

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 29th Apr, 2014

Present:

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

Appeal No. 95 of 2013

M/s. BMM Ispat Limited
No.114 Danapur Village,
Hospet Taluk,
Bellary District
Karnataka-583 222

... Appellant

Versus

- 1. Bangalore Electricity Supply Company Ltd.**
K R Circle,
Bangalore-560 001
- 2. The Power Company of Karnataka Limited.,**
Room No.501, 5th Floor,
KPTCL Building
Kaveri Bhawan, Bangalore-560 001
- 3. Karnataka Power Transmission Corporation Limited.,**
Kaveri Bhawan,
Bangalore-560 001
- 4. Karnataka Electricity Regulatory Commission,**
K R Circle, No.9/2, Mahalaxmi Chambers,
6th & 7th Floor,
M.G. Road,
Bangalore-560 001

Respondent(s)

**Counsel for the Appellant : Mr. Vishal Gupta
Mr. Kumar Mihir**

**Counsel for the Respondent (s): Mr. V Srinivasa Raghavan
Ms. Anupama Hebbar
Ms. Sumana Naganand**

J U D G M E N T

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

1. BMM Ispat Limited is the Appellant herein. Challenging the Impugned Order dated 7.3.2013 passed by Karnataka State Commission dismissing the Petition filed by the Appellant, this Appeal has been filed.
2. The short facts as referred to in the Appeal Memorandum are set out as follows:
 - (a) The Appellant is a Generating Company. It owns, operates and maintains two Co-Generation Based Power Plants each having a capacity of 25 and 70 MW respectively.
 - (b) Bangalore Electricity Supply Company Limited (BESCOM), the 1st Respondent, is the Distribution Licensee which is supplying electricity to the city of

Bangalore. The Power Company of Karnataka Limited, the 2nd Respondent, is the power procurer responsible for procuring power for various Distribution Licensees in the State of Karnataka.

(c) The Karnataka Power Transmission Corporation limited i.e. State Transmission Utility for Karnataka is the Respondent No.3.

(d) The Power Company (R-2) on 7.7.2011 issued a Request For Proposal (RFP) for procurement of power for the Medium Term for the period from 1.9.2011 to 15.6.2013 under Case-1 Bidding Procedure through tariff based competitive bidding process. The said Request For Proposal was issued for meeting the base load requirement of the Distribution Licensee.

(e) The Appellant accepted the said Request For Proposal through its letter dated 28.7.2011. On a query raised by the Respondent, the Appellant sent a letter dated 4.8.2011 clarifying that they had necessary permission to evacuate the required quantum of power through the existing 220 KV transmission line and that they satisfy all requirements and conditions as required by RFP.

(f) Thereupon, the Power Purchase Agreement was entered into between the Appellant and the

Distribution Licensee (R-1) on 27.8.2011 agreeing for supply of power by the Appellant to the Distribution Licensee for the period from 1.9.2011 to 15.6.2013.

(g) Under the said PPA, the total contracted capacity agreed to be supplied by the Appellant to the Distribution Licensee was 30 MW. Out of the said 30 MW, 12 MW was to be supplied from the existing power plant of 25 MW and the balance 18 MW was to be supplied from the new Generating Plant having an capacity of 70 MW.

(h) Under clause 4.3.1 of the PPA, the procurer namely the Distribution Licensee shall ensure the availability of inter connection facilities and evacuation of the power from the Delivery Point before the Scheduled Delivery Date. However, the Distribution Licensee (R-1) failed to provide Inter-connection Facilities for evacuation of 30 MW power from the Appellant's Generating Plants as per the obligations contained in the PPA.

(i) Although the Appellant was ready to deliver the contracted capacity of 30 MW to the Distribution Licensee, due to failure of the Distribution Licensee in ensuring the availability of Inter-connection Facilities and evacuation of power from the Generating Plants

of the Appellants, the total quantum of 30 MW could not be supplied to the Distribution Licensee (R-1).

(j) The Appellant's plant i.e. 25 MW plant from which the Appellant was to supply 12 MW to the Distribution Licensee was already connected to the said line. The Appellant requested to grant connectivity of its 70 MW plant to the said line to supply the balance 18 MW from the new plant. But, the Respondent failed to provide Inter-connection Facilities for evacuation of 18 MW of power as per its provisional approval. Therefore, the Appellant was constrained to approach the State Commission on 22.8.2011 for giving suitable direction to the Transmission Company for providing Inter-connection Facilities to enable evacuation of 30 MW of power to the Distribution Licensee. The Appellant also filed an interim application seeking direction to the Respondents to provide synchronisation of the 70 MW plant and allow supply of power on the existing 220 KV LILO transmission line. Accordingly, the State Commission by the Interim Order dated 25.8.2011 directed the Transmission Licensee (R-3) to consider facilitating evacuation of additional 18 MW during the pendency of the said Petition. The Appellant on 09.1.2012 obtained the provisional approval from the

transmission company(R-3) for interconnection of 70 MW power plant for exporting total 75 MW power i.e. 63 MW from the proposed 70 MW Plant and 12 MW from existing 25 MW Plant on the existing transmission line.

(k) Although the Transmission Company (R-3) filed a Memo before the State Commission that it has granted provisional connectivity to the Appellant's Generating Station on 21.9.2011, the Respondent did not provide the Inter-connection Facilities.

(l) Under those circumstances, the Appellant was forced to supply only 12 MW of power to the Distribution Licensee.

(m) Only on 9.1.2012, the Transmission Company (R-3) granted a provisional approval for additional 70 MW Generation Plant for exporting total capacity of 75 MW.

(n) Thereafter, a MOU was signed on 21.1.2012 whereby the final Inter-connection/synchronization was effected on 21.1.2012.

(o) Despite the above position and the genuine difficulty being faced by the Appellant, the Distribution Licensee (R-1) deducted a sum of Rs.3,93,15,720/- from March, 2012 bill of the Appellant due to the short

supply which is the violation of the provisions of the PPA.

(p) Hence, the Appellant sent a letter on 28.4.2012 seeking for the refund of the said reduction made by the Distribution Licensee. In response to the said letter, the Distribution Licensee (R-1) sent a reply on 30.4.2012 informing the Appellant that the deduction of Rs.3,93,15,720/- from the bill of March, 2012 was due to the default on the part of Appellant's side for supplying less than 85% of the contracted capacity during the year as per Clause 4.2.5 of the Schedule-4 of the PPA.

(q) Thereupon, the Appellant sent a legal notice to the Distribution Licensee demanding for the refund and informing that there was no default on its part. Despite the receipt of the notice, there was no response. Therefore, the Appellant filed a Petition in OP No.33 of 2012 on 23.6.2012 for seeking refund of the alleged wrongful deductions as well as claiming penalty from Distribution Licensee in failing to provide Inter-connection Facilities for evacuation of power.

(r) The Respondent filed a Statement of Objections before the State Commission justifying the said deductions by stating that the evacuation facilities

were already available and despite that, there was a short supply.

(s) The State Commission ultimately, after hearing the parties by the Impugned Order dated 7.3.2013, dismissed the said Petition filed by the Appellant.

(t) On being aggrieved by this Order, the Appellant has filed this Appeal.

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

(a) The State Commission wrongly held that it was Appellant's fault in not interconnecting its additional plant of 70 MW. In fact, it was established before the State Commission that the Appellant's plant could not be connected to the Grid due to the inaction on the part of the Transmission Company (R-3) in granting connectivity to additional grant of 70 MW to its transmission system. The Appellant could not connect its additional plant of 70 MW to the said transmission system due to the reasons beyond its control. Therefore, there was no occasion for the Distribution Licensee to penalise the Appellant for the same by way of the unlawful deduction.

(b) The PPA does not provide for levying of penalty for short supply of power by the Generating Station. If

the short supply was due to the reasons which cannot be attributed to the Appellant, there cannot be any penalty. Therefore, the State Commission could not uphold the wrongful recovery of the penalty from the Appellant.

(c) The obligations of the parties under the PPA were in the nature of reciprocal promises. Therefore, it was the duty of the State Commission to examine whether the Distribution Licensee was ready with its Inter-connection Facilities for taking-off balance of 18 MW of power. However, the State Commission did not care to ask the Distribution Licensee to provide information and data to establish that the interconnection facilities which were required to put in place by the Distribution Licensee were ready and functional. The State Commission merely held that when the Generating Station was not connected to the Grid, there was no need for the Distribution Licensee for providing interconnection facilities and as such, the levy and recovery of penalty from the Appellant was valid. This finding is wrong.

(d) It was not a case where the power was not available with the Appellant for supplying to the Distribution Licensee. The power was available with the Appellant but could not be supplied to the

Distribution Licensee due to the failure of the Transmission Company (R-3) to grant its connectivity with the Transmission system. The Appellant could not have incurred such a huge monetary loss for the inaction of the Transmission Company (R-3) to fulfil its obligation and duties cast upon it under the provisions of Electricity Act, 2003.

4. On these grounds, the learned Counsel for the Appellant seeks to set aside the Impugned Order.
5. In reply to the above submissions of the learned Counsel for the Appellant, the learned Counsel for the Respondents strenuously contended that the State Commission is perfectly justified to hold that short supply of power was due to the Appellant's default in not ensuring that their new 70 MW plant was synchronized to the Grid prior to the Scheduled Date of Delivery and all the Obligations of the procurer could arise only after the Delivery Point and discharge of obligations of the Sellers.
6. The learned Counsel for the Respondents would further contend that no allegations were made as against the Transmission Company by the Appellant either in the Petition or in the oral hearing before the State Commission as it is not a party to the new PPA but now new plea has

been raised in this Appeal as against the Transmission Company.

7. In the light of the above rival contentions, the question of law which may be framed in this Appeal are as follows:

(a) Whether the Distribution Licensee the Respondent-1 could levy and recover penalty from a Generating Company, the Appellant on the alleged short supply of electricity despite the fact that Distribution Licensee being fully aware that short supply was not due to the fault of the Generating Company?

(b) Whether the State Commission was right in not looking into the aspect as to whether the inter connection facilities to be provided by the Distribution Licensee were ready in order to find out that the reciprocal promise in the PPA by the Distribution Licensee have been fulfilled?

8. Before dealing with these questions, it would be worthwhile to refer to the discussion and findings contained in the Impugned Order passed by the State Commission on these aspects.
9. In the Impugned Order, the State Commission framed three questions.

10. We are only concerned with the 2nd Question which is this:
“Whether the Petitioner BMM Ispat Limited is entitled for the refund of penalty levied and collected by the power company of Karnataka Limited”?

11. Let us quote those discussions:

“ISSUE No.2:

11) The case of the Petitioner is that the 1st Respondent failed to ensure availability of interconnection facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date as per Article 4.3 of the PPA, because of which it could not fully supply the electricity undertaken to be supplied by it under the PPA. Therefore, the penalty levied and collected by the 1st Respondent on the ground of short-supply is not valid and legal.

12) In order to appreciate the case made out by the Petitioner, we have seen Article 4.3 of the PPA. The said Clause reads as under:

“4.3 Procurer’s Obligations

4.3.1 Subject to the terms and conditions of this Agreement, the Procurer(s) shall:

(a) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date.

XXX XXX XXX “

13) In order to understand what is the obligation of the 1st Respondent as per the above provision, it is necessary to refer to the following definitions in the PPA :

“1.1 Definitions

‘Delivery Point’ shall mean the STU Interface(s) as specified in Schedule 1 of this Agreement;

‘Injection Point’ shall mean the 220 KV LILLO between Ittagi and Lingapur of KPTCL Grid (Schedule 10 of this Agreement);

‘Interconnection Facilities’ shall mean the facilities on the Procurers’ side of the Delivery Point for receiving and metering the electrical output in accordance with this Agreement and which shall include, without limitation, all other transmission lines and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and, subject to Article 6, Metering System required for supply of power as per the terms of this Agreement;

‘Interconnection Point’ shall mean the point where the power from the Power Station switchyard bus of the Seller is injected into the interstate/intrastate transmission system (including the dedicated transmission line connecting the Power Station with the interstate/intrastate transmission system);

‘Scheduled Delivery Date’ shall have the same meaning ascribed in Article 4.1 of this Agreement;

‘State Transmission Utility’ or ‘STU’ shall mean the Board or the Government Company notified by the respective State Government under Sub-section (1) of Section 39 of the Act;

XXX XXX XXX “

14) When Article 4.3.1 of the PPA is read in conjunction with the Definitions extracted above, it

becomes clear that the obligation of the 1st Respondent will come into question only if the Petitioner interconnects its additional 70 MW generating plant also to the Delivery Point (as the existing plant had already been connected to the Grid). From the documents produced by the Petitioner, viz., the Official Memorandum dated 28.6.2011 (Annexure-P11) of the Chief Electrical Inspector to Government, the provisional interconnection approval for the 70 MW generating plant dated 9.1.2012 (Annexure-P12) granted by the 3rd Respondent and Respondent No.1's letter No.BESCOM/GMPP/BC-39/DGM-1/F-3080(B)/11-12/4924-26, dated 20.1.2012 (Annexure-P16), it is evident that the said additional generating plant of 70 MW capacity of the Petitioner was not connected to the Grid and was synchronized to the Grid only on 21.1.2012. This is supported by the declaration of capacity made by the Petitioner (Annexure-R3 of the Objection Statement of the Respondents). It is observed that on no hour of any day before 21.1.2012, the declaration was more than 12 MW and only subsequent to 21.1.2012, the date of synchronization of the generating plant of 70 MW to the Grid; it was increased to 30 MW. Once the Petitioner had not connected its additional plant to the Interconnection Point of the STU, the question of the 1st Respondent ensuring availability of interconnection facilities from the Delivery Point for that additional plant would not arise. Therefore, the Petitioner cannot excuse itself from performing the Contract on the ground that the 1st Respondent had failed to fulfil its obligation of ensuring availability of interconnection facility from the Delivery Point.

15) It is contended on behalf of the 1st Respondent, relying on Article 4.2.5 of Schedule-4 of the PPA that the Petitioner is liable to pay penalty as provided therein, since the Petitioner failed to supply the

required quantity of electricity. It is an admitted fact that the Petitioner did not supply the required quantum of electricity undertaken in the PPA. Having failed to get its Plant interconnected with the STU network and supply the required quantity of electricity undertaken in the PPA, in our view, the Petitioner is liable to pay penalty as provided in Article 4.2.5.1 of Schedule-4 of the PPA. Consequently, we hold that the action taken by the 1st Respondent in levying and recovering the penalty is in accordance with the provisions of the PPA, and valid and legal. Accordingly, we answer Issue No.2 in the negative and against the Petitioner.

12. The above discussion would show that the plea of the Appellant before the State Commission was that the Distribution Licensee failed to ensure availability of interconnection facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date as per Article 4.3 of the PPA and because of the said failure, the electricity could not be supplied as undertaken to be supplied by the Appellant under the PPA and that therefore, the penalty levied by the Distribution Licensee on the ground of short supply is not valid.

13. Thus, it is clear that the main allegation urged by the Petitioner/Appellant before the State Commission only

against the Distribution Licensee and not against the Transmission Licensee, the 3rd Respondent.

14. In the Impugned Order, the State Commission categorically held that the complaint was not maintainable as against the Power Company of Karnataka, the 2nd Respondent since the contractual relationship of the Petitioner for supply of electricity was only with the Distribution Licensee, the 1st Respondent and not with the second Respondent.
15. Thus, the entire blame was put on the Distribution Licensee alone before the State Commission. The State Commission as quoted above dealt with the said point and held that under Article 4.2.5 of Schedule-4 of the PPA, the Petitioner (Appellant) was liable to pay penalty in as much as the Petitioner failed to supply required quantity of electricity. In fact, the State Commission, after analysing the materials placed before it, came to the conclusion that the objection of the distribution licensee would come into question only if the Appellant inter connects its additional 70 MW power plant to the delivery point but the same was connected and synchronized to the Grid only on 21.1.2012. On the basis of this conclusion, the State Commission held that once the Petitioner had not connected its additional plant to the interconnection point of the State Transmission Utility, the question of the Distribution Licensee ensuring availability of

interconnection facilities from the Delivery Point for that additional plant would not arise.

16. Keeping these findings in our mind, we shall now discuss both the issues framed above together as they are inter connected.
17. This is a case of short supply of power under a Power Purchase Agreement dated 27.8.2011 between the Appellant and the Distribution Licensee (R-1) to supply 30 MW of power. Out of 30 MW of power the Appellant supplied only 12 MW from the plant of 25 MW capacity.
18. Subsequently, the Appellant put up another plant of 70 MW capacity out of which, the balance 18 MW was to be supplied to the Distribution Licensee. But this was not connected to the Grid before 21.1.2012 which led to the present dispute.
19. Admittedly, for the period from 1.9.2011 till the synchronization of the 70 MW power plant to the Grid, the Appellant only supplied 12 MW power to the Distribution Licensee out of the contracted capacity of 30 MW.
20. In view of the above, the Distribution Licensee imposed a penalty on the Appellant for short supply of power in view of the provisions under Clause 4.3 of the PPA.

21. At the outset, it shall be stated that the PPA was entered into between the Appellant and the Distribution Licensee (R-1) only. Admittedly, the Transmission Licensee (R-3) was not a party to the PPA. As per Clause 4.3 of the PPA, the obligation of the Distribution Licensee was to ensure the availability of interconnection facilities and evacuation of power from the Delivery Point onwards. Admittedly, this Obligation had been complied with long back in the year 2010 itself.

22. As per the PPA, it was the obligation of the Appellant to ensure that its new 70 MW plant was connected to the Grid. Only then the balance 18 MW could be exported. Since up to 75 MW could be exported through the existing 220 KV LILO transmission line and the contracted capacity was 30 MW, there was nothing further that the Distribution Licensee was required to do. Thus, the short supply of power was entirely due to the fault of the Appellant since it failed to get timely approvals to ensure connection of the 70 MW unit with the Grid. Therefore, the Appellant failed in its obligation to procure all necessary clearances and connections before the commencement under the PPA. Admittedly, this was only done by 21.1.2012.

23. In fact, the Appellant before the State Commission specifically alleged that the defaults had been committed by the Distribution Licensee (R-1) by failing to provide

necessary interconnection facilities. This contention was rejected by the State Commission by observing that the interconnection facilities were very much available in the year 2010 itself. Now in this Appeal, the Appellant has not raised the said contention as against the Distribution Licensee, the 1st Respondent.

24. Now in the Appeal, the Appellant for the first time without making any such allegation as against the Distribution Licensee, the 1st Respondent made a specific allegations against the Transmission Company (R-3) contending that there was a delay on the part of the Respondent-3 in giving approvals. Thus, the contention urged in this Appeal is completely different from the contention urged before the State Commission.

25. As indicated above, absolutely there is no merit in this contention in view of the fact that it was the Appellant who was at fault for not getting necessary approvals in time.

26. Article 4.2 of the PPA makes it clear that it is the Appellant's obligation to obtain all consents, clearances and permits and to maintain them as per the terms of the Agreement. In other words, it is the Appellant's obligation to ensure commencement of power. Admittedly, this was not done by the Appellant as its additional 70 MW plant was not connected to the Grid. Since this obligation of the Appellant was not discharged, it was due to the Appellant's default, its

plant was not connected to the Grid in time. In fact, the Scheduled Delivery Date for supply of power was on 1.9.2011 but the Appellant started supplying the entire contracted capacity of 30 MW only from 24.1.2012.

27. As indicated above, the main argument that was urged by the Appellant before the State Commission was that the Distribution Licensee had failed to provide interconnection facilities for evacuation of power from the Delivery Point.
28. The definition of the term interconnection facilities has been provided in the PPA. This definition is as under:

‘Interconnection Facilities’ shall mean the facilities on the Procurers’ side of the Delivery Point for receiving and metering the electrical output in accordance with this Agreement and which shall include, without limitation, all other transmission lines and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and, subject to Article 6, Metering System required for supply of power as per the terms of this Agreement”.

29. In the light of this definition, the State Commission has observed in the Impugned Order that this obligation would arise only upon the Appellant actually interconnecting its 70 MW power plant to the Grid.
30. The PPA is very clear to the fact that all the obligations of the Seller have to be discharged first and then the procurer’s responsibility would arise only after the Delivery Point and

after discharging all the obligations of the seller as per Clause 3.1 and 4.2.1 of the PPA.

31. In other words, it is the seller's obligations to secure all necessary consents, clearances and permits prior to the Scheduled Delivery Date. The Distribution Licensee's obligation to provide transmission linkages under Clause 3.2 would only arise after the Appellant had performed its obligations and ensured synchronization of its plant to the Grid. This is evident from the reading of Clause 4.1.2 of the PPA. This provides that the seller shall give the procurer and the concerned RLDC/SLDC at least 30 days advance preliminary written notice and at least 15 days advance final written notice for commencement of power. This would make it clear that the Seller/Appellant had to perform its obligation in time.

32. Admittedly, at no time before 24.1.2012, the Appellant did the schedule delivery of 30 MW of power as required under the PPA.

33. The materials available on record as correctly observed by the State Commission that the interconnection facilities were available from the beginning. The Appellant was exporting 12 MW of power right from the commencement of scheduled date of supply on the existing 220 LILLO Transmission Line. The evacuation approvals clearly state that the existing LILLO

transmission line had the capacity to evacuate up to 75 MW. As such, there was no requirement for additional interconnection facilities in view of the fact that the 70 MW plant had to be connected to evacuate the power through the same line.

34. As indicated above, the Appellant obtained the Interim Order from the State Commission in OP No.33 of 2011 directing the Transmission Company to provide synchronization through the existing line for up to 75 MW. Therefore, there was no system constraint for evacuating the remaining 18 MW power that was required to be supplied by the Appellant.

35. As indicated above, the evacuation approval had been granted for up to 75 MW. Further a fresh evacuation approval was also granted on 21.9.2011 for evacuation of the entire contracted capacity. However, the Appellant commenced supply of power only on 24.1.2012. This shows that the Appellant's argument that the Distribution Licensee had failed to perform its obligations under the PPA is misconceived.

36. The learned Counsel for the Appellant has now contended in this Appeal that, it is both the Distribution Licensee (R-1) and the Transmission Licensee (R-3) who are obligated to provide timely interconnection facilities for the plant. This

version is completely different from the earlier version. In the Petition before the State Commission, as mentioned earlier, the Appellant contended that interconnection facilities as defined in the PPA were not provided by the Distribution Licensee. But the stand taken before this Tribunal making allegations against the Respondent-3, the Transmission Licensee, is completely different.

37. As mentioned above, the PPA had been signed by the Appellant only with the Distribution Licensee. Therefore, no claim as against R-3 could be made in this Appeal since it was not a party to the PPA.

38. Once an evacuation approval is granted, it is the sole responsibility of the seller i.e. the Appellant to ensure that all the pre-requisites for interconnection with the Grid are made available subsequent to which an interconnection approval is granted. As mentioned earlier, the evacuation approval had been granted as early as on 2.8.2010 and again on 3.8.2010.

39. At this juncture, it is pertinent to refer to the undertaking given by the Appellant to the Respondent on 4.8.2011 on a query by the Respondent which is reproduced below:

“ **UNDERTAKING**

Dated 04.08.2011

BMM ISPAT Ltd has participated in Bid Process of procurement of 500 MW Power RTC from 1st September, 2011 to 15th June, 2013 floated by Power Company of Karnataka Limited. Our bid is very competitively prices as know during opening of financial bid on 3rd August, 2011.

During the interaction with Managing Director PCKL with other PCKL officials on 3rd August, subsequent to opening of financial Bid we were told to clarify regarding the Evacuation Status of our power plant at BMM ISPAT Ltd.

We would like to clarify that we have presently 220KV LILO of Lingapur Ittagi KPTCL Transmission Line at BMM Ispat Ltd which was commissioned in 2006 and we are exporting 12MW power to Indian Energy Exchange through same line. We have open access for 12 MW power to IEX valid upto 31st August, 2011. We are permitted to evacuate additional 63MW (Total 75MW) Through Same Line. We have offered 30 MW power in response to the Bid by PCKL which is well below the our exportable evacuation capacity of 75 MW on 220KV LILO on Ittagi Lingapur line which is our interconnection point as per our Bid.

We hereby undertake to supply 30 MW of power to the procurer and satisfy all requirements and conditions as required by Request for Proposal (RFP) Document and as per the Power Purchase Agreement including execution of Contract Performance Guarantee for 30 MW Power committed by us in the Bid. We would also like to state that we will furnish any other information/Undertaking if required by PCKL in this regard.

Enc: 1: Evacuation approval of 75 MW KPTCL letter No. CEE(TA&QC)/SEE(Plg)/EE(Plg)/KCO-93/26249/F-473/ 4518-28 dated 02.08.2010 for Evacuation of 75 MW Power (addition 63 MW + Existing 12 MW).

2.CEIG Approval No.CEIG/EI-1/AEI-1/BLY-40/7949-54 dated 28.6.2011

3. Letter by KPTCL No. CEE (TA&QC)/SEE (Plg)/EE (PSS)/KCO-93/36996/F-473/4430-33 Dated 03.08.2010 stating that new line to be constructed for power evacuation above 75MW and up to 75 MW is allowed in Existing LILO.

4. *Standing clearance/No objection Certificate NOC No. CEE/SLDC/KPTCL/EE/AEE-3/302/2011-12 dated 31.07.2011 issued by State Load Despatch Centre, KPTCL for Open Access of 12 MW Power Valid up to 31st August, 2001.*

(Sd/-)

*(Rajesh Naik)
Additional General Manager
BMM ISPAT Limited*

40. By the above undertaking, the Appellant confirmed that they are permitted to evacuate total of 75 MW through the existing 220 KW LILO of Lingapur Ittagi KPTCL Transmission line at BMM Ispat Ltd and also enclosed a copy of evacuation approval by KPTCL for additional 63 MW over and above the existing 12 MW. The Appellant should have obtained necessary approval for interconnection of the 70 MW generating unit to the KPTCL system much in advance of the expected date of synchronization of the unit to carryout testing, commissioning and trial operation of the unit before declaring its commercial operation and before submitting its bid against the RFP floated by the Respondent No.2. The bus bars of the Plant of the Appellant was already connected to the existing 220 KV transmission line of KPTCL and the Appellant needed only the permission to connect its 70 MW unit to existing system. In our view, the Appellant failed to take advance action to obtain the necessary interconnection approval from KPTCL.

41. Admittedly, the Appellant did not start supplying the contracted capacity till 24.01.2012. From this, it is evident that on the day when the Appellant bid for the PPA and on the Scheduled Delivery Date, they were actually not in a position to supply the power.
42. As stated above, obtaining all necessary consents and approvals was the sole obligation of the Appellant. It should have been done prior to the Scheduled Delivery Date. In fact, there was no plea in the Petition that the cause of short supply of power was for the reasons beyond the Appellant's control. The only allegations made in the Petition were that the Distribution Licensee had failed in its obligation. There was no allegation for the alleged fault as against the Transmission Licensee. Now, it is for the first time that such a contention has been raised in this Appeal as against the Transmission Licensee.
43. As per the Order of the State Commission in OP No.22 of 2011, a provisional approval dated 21.9.2011 was provided. Subsequently, the said Petition was disposed of. Admittedly, the Appellant did not object to OP No.22 of 2011 being disposed of by raising all these contentions regarding interconnection facilities as against the Transmission Licensee.

44. According to the Appellant before the State Commission, the interconnection facilities were not granted. But in the present Appeal, the Appellant has admitted about the grant of interconnection facilities but there was a delay in its plant being connected to the Grid and that delay was not due to the default of the Appellant but due to the fault of the Transmission Licensee. As mentioned earlier, this is entirely new plea which sought to be raised now.
45. The Appellant has now sought to contend that they were all along ready to supply power. This is misconceived as there is no proof to establish this.
46. As admitted by the Appellant, they did not schedule more than 12 MW of power until 24.1.2012. Even assuming that the Appellant's plant was capable of generating requisite power, it does not mean that it has got the capacity to generate since it involves within it, the existence of necessary connection and approvals.
47. Under those circumstances, it has to be held that the State Commission has correctly concluded that the Appellant was not ready to commence the supply of power as required under the relevant clauses of the PPA since its 70 MW plant was not connected to the Grid due to the failure on the part of the Appellant to obtain all necessary approvals.

48. So, the Distribution Licensee, having done its duty and having provided the interconnection facilities to the Appellant is entitled to expect delivery of power. When the power had not been supplied up to contracted capacity, the Distribution Licensee is entitled to impose the penalty under the contract. Even prior to submitting its bid and signing the PPA, the Appellant should have ensured that all the connections and approvals were in place. Having not done so, the Appellant cannot escape from the liability.

49. Accordingly these issues are decided as against the Appellant.

50. **Summary of Our Findings**

(a) **Even before entering into PPA for supply of power to the Distribution Licensee, the Appellant by an undertaking dated 4.8.2011 had informed the Distribution Licensee that they had necessary permission for evacuation of additional 63 MW (total 75 MW) on the existing 220 KV transmission line of KPTCL on which they were already exporting 12 MW from the existing 25 MW plant and they satisfy the conditions of RFP. Thus no additional transmission infrastructure was required**

for supply of power from the 70 MW power plant of the Appellant. The Appellant had only to obtain the inter-connection approval to connect its 70 MW unit to the existing transmission system of KPTCL.

(b) The Appellant has failed to obtain necessary interconnection approval for its 70 MW from KPTCL which was its obligation as per the PPA. This approval should have been obtained by the Appellant much in advance of the expected date of synchronization of the 70 MW unit to enable timely testing, commissioning and trial operation of the unit before declaring its commercial operation and before submitting its bid for supply of power against the RFP floated by the Respondent No.2.

(c) The Appellant was not ready to commence supply the contracted power from its 70 MW power plant until 24.1.2012. Accordingly, the Appellant is liable to pay penalty as per the terms of the PPA.

(d) Thus, the State Commission's order dated 7.3.2013 which does not suffer from any infirmity is liable to be confirmed.

51. In view of the above findings, there is no merit in the Appeal.
Consequently, the same is dismissed.

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

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 29th Apr, 2014

√REPORTABLE/~~NON-REPORTABLE~~