeting was held on 18.4.2008 between the parties in which all the parties participated.

(h) In the said meeting, the request of the Appellant was recorded that even though the billing and account modalities for such power which would be supplied through the transmission line of the Appellant would be

governed by the Central Commission's Regulations, the UI charges may be borne by the Distribution Company since the Distribution Company failed to construct its own transmission line.

(i) In the minutes of the meetings, it was also recorded that the matter would be put-up before the Board for decision on this issue.

(j) Thereafter, several letters were sent by the Appellant to the Distribution Company with regard to UI charges. Since the PPA expired on 7.12.2008, the Appellant stopped the supply of power to the Distribution Company.

(k) Thereupon, the Distribution Company (R-2) submitted the proposed supplementary agreement by adding a provision in Clause No. 2.2 (C) of the Draft PPA that UI charges would be borne by the Appellant.

(l) Since this was objected to by the Appellant on the basis of the minutes of the meeting conducted on 18.4.2008, the State Commission by the Order dated 4.4.2009, approved the draft PPA subject to deletion of payment of the UI Charges to be made by the Appellant and directed that the parties may decide mutually about the liability on account of UI charges separately.

(m) Thereafter, the Distribution Company (R-2) in pursuance of the said Order sent a draft supplemental agreement for execution to the Appellant on 13.4.2009 but the provision on the aspect of the payment of UI charges was absent.

(n) Thus, the 3rd Supplemental PPA dated 23.4.2009 did not include any provision relating to the payment of UI charges.

(o) Aggrieved by this, the Appellant sent a letter bringing to the notice of the Distribution Company to provide a provision with regard to the liability to pay the UI charges to be borne by the Distribution Company instead of the Appellant and consequently to reimburse the UI charges paid by the Appellant.

(p) In pursuance of this letter, the Distribution Company constituted a committee to decide the issue regarding the claim for the reimbursement of UI Charges. However, this committee, after deliberations, rejected the claim of the Appellant. This was conveyed to the Appellant by the letter dated 22.1.2010.

(q) Aggrieved by this, the Appellant filed a Petition in Petition No.18 of 2012 before the State Commission for the directions to be issued to be issued to the

Distribution Company for reimbursement of the UI charges to the Appellant. The State Commission after hearing the parties, rejected the claim of the Appellant by the Impugned Order dated 12.7.2013.

(r) Hence this Appeal.

7. The learned Counsel for the Appellant has urged the following grounds assailing the Impugned Order:

(a) The State Commission erroneously held that the Appellant is not entitled for the reimbursement of the unscheduled interchange charges on the ground that the arrangements of the supply of power was governed by the Open Access Regulations issued by the Central Electricity Regulatory Commission. The supply of power by the Appellant to the Distribution Company has been effected under a special arrangement entered into between the parties on the express condition put forth by the Appellant to the effect that UI charges would be the liability of the Distribution Company.

(b) The question of supplying electricity to the Distribution Company (R-2) through the Appellant's 400 KV transmission line arises only because of the failure of the Distribution Company to construct its transmission line. The parties were fully aware that in

such a situation, UI charges are likely to be incurred on account of under injection of electricity. Under this contingency, the parties had agreed that UI charges would be borne by the Distribution Company.

(c) The view taken by the State Commission in the Impugned Order is inconsistent with its own order passed in the same subject matter dated 4.4.2009. In the said order, the State Commission itself directed the parties to workout the modalities regarding the payment of UI charges separately. Thus, it is clear that the State Commission itself was of the view that the instant arrangement would not be decided solely on the basis of the Open Access Regulations of the Central Commission.

(d) It is a settled principle of law that a person for whose benefit a statutory provision has been made can waive the right of benefit unless the statutory provision serves the public purpose or is in public interest. If the Distribution Company has agreed to pay the UI charges to the Appellant, the same would not in any manner be inconsistent with the public policy. Therefore, it shall be construed that the right of the statutory benefits had been waived by the Distribution Company.

8. On these grounds referred to above, the Appellant in this Appeal, is seeking for a direction that the Impugned Order dated 12.7.2013 be set-aside and the Distribution Company (R-2) be directed to reimburse the Appellant the UI charges for the period from 21.4.2008 to 7.12.2008.
9. In reply to the above grounds, the learned Counsel appearing for the Distribution Company as well as the State Commission in justification of the Impugned Order has elaborately argued that the grounds raised by the Appellant assailing the impugned order are not sustainable and the same are liable to be rejected as there is no infirmity in the reasonings given by the State Commission while rejecting the claim of the Appellant.
10. Having regard to the above rival contentions, the question as referred to above has arisen for consideration. The same is reiterated as below:

“Which is the party who is liable to bear the UI charges for the sale of power by the Appellant to the Distribution Company for the period from 21.4.2008 to 27.12.2008?”

11. We have heard the learned Counsel for the parties who argued at length on this question. We have given our thoughtful consideration to their respective submissions.

12. Before dealing with the issue raised in this Appeal, it would be worthwhile to refer to the findings rendered by the State Commission while rejecting the claim of the Appellant by the Impugned Order dated 12.7.2013:

“21. The petitioner power plant had connectivity with Central grid (CTU/PGCIL). In this case, since CSEB’s transmission line was not ready, it was agreed to procure the power from petitioner through inter-State transmission lines of Power grid(CTU) i.e. through inter-State open access. As inter-state transmission is regulated by Central Commission, it was decided not to adopt short-term power procurement modality and other conditions such as load factor which are specified for CPP’s/IPP’s of the State which supplied power through State grid. For power purchase by Board from petitioners company, it was only the short-term rates specified by this Commission, which was adopted. The maximum ceiling rates specified during that period was Rs 2.80/unit. For other CPP’s/IPP’s of the State, this rates varied according to load factor of supply by suppliers. But in the instant case, the petitioner company scheduled power at CTU, power grid system(injection schedule) for CSEB. The Board paid to petitioner for energy scheduled for it. In suo-motu petition no 19/2009(M), the Commission has ordered to decide about the liability of UI charges mutually. But any such mutual agreements had to be settled within the provisions of law, relevant Regulations and order.

When the power is transacted through inter-state transmission lines, the lines owned by CTU(Power grid), the power injecting utility and buying entity are categorized as regional entities. The injecting utility schedules its power at injection point of inter-state transmission system. The system operator, central

agency ,i.e RLDC finalizes injection schedule of injecting utility. As per allocations/entitlement, RLDC after deducting transmission losses of inter-State transmission lines, finalizes the drawl schedule for buyers/beneficiaries(regional entities). Deviations from the schedule in case of inter-state transmission are settled through UI mechanism. RLDC maintains central UI pool account. As per Indian Electricity Grid Code and Central Commission's relevant Regulations, the injecting utility is responsible for deviations from its injection schedule and drawing entity is held responsible for deviations from their drwal schedule. The respondent Board is correct in stating that applicable Central Commission's Regulations /IEGC do not specify any responsibility on beneficiary for the under injection by the generator.

22. The net drawl schedule of CSEB comprised of power from CGS, short-term procurement from inter-State traders and petitioners scheduled power. The Board was responsible only for deviations from its net drawl schedule. A UI mechanism cannot operate between a single generator and single buyer(beneficiary). Alternatively ,it can be said that a UI mechanism cannot operate between specified generator and specified buyer (beneficiary). UI mechanism can be operated in integrated transmission system only i.e. between number of generators and number of buyers in the integrated power system. The petitioner is a member of regional UI pool. If there was under-injection by the petitioner from its injection schedule, then it has to pay UI charges to RLDC. If there was over-injection at certain times, then petitioner may have received UI charges from regional UI pool. Similarly, if there was under-drawal by the respondent from its drawl schedule, then it has received UI charges from RLDC. If there was over-drawal at certain times, then respondent may have paid UI charges to regional UI pool. The

Board paid to petitioner for energy scheduled by petitioner for the Board at Rs 2.80/unit, irrespective of its actual injection. As it is case of power purchase through inter-State transmission system, it has to be governed through relevant Central Commission's Regulation/IEGC. UI mechanism is such that, any specific seller cannot claim UI charges for deviations from its schedule from a specified buyer to whom it has scheduled power. Accordingly, the claim of petitioner from respondent for UI charges is rejected.

The case is disposed of accordingly.”

13. The crux of the findings on the basis of the discussions rendered in the Impugned Order is as follows:

(a) The 70 MW power supply was being effected by the Appellant through inter-State open Access which was regulated by Central Commission. Therefore, short term power procurement modalities specified in the State for CPPs/IPPs with conditions such as load factor were decided not to be adopted; only the short term rates of Rs.2.80/unit specified by the Commission was adopted.

(b) When the State Commission has ordered the parties to decide the issue of UI charges payment mutually and separately, such mutuality was necessarily to be within the applicable law, rules and regulations. As per the Indian Electricity Grid Code and the relevant Regulations of the Central Commission,

the injecting utility (i.e. the Appellant in this case) was responsible for deviations from its injection schedule and the beneficiary (i.e. Respondent No.2 in this case) was not responsible for under injection by the Generator.

(c) UI mechanism did not operate between a specified generator and a specified buyer. It operated on an integrated transmission system only i.e. between number of generators and number of buyers in an integrated power system. Respondent No.2 paid to the Appellant for energy scheduled at Rs.2.80/-unit irrespective of actual injection. Therefore, whenever there was deviation from the schedule by way of under-injection, the Generator was liable to bear UI charges as per the mechanism set out in the Central Commission's Regulations.

14. The above finding rendered in the impugned order would indicate that the State Commission proceeded on the legal premises as per the applicable Regulations i.e. the Central Commission's Regulations and rejected the UI charges claim of the Appellant for the under injection done by it from the scheduled power under the PPA.

15. Now let us go into the question framed in this Appeal in the light of the reasonings given in the Impugned Order.

16. The Appellant being an independent power plant entered into a Power Purchase Agreement with the Distribution Company (R-2) for the sale of 300 MW of power generated from the Appellant's plant to the Distribution Company. As per the PPA, the Distribution Company would make all efforts for evacuation of power through its 220 KV dedicated transmission lines from the Appellant's plant to its sub stations to receive the power from the Appellant. It was agreed in the PPA that 220 KV dedicated transmission line would be made ready by July/August, 2007 by the Distribution Company.
17. In the very same PPA, it is stated that in case the said line was not ready within the time frame, after the Appellant's power plant became operational, then the possibility of availing power by the Distribution Company was to be explored through the 220 KV line of the Appellant routed through its group company namely Jindal Steel and Power Limited. Thus, under the PPA, the option of routing power from the Appellant's group company line was under the mutually agreed arrangements between the parties.
18. The agreed modalities have been referred to in Clause 7.01 of the PPA. The said Clause is as follows:

“.....In this case, the metering will be done on the existing 220 KV feeder between CSEB 220 KV S/S and 220 KV S/S of M/s. JSPL for the time being. The

adjustment of losses in this case would be done as per mutual agreement. The modalities of power supplied in that case would be decided subsequently.....”

19. The above clause would indicate that the manner of adjustment of losses and modalities of power supply would be done later by mutual agreements.
20. Admittedly, the construction of 220 KV direct line by the Distribution Company was not completed by the time the Appellant's first unit of plant became commercially operational.
21. In view of the above, in accordance with the Clause 7.01 of the PPA, the Distribution Company agreed to avail power from the Appellant through 220 KV line belonging to the Group Company of the Appellant till the direct 220 KV line by the Distribution Company was completed.
22. To formalise the above arrangements, the Appellants and the Distribution Company entered into a Supplementary PPA dated 9.1.2008. This Agreement would show that the parties had agreed to the following modalities:
 - (a) The rate of power purchase up to 31.3.2008 would be Rs.2.80 per unit for power supplied at 85%. Beyond 31.3.2008, the above load factor and the rate of power would be applicable as per the decision of the

State Commission regarding fixation of the rate of purchase.

(b) The accounting of power export from the Appellant's plant to the Distribution Company (R-2) through 220 KV JSPL line and the modality on losses calculation was also agreed to in detail.

23. These arrangements contemplated under Clause 7.01 of the PPA were thus, mutually agreed to and reduced into writing between the Appellant and the Distribution Company.
24. Admittedly, the supply of power from the Appellant's plant to the Distribution Company commenced through JSPL transmission line on 8.12.2007 itself. Due to the technical constraints, the Appellant was unable to supply more than 230 MW of power. Since, the 220 KV direct transmission line was not yet completed, the Appellant through letter dated 27.3.2008 suggested that its 400 KV D/C dedicated transmission system to Power Grid Sub-Station could be used for availing the balance power of 70 MW under the PPA.
25. In pursuance of the same, a meeting was held on 18.4.2008 between the Distribution Company and the Appellant. In that meeting, the Appellant submitted that under contingency condition due to less injection by the Appellant, the UI liability for the charges was to be borne by the

- Distribution Company. The same was recorded in the minutes of the meeting. However, it was decided that the issue would be referred to the Electricity Board for ultimate decision.
26. Thereupon, the Appellant commenced the scheduling and supply of power through 400 KV line even before the final decision was taken by the Board.
 27. The above supply of 70 MW of power was under Short Term Open Access scheduled on a day ahead basis.
 28. During the period from 21.4.2008 to 7.12.2008, there was a consistent short fall in supply of scheduled power in full or in part by the Appellant.
 29. At this stage, through the letter dated 2.7.2008, the Distribution Company informed the Appellant that the competent authority had approved the accounting and billing modality towards purchase of 70 MW firm power from the Appellant through the 400 KV route under some conditions.
 30. However, the Appellant by the letter dated 12.7.2008 and 6.8.2008 accepted the part of the offer which was beneficial to its interest and rejected the other part which resulted in adverse financial implications. Thus, the billing modality for power being supplied through 400 KV route were yet to be finalised between the parties.

31. In the meantime, the Distribution Company continued to schedule the power on day ahead basis out of the 70 MW firm commitment of the Appellant and the Appellant continued to supply the said scheduled power though with substantial under injection.
32. During this period, the Distribution Company duly made payment to the Appellant for the power supplied to it. At this stage, no question of alleged reimbursement of UI charges for the under injection done was raised by the Appellant.
33. In the above scenario of uncertainty regarding UI payment liability, the Distribution Company forwarded to the State Commission for its ex post facto approval, a draft of supplementary PPA which consisted all the billing and scheduled modality for 70 MW of power supplied by the Appellant to the Distribution Company.
34. At this stage, the Appellant has raised the question of liability of UI charges to be borne by the Distribution Company.
35. In the light of the question raised by the Appellant, the State Commission gave an ex post facto approval of the supplementary PPA subject to the deletion to the provision regarding UI charges of Clause 2.2 of the Supplementary PPA.

“3.....The only point of difference between the two parties in so far as the present draft agreement is concerned, is the payment of UI charges.....”

4. As has already been mentioned, this PPA is only for ex post factor approval. It has already been given effect to on the conditions agreed between the two parties and now incorporated in the PPA except for the matter regarding UI charges. Both the parties agree that they would like to settle the matter regarding the liability of the UI charges separately. Accordingly, the proposed PPA is approved subject to deletion of provision regarding UI charges of Clause 2.2. The parties may decide about the liability of UI charges separately.”

36. In pursuance of the above Order, the Appellant and the Distribution Company (R-2) entered into a Supplementary PPA dated 21.4.2009 which incorporated the provisions prescribing the rates and modalities of power purchase for both 220 KV line and 70 MW through 400 KV line.
37. In that agreement, it was agreed that the supply of 70 MW of power would be governed by the Central Commission's Open Access Regulations and there was no other reference about the liability of UI charges.
38. The Appellant at this stage on 4.7.2009 sent a letter to the Distribution Company (R-2) demanding for reimbursement of UI charges as per the assurance given in the meeting on 18.4.2008.

39. In pursuance of this letter, the Distribution Company constituted a Committee to examine the said claim of the Appellant. Ultimately, the Committee after deliberations, decided in its report that under Open Access Regulations of Central Commission, there was no provision for sharing UI liability by the Distribution Company on account of under injection by the Generator and thus, the UI liability for under injection must be borne by the Appellant Generator. This decision taken by the Committee was conveyed to the Appellant by the letter dated 22.1.2010.
40. Aggrieved by this, the Appellant filed a Petition before the State Commission claiming for the reimbursement of the UI charges from the Distribution Company as agreed by the parties as per the applicable Open Access Regulations.
41. The State Commission after analysing the submissions made by the parties had come to the conclusion in the Impugned Order dated 12.7.2013 that the Appellant is not entitled to the reimbursement of the said UI charges as the arrangements for supplying power is governed by the Open Access Regulations of the Central Commission which requires UI charges for under injection to be borne by the Generator and not by the Buyer, the Distribution Company.

42. As against this Order, the Appellant has raised various grounds raised in this Appeal. One of the contentions of the Appellant is with regard to the Waiver of Right.
43. Let us first deal with the said ground.
44. According to the Appellant, the statutory benefit available to the Distribution Company as per the Open Access Regulations has already been waived as the Distribution Company has in fact, agreed to pay the UI charges to the Appellant.
45. With regard to the above point relating to waiver, the learned Counsel for the Appellant has cited the following two decisions rendered by the Hon'ble Supreme Court:
- (a) 1971 (1) SCC 619; Shri Lachoo Mal Vs Shri Radhey Shyam
 - (b) 2002 (4) SCC 316 Commissioner of Customs, Mumbai Vs Virgo Steels, Bombay
46. In these decisions the ratio has been decided that even though a provision of law is mandatory, the person who is beneficiary can waive such a right.
47. As pointed out by the learned Counsel for the Respondent, the above plea of the Appellant is completely untenable as the Distribution Company has never agreed to bear the UI charges liability and as such, the authorities cited by the Appellant would not apply to the present case.

48. As discussed above, though the Appellant has raised the point of liability of UI charges to be borne by the Distribution Company, it was decided in the minutes of the meeting that the said issue would be referred for the ultimate decision of the State Electricity Board and as such, the Distribution Company never agreed to waive its rights.
49. On the other hand, the Distribution Company as well as the Generator agreed to refer the issue for the final decision to be taken by the State Electricity Board. This would not amount to waiver.
50. Therefore, this contention urged by the Appellant has no basis and the same is liable to be rejected.
51. Now we will deal with the other issues.
52. The PPA dated 23.7.2007 read with Supplementary PPAs dated 9.1.2008 and 21.4.2009 had recorded the agreed terms for supply of power by the Appellant to the Distribution Company (R-2) for the period in question.
53. In these PPAs, there was no provision regarding the reimbursement of the UI charges to the Appellant.
54. On the other hand, it was clearly recorded in these PPAs that the supply of 70 MW power on short term basis would be governed by the Central Commission's Open Access Regulation. It cannot be disputed that the Appellant and the

Distribution Company, the Respondent are bound by the terms and conditions of the PPA executed by them.

55. According to the Appellant, there was a special arrangement by which the Distribution Company agreed to pay the UI charges to the Appellant. There is no basis for this contention. The materials available before the State Commission were the three PPAs one dated 23.7.2007 and other Supplementary PPAs dated 9.1.2008 and 24.1.2008. As per these PPAs, the supply of power on short term basis would be governed by the Open Access Regulations framed by the Central Commission.

56. It is settled principle of law that when the Agreements between the parties were written agreements, the parties were bound by the terms and conditions of the said Agreements. Once a contract was reduced in writing, it was not open to any of the parties to seek to prove the terms and contracts with reference to some oral or other documentary evidence to find out the intention of the party.

57. This principle has been laid down by the Hon'ble Supreme Court in the following judgments:

(a) Tamil Nadu Electricity Board & Anr Vs N Raju Reddiar: AIR 1996 SC 2025;

(b) Central Bank of India Ltd Vs the Hartford Fire Insurance Co Ltd (AIR 1965 SC 1288)

(c) Union of India Vs Kishori Lal ; AIR 1959 SC 1362

58. The crux of the ratio decided in these cases is as follows:

(a) It is the court's duty to give effect to the bargains of the parties according to their intention and when that bargain is in writing, the intention has to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court could do. The court must give effect to the plain meaning of the words however it may dislike the result.

(b) When the Agreement between the parties was executed through written Agreement, the parties are bound by the terms and conditions of the said Agreement. Once a contract is reduced into writing, by operation of Section 91 of the Evidence Act, it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. U/s 92 of the Evidence Act, where the written instrument appears to contain the whole terms of the contract, then parties to the contract, are not entitled to lead by oral evidence to ascertain the terms of the contract.

(c) When the words in the Agreement are clear and unambiguous, there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties.

59. The ratio decided by the Hon'ble Supreme Court in the above decision would squarely apply to the present case also.
60. The State Commission, being a statutory authority has to decide the matter in terms of the prevailing statutory requirements i.e. Central Commission's Open Access Regulations, 2008, applicable Indian Electricity Grid Code and UI Regulations. There is no provision in the above Regulations for liability of the UI charges to be settled between a specified Seller and specified Buyer.
61. In the light of the above ratio, the State Commission has correctly decided taking into account the Central Commission's Regulations as well as the wordings contained in the PPA and Supplementary PPAs.
62. One more contention urged by the Appellant is that the view taken in the Impugned Order by the State Commission is not consistent with its own Order earlier passed in the same subject matter on 4.4.2009 and in that order, the State Commission was of the view that the instant arrangements with regard to UI charges would not be decided solely on the

Open Access Regulations of the Central Commission but would be mutually agreed upon by the parties.

63. In order to deal with this ground, we shall now refer to the earlier Order passed by the State Commission on 4.4.2009. The Order dated 4.4.2009 relates to Ex Post Facto Approval on the request of the Distribution Company. The said Order is as follows:

“2. The facts of this case are that the then Chhattisgarh State Electricity Board (CSEB), the successor to which is the present petitioner Chhattisgarh State Power Distribution Company(CSPDCL), entered into an agreement with Jindal Power Limited(JPL) ON 23.3.2007, for purchase of 300 MW of power on certain terms and conditions(herein after the original PPA). The CSEB was to avail this power through its dedicated 2x220 KV line. However, since CSEB’s transmission line was not ready, it was agreed between the parties that 230 MW power would be supplied by the respondent through the lines of Jindal Steel & Power Company, of which JPL is a subsidiary, and the balance 70 MW through JPL’s dedicated 400 KV transmission line to PGCIL’s 400 KV sub-station at Kumhari, temporarily. Since the licensee had to use the Generating Company’s dedicated transmission line for availing this power, it was agreed to procure this power through Open Access and not to insist on other conditions such as load factor as in the original PPA. The then CSEB, and subsequently CSPDCL availed 70MW power from the Respondent without any supplementary PPA. After the lapse of almost a year, the Petitioner has now submitted a draft supplementary PPA for purchase of power, already been affected during the term of original PPA, which has since expired.

3. We have gone through the draft PPA and heard the parties. While the draft PPA was submitted to this Commission, it was expected that the draft would be as per the agreement between the two parties. It would appear that there was, in fact, a meeting held on 18.4.2008 between the then CSEB and the respondent company regarding availing power through 400 KV dedicated transmission line of JPL to Kumhari. A copy of the proceedings of the meetings has been submitted to the Commission by the respondent company. The petitioner does not deny the existence of the document. The draft agreement apparently has been prepared on the lines of the discussions in the meeting. The only point of difference between the two parties in so far as the present draft agreement is concerned, is the payment of UI charges. As per clause 2.2 of the draft PPA the liability of UI charges on this account shall be borne by the respondent company. The respondent does not agree to this condition and states that he had raised this issue in the meeting and it was then agreed that the matter would be put up to the Board for a decision. This was on 18.4.2008 and thereafter no decision has been conveyed to the Respondent Company. The UI liability has now, however, been included as that of the respondent company. The UI liability has now, however, been included as that of the respondent company. This is the only contentious issue in the draft PPA. Otherwise the PPA appears to be in order.

4. As has already been mentioned, this PPA is only for ex-post facto approval. It has already been given effect to on the conditions agreed between the two parties and now incorporated in the PPA except for the matter regarding UI charges. Both the parties agree that they would like to settle the matter regarding the liability of the UI charges separately. Accordingly the proposed PPA is approved subject to deletion of provision

regarding UI charges at clause 2.2. The parties may decide about the liability of UI charges separately.

5. The Commission's approval of the PPA may be conveyed to the parties and the case closed".

64. Though, this Order dated 4.4.2009, the State Commission directed deletion of provision regarding UI charges at clause 2.2 and asked both the parties to settle the matter regarding the liability to bear the UI charges between themselves separately. This means that the State Commission did not incline to go into the merits of the claim made by the Appellant with regard to the UI charges. This does not mean that the State Commission had taken the view that this issue could not be decided on the basis of the applicable Open Access Regulations.

65. Admittedly, in pursuance of the Order dated 4.4.2009, both the parties had various discussions regarding the liability to pay the UI charges.

66. After the said discussion, the Supplementary PPA dated 21.4.2009 was entered into between these parties. In that agreement, it was decided that the sale of power would be as per the provisions of the CERC Open Access Regulations. The relevant portion of the Clause is as follows:

“(1.2) The Company has offered 70 MW power to Licensee/CSPDCL through 400 KV line between JPL power station Raigarh and Power Grid Corporation of

India Ltd. Kujhari and Licensee/CSPDCL has agreed to purchase the said quantum of power through 400 KV link as stated above under Open Access Regulation w.e.f. 21.04.2008 subject to the provisions contained in the Electricity Act, 2003 and Rules made there under as applicable from time to time.”

67. This means that there was no agreement with regard to deletion of UI charges to be borne by the Appellant.
68. On the other hand, both the parties agreed to the Supplementary PPA dated 21.4.2009 where there was no reference about the mutual agreement over the liability for the UI charges.
69. In the absence of any agreement between the parties in regard to the above issues, the State Commission as a statutory authority is bound to decide the matter only in terms of the Central Commission's Regulations, 2008 and applicable Indian Electricity Grid Code.
70. Accordingly, the State Commission on the basis of the Grid Code and the Open Access Regulations of the Central Commission correctly decided that the liability to bear the UI charges only falls upon the Generator, the Appellant and not on the Distribution Company.
71. This conclusion arrived at by the State Commission on the basis of the applicable Open Access Regulations, in our view, does not suffer from any infirmity whatsoever.

72. Summary of Our Findings:

- i) **The liability of payment of UI charges on account of deviation in generation at the Appellant's power plant has to be according to the Central Commission's Inter-State Open Access Regulations, 2008 and the applicable Indian Electricity Grid Code in respect of the power supplied to the Distribution Company by the Appellant through the inter-state transmission system. According to these Regulations, the injecting utility i.e. the Appellant is responsible for deviations from its injection schedule and the drawing utility i.e. the Distribution Company is responsible for deviation from their drawal schedule. The Distribution Company was responsible only for deviation of its net drawal schedule which comprised of its combined drawal schedule from Central generation stations, traders, from the Appellant's power plant etc. UI mechanism does not operate between a single generator and single buyer. Accordingly, the liability of UI charges of the generator have to be borne by the Appellant. There was no specific agreement between the parties for**

bearing of the UI charges of the generator by the Distribution Company. As such, we do not find any infirmity in the impugned order of the State Commission.

73. In view of our above findings, there is no merit in the Appeal. Consequently, the Appeal is dismissed as devoid of merits.

74. However, there is no order as to costs.

75. Pronounced in the Open Court on this day of 30th June, 2014.

(Rakesh Nath)

Technical Member

Dated:30th June, 2014

REPORTABLE/~~NON-REPORTABLE~~

(Justice M. Karpaga Vinayagam)

Chairperson