Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 23rd March, 2012

Present: HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Appeal No. 118 of 2010

In The Matter of

Magnum Power Generation Limited
48/12 Commercial Centre,
Malcha marg, Chanakyapuri,
New Delhi 110021 …Appellants

Versus

1 Haryana Electricity Regulatory Commission
Bays 33-36, Sector 4
Panchkula, Haryana 134109

2 Haryana Power Purchase Centre
Shakti Bhawan, Sector – 6
Panchkula, Haryana 134109

3 Uttar Haryana Bijli Vitran Nigam Ltd.
Shakti Bhawan, Sector – 6
Panchkula, Haryana 134109

4 Dakshin Haryana Bijli Vitran Nigam
Shakti Bhawan, Sector – 6
Panchkula, Haryana 134109

5 Haryana Power Generation Limited
Shakti Bhawan, Sector – 6
Panchkula, Haryana 134109 …Respondents

Appeal No. 13 of 2011

In The Matter of

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48/12 Commercial Centre,
Malcha marg, Chanakyapuri,
New Delhi 110021 …Appellants

Versus

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6 Haryana Power Generation Limited
Shakti Bhawan, Sector – 6
Panchkula, Haryana 134109 …Respondents

Counsels for the Appellants: Mr. M G Ramachandran
Ms. Radhika Arora

Counsels for the Respondents: Mr. Parag Tripathi Sr Adv
Ms Ruchi Gaur Narula
Ms. Nidhi Minocha for R-2
Mr. Sanjay Sen
Ms. Shikha Ohri
Ms. Surbhi Sharma for R-1

JUDGEMENT

Per Mr. V.J. Talwar, Technical Member

1 M/s Magnum Power Generation Limited is the Appellant. Haryana Electricity Regulatory Commission (State Commission) is the 1st Respondent. Uttar Haryana Bijli Vitran Nigam, 3rd Respondent and Dakshin Haryana Bijli Vitran Nigam, 4th Respondent are the distribution licensees in the state of Haryana. 2nd Respondent, Haryana Power Purchase Committee is a Joint Venture of 3rd & 4th Respondents and is responsible for bulk power purchase and sale to distribution licensees in the state of Haryana. 5th Respondent Haryana Power Generation Corporation Ltd. is the generation company wholly owned by the Government of Haryana. Respondent nos. 2, 3 and 4 being contesting Respondents are jointly referred to as Respondent in this judgement.

2 Aggrieved by the Impugned Order of the State Commission (R-1) dated 23.3.2010 wherein the State Commission has rejected certain claims of the Appellant arising out of Power Purchase Agreement (PPA) dated 12.8.1998, the Appellant has filed this Appeal before this Tribunal as Appeal No. 118 of 2010.

3 While the Appeal No. 118 of 2010 was pending before this Tribunal, a meeting was held on 12.11.2010 between the parties for reconciliation. The minutes of this meeting would indicate conciliation between the parties could not be reached and parties were to obtain certain clarification from the Commission. Accordingly, on 19.11.2010 this Tribunal directed the Appellant to seek clarification from the State Commission with reference to

amount payable towards deemed generation. In persuasion to this direction, the Appellant filed an application before the Commission seeking the clarifications. The Commission disposed off the said Application through an Order dated 13.1.2011. Aggrieved by this Order of the Commission, the Appellant filed another Appeal in Appeal No. 13 of 2011.

4 Since the issue raised in Appeal No. 13 of 2011 is similar in nature with one of the issues raised in Appeal No. 118 of 2010 and also due to the fact that Appeal No. 13 of 2011 is dealing with consequential orders in Appeal no. 118 of 2010, Common Judgment is being rendered in both these Appeals.

5 Brief facts of the case are as under:-

a. A Memorandum of Understanding was signed on 29.8.1995 between the Appellant and Haryana State Electricity Board (Predecessor Board of Respondent no. 2 to 5) for the Appellant to set up 25 MW Diesel Engine Power Project and supply of power generated to the Board. In pursuance of this MoU, the Appellant has set up a Diesel Generation Station of 25.2 MW comprising of 4 units of 6.3 MW each at Gurgaon in Haryana.

b. On 12.8.1998 a Power Purchase Agreement was entered into between the Appellant and the Board for the sale of power from the Diesel Engine Generation Plant set up by the Appellant. Immediately, thereafter i.e. between September 1998 and November 1998 all the four Units of the Appellant's Power Plants were tested, commissioned and synchronized with the grid. In terms of PPA Independent Engineering

Acceptance Tests certifying the successful commissioning of the plants were carried out. Based on these tests, the aggregate tested capacity of four units was found to be 22.68 MW or 191.72 Million Units per year at 100% Plant Load Factor. The results of these tests were accepted by the Board.

c. In the year 2000, Haryana State Electricity Board was unbundled in accordance with provisions of Haryana Electricity Reforms Act, 1999 and Respondents (R-2 to R-5) succeeded to the functions and assets of the Board.

d. All the four generating units of the Appellant were taken out for scheduled maintenance one by one during the year 2002-2003 as per Engine Manufacturers recommendation of 18000 running hours and as envisaged in Article 8 of the PPA. This resulted in reduced availability during the financial year 2002-03. After complete overhaul all the four units were capable of performing at full capacity and the Appellant had declared the full capacity availability.

e. On 12.8.2003, the Commission passed Tariff Order for the FY 2002-03. In this Order the Commission did not approve the purchase of electricity by Respondent Utilities from the Appellant for the financial year 2003-04 because of high variable cost. However, the Commission recognized that the fixed cost has to be paid to the Appellant in accordance with the provisions of the PPA.

f. The Respondent carried out a surprise check of Appellant's generating station on 16.1.2004. The plant was operated and

established its ability to generate equal to the declared availability of 21.2 MW.

g. One of the four units broke down on 31.10.2004 as a result of which the declaration of availability by the Appellant has been reduced to 15.3 MW from the other three units only.

h. On 10.5.2005 an Order was passed by the State Commission disallowing the purchase of electricity by Respondent Utilities from the Appellant's plant and directed the Respondent Utilities to renegotiate the PPA with the Appellant. Further, Respondent Utilities vide its letter dated 16.1.2006 suspended the PPA with effect from 10.5.2005. Thereafter, Respondent stopped scheduling of power from the Appellant's plant. However, on 10.9.2009 the Respondent gave generation schedule for purchase of power from the Appellant's plant.

i. The Appellant replied to the Respondent on 18.9.2009 that although the three units of the Appellant are in operational condition with appropriate maintenance, the plant would not be able to generate as stock of Furnace Oil had been exhausted. Since the Respondent had not been scheduling power since 10.5.2005 on the directions of the Commission, the Appellant did not recoup the stock of Furnace Oil. The Appellant further requested that the Respondent should rectify the default in the payment to enable the Appellant to purchase fuel stock, give commitment to schedule power and fulfil the terms and conditions contained in the PPA such as

opening of the Letter of Intent etc., whereupon the Appellant would generate and supply electricity.

j. At that stage the Appellant filed a petition before the Commission under Section 86(1)(f) of the Act for adjudication of dispute. In the proceedings for adjudication of dispute, the State Commission raised number of queries on the status of the Appellant's power plant.

k. The Commission passed the First Impugned Order on 23.3.2010 accepting the claims of the Appellant in regard to deemed generation but restricting it to declared availability during 2002-03. The Commission also rejected all other claims of the Appellant. Aggrieved by this Impugned Order (1st Impugned Order), the Appellant filed an Appeal being No. 118 of 2010 before this Tribunal.

l. During the pendency of the Appeal No. 118 of 2010, the Appellant filed an application before this Tribunal for interim relief for payment of amount for deemed generation as per the Impugned Order. On 19.11.2010, the Tribunal directed the Appellant to file an application before the State Commission for deciding the issue on the quantum of amount due to the Appellant as per the impugned Order dated 23.3.2010.

m. Accordingly the Appellant filed the said application before the Commission. The Commission passed 2nd Impugned Order on 13.1.2011 deciding on the quantum of the amount due from Respondents to the Appellant under 1st Impugned Order dated 23.3.2010. In this Impugned Order dated

13.1.2011 the State Commission held that the Appellant is not entitled for any payment of fixed charges on account of 'Deemed Generation' on the ground that the Appellant could not generate 100% of the Scheduled Power during any month throughout the concerned period.

n. Aggrieved by the 2nd Impugned Order of the Commission dated 13.1.2011, the Appellant has filed no other Appeal being No. 13 of 2011 before this Tribunal.

6 First we will deal with Appeal No. 118 of 2010

7 The Appellant has raised following issues in this Appeal for our consideration:

i). Payment of Capacity Charges towards Deemed Generation.

ii). Metering Issues.

iii). Deduction of amounts by the Respondents on account of fuel density.

iv). Interest on Delayed payment by the Respondent.

v). Return of Bank Guarantees.

vi). Miscellaneous Deductions.

8 Let us now discuss each of the above issues.

9 First issue for our consideration is **payment of Capacity Charges towards deemed generation** which relates to both the Appeals. In order to fully appreciate the import of the issue, it would be desirable to understand the concept of deemed generation and

payments which are admissible thereunder along with the relevant provisions of the Power Purchase Agreement entered in to by the rival parties.

10 Broadly speaking, Deemed Generation is the Apparent Generation which a generator was capable of generating but could not generate because of the reasons not attributable to the generator and includes backing down of generator by the procurer of power due to Low Demand. With a view to enable the generator to recover its annual fixed charges in the event when the generator could not achieve prefixed Plant Load Factor (PLF), it is entitled to recover capacity charges component of the applicable tariff for the shortfall of generation up to such prefixed PLF. Concept of Deemed Generation is applicable only where capacity charge component is payable on per unit basis. It is not applicable where capacity charge is paid on per month basis irrespective of actual generation. In the present case before us, the PPA provides that a fixed amount of Rs 1.29/unit would be payable as capacity charge and variable charges would be payable on actual basis. Article 8.2 read with Schedule 6 of PPA provides for the deemed generation. These provisions are reproduced below:

“8.2 Operation

(a) The HSEB shall issue daily Despatch Instructions directing the Company’s generating operator to comply with clause 5.2(a) of Schedule 6 but ensuring annual PLF of 75% failing which the Company will be compensated for the Constant Component of the tariff for the shortfall. The adjustment for PLF will be on semi-annual basis. However if in subsequent six months declared availability is not sufficient to achieve 75% PLF then the overall annual PLF shall be considered on the basis of declared availability over the year.”

Schedule 6 to the PPA read as under:

DESPATCH PROCEDURE

1. Availability Declaration
Magnum Power Generation Ltd. shall by not later than 10.00 hrs. each day, submit HSEB an Availability Declaration, prepared as a best estimate on good faith, in respect of an Availability Period during the following Schedule Day.
2. Failure to Submit
...
3. Confirmation of Availability Declaration
...
4. Revision of Availability Declaration

...

5. Generation Schedule

HSEB shall issue to the Company a schedule of its energy requirement with respect to the generation by the Power Plant during each Schedule day by 17:00 hrs on the preceding Day, provided that the Company had submitted an Availability Declaration containing all the necessary information by 10:00 hrs on such preceding Schedule Day. However, if HSEB is unable to furnish its energy requirements by the stipulated time of 17:00 hours on preceding day, the energy generated as per the availability declaration shall be deemed to be the energy requirement.

5.2 Each Generation Schedule will contain the following information in respect of each relevant Schedule day:

(a) The level of Active Power which the Power Plant is required to produce way of base load generation:

The level of 'Active Power shall be within (-) 10% (minus ten per cent) of the Declared Availability of that Schedule Day: subject to minimum of 75% of the contracted energy.

(b) HSEB shall ensure that the Power Station is dispatched as per the Generation Schedule given to the Company for the Schedule Day.

11 Perusal of the Article 8.2 and Schedule 6 of the PPA would reveal the following aspects:

a. The Appellant was required to declare its availability for the next day.

b. 2nd Respondent was required to issue daily despatch instructions to the Appellant.

c. Despatch instructions issued by the 2nd Respondent would be within (-)10% of the declared availability schedule given by the Appellant.

d. The 2nd Respondent to ensure that annual PLF of 75% failing which the Appellant would be compensated for short fall by way of payment of fixed charges.

e. However, annual PLF of 75% could be achieved only if the declared availability of the plant was more than 75%.

12 Before dealing with the contentions raised by the Learned Counsels of the parties, let us first examine the findings of the State Commission in the 1st Impugned Order dated 23.3.2010 which read as under:

> *"In view of the observations in the foregoing paragraphs it is difficult to discern a logical and consistent stand on the part of either of the parties. As per the declarations of MPGL year after year plant availability was shown to be less than 75% PLF and in one year i.e. 2003-04 suddenly it has been shown exceeding 75% PLF though actual generation was much less. The reason for low availability has been indicated by the claimant as not having sufficient availability of liquid fuel stock, frequent start-stop instructions from the respondent and disruption and occasional failure of grid. There has been no consistent stand on the part of the*

respondent either. Initially the stand was taken by the respondent that they were not under any obligation to purchase power if the petitioner does not demonstrate their ability to generate power to the extent of 75% of PLF. However, they carried on transactions with the petitioner even when the performance was of much lower PLF. Subsequently, the plea was taken that the Commission's order prohibited them to purchase power from the petitioner which, on detailed examination was not found to be based on facts. To confuse the matter further, both the parties compromised their stand by agreeing to certain principles i.e. performance factor as decided in the meeting dated 5.8.2003 between the parties on the basis of which claims were to be settled which were not even mentioned in the PPA.

After detailed deliberation, the Commission feels that to uphold the principle of deemed generation charges which is one of the cornerstones of the PPA executed between the parties, which, till now has not been formally put to an end, despite advice from the Commission for renegotiating the same from time to time; it would be appropriate to order payment of deemed generation on the basis of the following details:-

As per the generation data including data for plant availability for the years 2002-03 onwards furnished by petitioner, M/s MPGL in their filing and the data relating to the years prior to 2002-03 furnished by the respondent, it is amply clear that the plant's capacity to generate i.e. availability since beginning has been less than 75% of annual PLF i.e. 143.79 MU except during the year 2003-04. In the year 2003-04, the petitioner has suddenly shown the plant availability of more than 90% PLF which is undoubtedly an aberration in the data and this jump in availability has nowhere been explained. Hence, it cannot be accepted as true keeping in view the past and future performance data relating to the plant availability. Subject to acceptance / reconciliation with the figures from the respondent, it would be logical to ***accept the plant availability figure for the year 2002-03 as per petitioner's submission and keep the same for 2003-04 and 2004-05 up to Oct; 2004 as well, thereafter as one of the engines got damaged on 21.10.2004 admitted by the petitioner. Consequently, the plant availability during the remaining half of the year 2004-05 and during the year***

2005-06 became 3/4th of the availability during the year 2002-03.

Since the declared plant availability has been less than 75% of the annual PLF at 143.79 MU as per clause 8.2(a) of the PPA, the purchase obligation of 75% thereof would also correspondingly get reduced. Hence the generation schedule given by the respondent has to be compared with the reduced purchase obligation. Whatever is the shortfall between the two would be treated as deemed generation charges which the respondent will have to pay. This is subject to the condition that actual generation achieved from 2002-03 onwards on year to year basis upto 2005-06 was atleast equal to the generation schedule given by the respondent.

The deemed generation charges may be calculated in the light of the above observation from 2002-03 to 2005-06 on the basis of mutually accepted generation data. Net amount may be calculated after adjusting all the payments/adhoc payments/advances and charges for supply of electricity as start up power.

From 2006-07 there has been no commercial transaction between the parties. MPGL admitted in their clarification that they could not run the plant from 2006-07 onwards because of refusal of permission from the respondent for purchase of liquid fuel. It is not understood as to why permission is needed for purchasing liquid fuel to run the plant from the respondent as the same was not done in the earlier years nor was it stipulated in the PPA. Hence the Commission is not convinced regarding the capability of the running of the plant from 2006-07 onwards and consequently decides to ignore the expected unit generation figures submitted by the petitioner as per plant declared availability. The Commission has already elaborated its views on the point in the earlier paras. As per intimation of the petitioner the plant is lying closed at present and it would take five to six months to restart the same after receipt of part payment of the dues and other conditions."

13 The findings of the State Commission can be summarised as below:

i). To uphold the principle of deemed generation charges which is one of the cornerstones of the PPA executed between the parties, it would be appropriate to order payment of deemed generation.

ii). The plant's capacity to generate i.e. availability since beginning has been less than 75% of annual PLF i.e. 143.79 MU except during the year 2003-04.

iii). In the year 2003-04, the petitioner has suddenly shown the plant availability of more than 90% which is undoubtedly an aberration in the data and this jump in availability has nowhere been explained. Hence, it cannot be accepted as true keeping in view the past and future performance data relating to the plant availability.

iv). It would, therefore, be logical to accept the plant availability figure for the year 2002-03 as per petitioner's submission and keep the same for 2003-04 and 2004-05 up to Oct; 2004 as well, thereafter as one of the engines got damaged on 21.10.2004 admitted by the petitioner. Consequently, the plant availability during the remaining half of the year 2004-05 and during the year 2005-06 became 3/4th of the availability during the year 2002-03.

v). Since the declared plant availability has been less than 75% of the annual PLF at 143.79 MU as per clause 8.2(a) of the PPA, the purchase obligation of 75% thereof would also correspondingly get reduced. Hence the generation schedule given by the respondent has to be compared with the reduced purchase obligation. Whatever is the shortfall between the two would be treated as deemed generation charges which the respondent will have to pay.

vi). **This is subject to the condition that actual generation achieved from 2002-03 onwards on year to year basis upto 2005-06 was atleast equal to the generation schedule given by the respondent.**

vii). From 2006-07 there has been no commercial transaction between the parties. The Appellant had admitted that they could not run the plant from 2006-07 onwards because of refusal of permission from the respondent for purchase of liquid fuel. Such permission for purchasing liquid fuel to run the plant from the respondent was not stipulated in the PPA and was not sought for during earlier years.

viii). Hence the Commission was not convinced regarding the capability of the running of the plant from 2006-07 onwards and consequently decides to ignore the expected unit generation figures submitted by the petitioner as per plant declared availability.

ix). As per the intimation of the petitioner the plant is lying closed at present and it would take five to six months to restart the same after receipt of part payment of the dues and other conditions.

14 The Learned Counsel for the Appellant assailing the above findings in Impugned Order dated 23.3.2010 of the State Commission submitted the following contentions:

a. The deemed generation charges claim of the Appellant need to be considered for the period from 1.4.2002 onwards till the entire duration of the PPA i.e. till November 2013. This claim is to be considered for the period 1.4.2003 to 20.10.2004 for all the four units of the generating stations; from 21.10.2004

till 31.3.2006 for the three units of the generating station based on the declared available; and for the period from 1.4.2006 based on the capacity of the three units declared available during the past period in view of the suspension of the PPA by Respondent No. 2.

b. In terms of Article 8.2 read with Schedule 6 of the PPA it is clear that once the Appellant has declared availability of the generating units at a particular level and Respondent No. 2 asks for the quantum less than the declared availability, Respondent No. 2 is required to compensate the Appellant for the constant component of the tariff for the shortfall up to 75% PLF on an annual basis as deemed generation. The Appellant is to be compensated for such deemed generation by payment of the capacity charges notwithstanding that the Appellant is not required to generate electricity as Respondent No. 2 has not scheduled the quantum.

c. In the Impugned Order dated 23.3.2010 the State Commission had clearly held that the Appellant is entitled to deemed generation. However, after recording the above findings in favour of the Appellant in regard to the admissibility of the deemed generation charges, the State Commission has restricted the claim of the Appellant to declared availability during 2002-03 without any basis.

d. The issue before the State Commission was the validity of the declaration of availability given by the Appellant to Respondent Utilities. The fact that the availability declaration was made as per the provisions of the PPA by the Appellant

specifying the quantum in MW capacity is not disputed. It is also not disputed that Respondent No. 2 did receive the declaration from Appellant. There was no objection raised by Respondent Utilities at the relevant time as to the veracity of the quantum declared available by the Appellant or otherwise the capability of the Appellant's station to generate the quantum declared.

e. The State Commission has proceeded purely on surmises, and conjectures ignoring the relevant material available on record including unimpeachable evidence in support of the Appellant's case as stated hereunder.

f. While arriving at the conclusion to limit the deemed generation to the quantum declared available in the year 2002-03, the State Commission over-looked the basic fact that during the period 2002-03 the Appellant had undertaken the overhauling of all the four generating units/engines. This overhauling was done as per the equipment manufacturers recommendations after the machines had been run for a period of 18000 hours. During the period of overhauling of each of the four machines, the Appellant did not declare the availability in respect of the engines being overhauled during such period of overhauling. The quantum of electricity declared available during the year 2002-03 was, therefore, obviously less. This quantum cannot be taken as a representative quantum of declaration of availability for the subsequent periods. During the period from 1.4.2003 onwards till 20.10.2004 the Appellant had all the four engines available for generation after complete overhauling of the

machines. The Appellant was, therefore, in a position to generate electricity from all the four generating units after such overhauling to the maximum extent.

g. In terms of PPA, the 2nd Respondent has right to call upon the Appellant to demonstrate the capability to generate upto declared availability. In fact on 16.1.2004, the 2nd Respondent's representative made a surprise visit and called upon the Appellant to demonstrate the capacity of the machines to generate quantum of declared availability. The Appellant had duly established the capacity. The 2nd Respondent could have exercised this right of demonstration by the Appellant any time. When 2nd Respondent exercised such right the Appellant had duly demonstrated the capacity.

h. In view of the above, limiting the possibility of generation from the generating stations to the quantum of generation declared available during 2002-03 is patently erroneous and absolutely arbitrary and without any basis.

15 The learned Senior Counsel for the Respondent Distribution Licensees refuted the allegations made by the Appellant and submitted in reply as follows:

a. The Respondents entered into a contract with the Appellant for supply of contracted energy. The contracted energy calculated in accordance with the Schedule 3 of the PPA at 75% PLF works out to be 143.79 MU annually, which the Appellant had undertaken to generate in terms of Article 6.1 (j) & (k) of the PPA. The Respondents were bound to purchase a minimum of 75% of the contracted energy in

accordance with clause 5.2 (a) of the Schedule 6 of the PPA, i.e. the purchase obligation of the Respondent was only 107.84 MU, failing which the it would be liable to compensate the Appellant for the shortfall between the purchase obligation and the actual purchase made by the Respondent. However, the question of compensating the Appellant for shortfall in meeting the purchase obligation would arise only if the Annual Declared Availability by the Appellant was more than or atleast equal to the contracted energy. In case the Appellant does not declare its availability to generate the contracted energy to the Respondent, the Respondent cannot be saddled with the obligation to purchase 75% of whatever quantum is declared to be available by the Appellant. Therefore the minimum purchase obligation of the Respondent is linked to supply of the contracted energy by the Appellant.

b. The contention of the Appellant that the PPA does not provide for any minimum obligation to supply or that the Respondent is bound to schedule its energy requirement with reference to the declared availability of the Appellant is totally misconceived and ill founded. The parties right from the time they entered into the MoU dated 29.8.95 for setting up a power plant of 25 MW capacity envisaged a situation where the plant would always run at PLF above 75% or above, therefore, the provision was made for purchase of power at a PLF of 75% and above and not below 75%.

c. The main purpose of entering into a PPA with the Respondent was to have an assured supply of electricity and

the same has been reflected in Article 6.1 (j) & (k) of the PPA. Further, the Schedule 4 of the PPA provides for applicable Rate upto 75% PLF as also applicable Rate above 75% PLF. Therefore, the parties at the time of execution of the contract were contemplating generation above 75% PLF, which the Appellant failed to achieve. The obligation of the Appellant to run the plant at a PLF of 75% and the Respondent to issue dispatch instructions maintaining a PLF of 75% has been recognized by the Commission in the Impugned Order dated 23.3.2010.

d. The Appellant, from the inception, failed to supply contracted energy to the Respondent. This was inter alia due to the fact that the machinery installed in the plant by the Appellant was second hand and could not achieve the levels of generation that a new plant could have achieved.

e. The Appellant was obliged to declare availability in accordance with Clause 1 of Schedule 6 of the PPA on a best estimate and good faith basis. As per the Appellant's own admission in its letter dated 18.9.2009, it was not in position to generate on account of fuel being exhausted and it was not in position to procure fuel. The fact remains that the Appellant could not declare annual availability equal to contracted energy in any of the year with an exception of year 2003-04.

f. The Appellant had been mis-declaring its availability and was not actually capable of generating the declared power. In-fact the Appellant right from the very beginning never supplied the contracted energy to the Respondent. The PLF of the plant was in the range of 17% to 54% between years from 1998-2003. Further, the Appellant could never generate power equal to the schedule provided by the Respondent. It was due to this poor performance of the plant which compelled the State Commission to disbelieve the availability declared by the Appellant for the year 2003-04 and kept the plant availability achieved in the year 2002-2003 as the benchmark for the following years till Oct 2004 where after one of the engines had broken down.

g. The Appellant could achieve 100% of Schedule Generation only for 33 days during the year 2002-03. For 46 days its generation remained between 47.5% to 99% of schedule generation and for balance period of the year it could generate less that 47.5% of the Schedule Generation. The Appellant had submitted that it has overhauled its units in 2002-03 and has claimed that it was actually capable of generating what it had declared after the said overhaul. However, the performance record of the Appellant for the year 2003-04 remained very poor as it could generate only 27.49 MU against a Scheduled generation of 34.87 MU i.e. only 78.87%. This only shows that the Appellant has been misdeclaring its availability.

16 In view of rival contentions referred to above urged by the learned counsels for parties, following questions would arise for consideration:

i). Whether the PPA has any provision which obligated the Appellant to declare plant availability to certain minimum level to qualify for getting compensation against deemed generation?

ii). Whether the State Commission has rightly restricted the availability of generation plant to 2002-03 level ignoring higher declared availability during the year 2003-04?

iii). Whether the State Commission has rightly ignored the claim of the Appellant for deemed generation for the year 2005-06 and thereafter?

17 We shall now deal with each question one by one. The first question before us for our consideration as to whether the PPA has any provision which obligated the Appellant to declare plant availability to certain minimum level to qualify for getting compensation against deemed generation.

18 The Appellant has relied on interpretation of Article 8.2 read with Schedule 6 of the PPA. The Respondents have also relied on these two provisions and also on Article 6.1 (j) & (k) and Schedule 4 of the PPA. Article 6.1 deals with undertakings of the Appellant and Article 8.2 of the PPA deals with the deemed generation. Schedule 3 of the PPA defines the terms ‘Contracted Energy’ and Plant Load Factor (PLF) and Schedule 4 provides for the tariff

payable to the Appellant. Let us examine these provisions of the PPA.

19 Article 6.1 (j) & (k) which records the undertakings of the Appellant, reads as under:

> "6.1 Company Undertakings
>
> The Company hereby covenants and agrees with the HSEB Co:
>
> *(i). **Make available to HSEB** not later than the Required Syncronisation Date, **the Contracted energy** and the Contracted energy and the Contracted operating Characteristics of each Units; and*
>
> *(k) **Operate and maintain the Project so as to provide the HSEB with the Contracted energy** and the Contracted Operating Characteristics of the Units **reliably over the Term of this Agreement, taking into account permissible degradation**"*

20 Term Contracted Energy has been defined in Schedule 3 of the PPA which read as under:

"*Schedule 3*

DETERMINATION OF AVAILABLE CAPACITY

3.1 Formula for Contracted Electrical Output

Contracted Electrical output per year in Million KWh (MU)

$$= \frac{\{8760 \times 0.75 \times 1000)\ \{1\text{-AuxCons. }\%) \times \text{Tested Capacity in MW}}{1000000}$$

3.2 Annual Plant Load Factor (PLF) shall be calculated as under

$$\text{PLF }(\%) = \frac{\text{Actual electrical output at interconnection point in MU by the project} \times 100}{\text{Electrical output plant is capable of delivery at the interconnection point as Per tested capacity of the project.}}$$

Auxiliary Consumption = 3.5%

21 Although the Installed Capacity of the plant is 25.2 MW but its tested capacity is 22.5 MW only. Thus this tested capacity is to be adopted for determining the Contracted Capacity as well as the

Annual Plant Load Factor (PLF). Article 8.2 of the PPA provide for compensation to the Appellant in the form of payment of fixed component of the approved tariff if the plant the plant fails to achieve 75% PLF because of lesser scheduling by the Respondents. Article 8.2 of the PPA is reproduced below:

"*8.2 Operation*

(a) The HSEB shall issue daily Despatch Instructions directing the Company's generating operator to comply with clause 5.2(a) of Schedule 6 but ensuring annual PLF of 75% failing which the Company will be compensated for the Constant Component of the tariff for the shortfall. The adjustment for PLF will be on semi-annual basis. However if in subsequent six months declared availability is not sufficient to achieve 75% PLF then the overall annual PLF shall be considered on the basis of declared availability over the year."

22 Schedule 6 of the PPA lays down the procedure for declaration of plant availability by the Appellant and Scheduling of the Generation by the Respondent licensees on day ahead basis. Relevant portion of Schedule 6 is reproduced below:

6. DESPATCH PROCEDURE

1 Availability Declaration

Magnum Power Generation Ltd. shall by not later than 10.00 hrs. each day, submit HSEB an Availability Declaration, prepared as a best estimate on good faith, in respect of an Availability Period during the following Schedule Day.

2 Failure to Submit

...

3 Confirmation of Availability Declaration

...

4 Revision of Availability Declaration

...

5 Generation Schedule

HSEB shall issue to the Company a schedule of its energy requirement with respect to the generation by the Power Plant during each Schedule day by 17:00 hrs on the preceding Day, provided that the Company had submitted an Availability Declaration containing all the necessary information by 10:00 hrs on such preceding Schedule Day. However, if HSEB is unable to furnish its energy requirements by the stipulated time of 17:00 hours on preceding day, the energy generated as per the availability declaration shall be deemed to be the energy requirement.

5.2 Each Generation Schedule will contain the following information in respect of each relevant Schedule day:

(a)The level of Active Power which the Power Plant is required to produce by way of base load generation:

The level of 'Active Power shall be within (-) 10% (minus ten per cent) of the Declared Availability of that Schedule Day: subject to minimum of 75% of the contracted energy.

(b)HSEB shall ensure that the Power Station is dispatched as per the Generation Schedule given to the Company for the Schedule Day.

23 Clause 1 of this Schedule 6 requires the Appellant to submit day ahead Availability Declaration by 10:00 Hrs giving details of generation that would be available on the next day (Scheduled day). Clause 5 of this Schedule required the Respondent to issue by 17:00 hrs the Generation schedule for the Scheduled day. The Generation Schedule thus provided would indicate the level of generation in MW (active generation) the plant is required to run as

base load. Further, Active Power generation given in the generation schedule should not be less than 10% of the declared availability subjected to minimum of 75% of 'contracted energy'. i.e. 0.394 MU per day arrived at by using the formula given in Schedule 3 for determining annual contracted energy. Clause 5.2(b) mandates the Respondent to ensure that the power is generated on the Scheduled day as per the Schedule given to the Appellant.

24 Relying of these provisions the Appellant has contended that there is no provision in the PPA under which it is obligated to declare certain percentage of availability to claim deemed generation. According to the Appellant, he is entitled to deemed generation restricted to 75% of declared available capacity. In accordance with this contention the Appellant has made a claim of compensation against deemed generation as shown in the Table below:

YEAR	Plant declared availability **(Clause 1 of Schedule 6)**	Respondent's Obligation to take 75% Units of (A) (**as per Article 8.2)**	Generation Scheduled by the Respondent **(Clause 5 of Schedule 6)**	Shortfall Units for Deemed Generation
	A	B=.75xA	C	B-C
2002-03	135303538	101477654	96659881	4817773
2003-04	175719264	131789448	27475158	104314290
2004-05	136629925	102472444	75094324	27378120
2005-06	128737778	96553334	5927537	90625797
2006-07	129337020	97002765	0	97002765
2007-08	129691368	97268526	0	97268526
APR'08-DEC'08	97445700	73084275	0	73084275
G.TOTAL	932864593	699648446	205156900	494491546

25 From the Colum 3 of Table, it becomes clear that the Appellant has restricted its claim of deemed generation to 75% of Declared Availability purporting to be in accordance with Article 8.2. which provide for Respondent's obligation to purchase power upto PLF of

75%. It appears that the Appellant has misconstrued the term 'Electrical output plant is capable of delivery' used in denominator of definition of PLF given in Schedule 3 of the PPA as its 'Declared Availability'. Plant Load Factor is a standard term of Electrical Engineering and is defined as a ratio between actual generation during the period and the plant is capable to generate during that period i.e. maximum possible generation by the plant during the period. PLF is not a function of declared availability. It is explained by the following example:

> **Example:** Consider a generating plant of 1 MW capacity
>
> It is capable of generating 1 x 1000 x 8760 = 8760000 units or 8.76 MU in a year. If it generates 6 MU during the year, its annual PLF during that year would be 6/8.76 = 0.6489 or 64.89%.

26 Now let us analyse the Article 8.2 which has been relied upon by the Appellant as well as the Respondent. Clause 8.2 of the PPA read as under:

> "*8.2 Operation*
>
> *(a) The HSEB shall issue daily Despatch Instructions directing the Company's generating operator to comply with clause 5.2(a) of Schedule 6 but ensuring annual PLF of 75% failing which the Company will be compensation for the Constant Component of the tariff for the shortfall. The adjustment for PLF will be on semi-annual basis. However if in subsequent sis months declared availability is not sufficient to achieve 75% PLF then the overall annual PLF shall be considered on the basis of declared availability over the year."*

27 For better understanding of this Article, let us dissect this Article in three parts as under:

28 1st Part of the Article 8.2 of PPA is "the *HSEB shall issue daily Despatch Instructions directing the Company's generating operator to comply with clause 5.2(a) of Schedule 6 but* ***ensuring annual PLF of 75%*** *failing which the Company will be compensation for the Constant Component of the tariff for the shortfall."* This part of Article 8.2 provide that the Respondent would issue daily despatch instructions for generation to the Appellant and while doing so it will ensure that plant achieves annual PLF of 75% (in other words, it generates atleast 143.79MU i.e. the Contracted Capacity during the year). In case the Respondent gives lesser schedule and plant could not achieve annual PLF of 75%, the Appellant would be compensated for by making payment for fixed component of tariff for the short fall. It is important to note that the Respondent could not have schedule generation more than the declared capability as per Schedule 6 reproduced above. Thus for attaining annual PLF of 75%, the annual declared availability has to be equal to or more than 75% of tested capacity i.e. 143.79 MU. In case the Declared availability itself is less than 75%, annual PLF of 75% cannot be achieved.

29 2nd Part of the Article 8.2 of PPA runs as "*The adjustment for PLF will be on semi-annual basis."* Generally adjustment of PLF for determining deemed generation is done annually. In this case it is provided that adjustment of PLF would be done six monthly. The presence of this provision in the PPA would reflect that it was anticipated by the parties that Respondent could schedule generation quite low and there could be wide gap between declared availability by the Appellant and Scheduled Generation by the Respondent. Since the Appellant would be getting fix charge

component for the actual generation only till the adjustment in PLF is done, the Appellant may face cash flow problem during the year. In order to mitigate his problem of expected cash flow caused by low schedules, this provision of six monthly adjustment of PLF has been made.

30 The 3rd part of the Article 8.2 read as *“However if in subsequent six months declared availability is not sufficient to achieve 75% PLF then the overall annual PLF shall be considered on the basis of declared availability over the year.”* This provision has also been made to help the Appellant. It could be possible that the Declared Availability during 1st half of the year was much higher than 75% and the Respondents gave schedule less than 75%. Then the deemed generation compensation would be restricted to 75% only. However, during 2nd half of the year the declared availability fell down and become less than 75%. In that case the Appellant shall not be entitled to any deemed generation for that half of the year. However, in such cases Availability for the whole year would be considered and PLF Adjustment would be carried out accordingly. In other words, this provision has made the provisional adjustment of PLF after 1st half of the year and final adjustment of PLF after completion of the year. This can be explained by following example.

> Example: Suppose declared availability of the Plant during 1st half of the year was 80% and the Respondent gave Schedule for 60% only. The Appellant would be compensated for 15% (75%-60%) shortfall for six months. During 2nd half of the year, the Appellant declared availability at 70% only and the Respondent gave a schedule of 60%. The Respondent would not be entitled for any adjustment for this half as plant

availability was less than 70%. However, when PLF adjustment is done for the whole year, as per this provision, its annual availability becomes 75% and Scheduled generation for the whole year is 60%. The Appellant becomes entitled for 15% adjustment in PLF for the whole year. In real numbers the benefit to the Appellant would be almost double. This is illustrated in the Table given below:

Capacity of plant 1 MW. All fig. in MU

	Energy at 75% PLF	Declared Capacity	Scheduled generation	Deemed Generation
1st Half	3.285	3.504	2.628	0.657
2nd Half	3.285	3.066	2.628	0
Whole Year	6.57	6.57	5.256	1.314

31 If the contention of the Appellant that the PLF is the ratio between actual generation and his declared availability and he is entitled to deemed generation restricted to 75% of its declared availability is accepted, then the 3rd part of the Article 8.2 would become absolutely redundant. It would serve no purpose. There could not be any occasion where declared availability would fall short of 75% ‘PLF’ as ‘PLF’ itself would depend on the declared availability.

32 Therefore, 3rd Sentence of Article 8.2 makes it amply clear that this Article would become operative only when Declared Availability is more than 75%.

33 The above analysis of Article 8.2 would indicate that the Appellant was under obligation to make available the plant to generate atleast 143.79 MU at 75% PLF. This conclusion is supported by Article 6.1(j) & (k) under which the Appellant has under taken to supply the Contracted Capacity as defined in Schedule 3 of the PPA and works out to 143.79 for tested capacity of the Plant.

These provisions are reproduced below for better understanding and completeness.

> *(i). **Make available to HSEB** not later than the Required Syncronisation Date, **the Contracted energy** and the Contracted energy and the Contracted operating Characteristics of each Units; and*
>
> *(k) **Operate and maintain the Project so as to provide the HSEB with the Contracted energy** and the Contracted Operating Characteristics of the Units **reliably over the Term of this Agreement, taking into account permissible degradation**"*
>
> *3.1 Formula for Contracted Electrical Output*
>
> *Contracted Electrical output per year in Million KWh (MU)*
>
> $$= \frac{(8760 \times 0.75 \times 1000)\ (1\text{-AuxCons. }\%) \times \text{Tested Capacity in MW}}{1000000}$$
>
> = 8760 x 0.75 x 0.965 x 22.67 /1000 = 143.79 MU.

34 In the light of above analysis, we hold that the Appellant was under obligation to declare annual availability of the plant to atleast 75% of tested capacity so as to obtain an annual PLF of 75%.

35 Next question before us for our consideration is as to whether the State Commission has rightly restricted the availability of generation plant to 2002-03 level ignoring higher declared availability during the year 2003-04?

36 The Appellant has submitted that low availability during the year 2002-03 was due to overhauling of all the 4 machines during this year. After overhauling all the 4 machines were available to generate to full capacity and accordingly the Annual Declared Availability Factor for the year 2003-04 was higher. The Appellant further submitted that the State Commission has ignored this fact and has proceeded purely on surmises, assumptions and

conjectures ignoring the relevant material available on record including unimpeachable evidence in support of the Appellant's case.

37 Countering the contention of the Learned Counsel for the Appellant, the learned Counsel for the Respondents submitted that although the Appellant has claimed that all the 4 units were overhauled during the year 2002-03 and therefore his availability got improved during the year 2003-04, the records submitted by the Appellant would show the other way as the performance of the Appellant for the year 2003-04 remained very poor as it could generate only 27.49 MU against a Scheduled generation of 34.87 MU i.e. only 78.87%. This only shows that the Appellant has been misdeclaring its availability. The fact remains that the Appellant could never generate power equal to the schedule provided by the Respondent. It was due to this poor performance of the plant which compelled the State Commission to disbelieve the availability declared by the Appellant and kept the plant availability achieved in the year 2002-2003 as the benchmark for the following years till Oct 2004 where after one of the engines had broken down.

38 We have examined the issue in detail. The Appellant has claimed that he had overhauled its all the units during the year 2002-03 as per Table given Below:

PARTICULARS	**FROM**	**TO**	No of days of overhauling in the year 2002-03
ENGINE NO. 1	28.01.2002	5.5.2002	35*
ENGINE NO. 2	6.10.2002	10.11.2002	37
ENGINE NO. 4	18.11.2002	17.12.2002	30
ENGINE NO. 3	30.12.2002	8.3.2003	69

Total Numbers of Machine-days for over hauling	171
* between 1st April to 5th May	
Expected Declared Availability Factor	0.882877

39 From the above table, it can be noted that the machines have been taken for overhauling for 171 machine-days and the plant could have achieved Annual Declared Availability Factor (ADAF) of 88%. However, the plant could achieve only 61% ADAF during the year 2002-03. Further, the above table shows that all the four machine were available from 6th May 2002 to 6th October 2002. However, the daily generation data submitted by the Appellant shows that the Appellant did not declare full capacity of even from three machines (17 MW) during most of this period. Interestingly, the daily generation data submitted by the Appellant also reveal that the Appellant has declared full availability from all the 4 machines during the period from Feb 2000 to Oct 2004 only for 438 days out of 1735 days. These facts only reflect that there was some thing more than overhauling which resulted in low availability of the plant.

40 As regards declared availability for the year 2003-04, it is observed that the Appellant has submitted daily generation data for the months of April 03 to August 03 for 120 days only when the Appellant has declared full availability from all the four machines. No data has been submitted for rest of the year. Analysis of the daily generation data submitted by the Appellant revealed that the Appellant did generate electrical power to the full capacity as per demand of the Respondents. Analysis of the partial data evidenced the claim of the Appellant of having more than 90% declared availability during the period. Since the Appellant has not submitted daily generation data for the full year, it cannot be said that the

Appellant had achieved declared availability of 90% for the year 2003-04. But one thing is for sure, the claim of the Appellant of higher availability cannot be brushed aside as aberration. We, therefore, direct the Appellant to submit the daily generation data for the year 2003-04 to the State Commission and State Commission may carry out detailed analysis of the data to arrive at correct conclusion. The question is answered in favour of the Appellant.

41 Next question before us for consideration is as to whether the State Commission has rightly ignored the claim of the Appellant for deemed generation for the year 2005-06 and thereafter?

42 Admittedly there has not been any commercial transaction between the parties from 2006-07 onwards and the Appellant could not run the plant from 2006-07 onwards because of refusal of permission from the respondent for purchase of liquid fuel. The requirement of any permission of the Respondent for purchase of fuel to run the plant has not been stipulated in the PPA nor had been sought in the past when the plant was running. The Appellant has also admitted before the State Commission that the plant has been lying closed and would take five to six months to restart the same after receipt of part payment of the dues and other conditions. On these reasoning, the State Commission was not convinced regarding the capability of the running of the plant from 2006-07 onwards and consequently ignored the expected unit generation figures submitted by the petitioner as per plant declared availability.

43 The Learned Counsel for the Appellant submitted that the State Commission in the Tariff Order for FY 2002-03 dated 12.8.2003

and also in Tariff Order for FY 2004-05 did not allow the purchase of electricity from the Appellant's plant. In pursuance to these orders of the State Commission, the Respondent No.2 had suspended the PPA through its letter dated 16.1.2006 and did not schedule any power effective 2005-06. The Respondent was also not making any payment due to the Appellant. It was with this background the Appellant had written letter dated 19.8.2005 to the 2nd Respondent informing that in view of the decision taken not to purchase electricity from the Appellant, the Appellant had to cease to have arrangement with the transporters of fuel and it would take some time to re-arrange things as and when Respondent No. 2 decides to take power.

44 Per contra, the learned Senior Counsel for the Respondent submitted that the Appellant's claim that its engines are in absolute running condition since they have been regularly run for maintenance purposes in wholly incorrect. The Appellant has admitted that its stock of HSD used for keeping the engines in running condition expired in 2009 and it had refused to incur any further expenditure on running the plant therefore the plant would evidently have been shut for at least the past one and half year if not more. Even as on date, the Respondent vide its letter dated 20.6.2011 requested the Appellant to generate electricity in terms of clause 5.1 of schedule 6. However, the Appellant once again refused to supply any power stating that both the parties are required to maintain status quo in terms of Commission's order dated 22.1.2010. Thus, the Appellant being fully aware of its incapability to supply any power to the Respondent, yet it is insisting for deemed generation charges for the period 2006

onwards till 2013 (the expiry of the PPA) which shows nothing but malafides on its part.

45 Schedule 6 of the PPA prescribes detailed procedure for declaration of availability of power from the plant for the following day by the supplier and scheduling thereof by the procurer. Schedule 6 of the PPA read as under:

Schedule 6
DESPATCH PROCEDURE

1. Availability Declaration

Magnum Power Generation Ltd. shall by not later than 10.00 hrs. each day, submit HSEB an Availability Declaration, prepared as a best estimate on good faith, in respect of an Availability Period during the following Schedule Day.

2. Failure to Submit

If an Availability Declaration is not submitted to HSEB in respect of any Schedule Day in accordance with the terms of this Agreement, the Company shall be deemed to have submitted an Availability Declaration in the same terms as the most recent Availability Declaration made by it.

3. Confirmation of Availability Declaration

By 05.00 hrs. each day the Company shall submit to HSEB in written form by fax, confirmation of the Availability Declaration for that day or, if appropriate, such revisions to the Availability Declaration as may be necessary.

4. Revision of Availability Declaration

If at any time after the issue of an Availability Declaration circumstance should change such that the original or current Availability is no longer a best estimate made in good faith the Company shall:

(a) revisions to the data submitted to HSEB under paragraphs 1 to 3 :

(b) Notify HSEB in writing by fax as well as by telephone if any emergency occurs, of any revision to the previously submitted data; and

(c) Notify HSEB of any special circumstance of which affects the Availability Declaration.

5. Generation Schedule

HSEB shall issue to the Company a schedule of its energy requirement with respect to the generation by the Power Plant during each Schedule day by 17:00 hrs on the preceding Day, provided that the Company had submitted an Availability Declaration containing all the necessary information by 10:00 hrs on such preceding Schedule Day. However, if HSEB is unable to furnish its energy requirements by the stipulated time of 17:00 hours on preceding day, the energy generated as per the availability declaration shall be deemed to be the energy requirement.

46 Bare reading of this provision would indicate that in accordance with Para 1 & 2 of Schedule 6 of PPA, the Appellant was required to submit availability declaration by10.00 AM for following day **as a best estimate and in good faith**. If an availability declaration was not submitted to the Respondent in respect of any scheduled date in accordance with the terms of this agreement which the company shall be deemed to have submitted the availability declaration on the same terms as the most recent declaration made by it. Similarly, as per Para 5 of Schedule 6, the Respondent shall issue its energy requirement by 5.00 PM on the preceding day failing which the energy generated as per availability declaration shall be deemed to be energy requirement.

47 In terms of Clause 1 of Schedule 6 of PPA submission of Declaration of availability of plant for the following day in good faith

is the first basic requirement and is one of the corner stones of the PPA. The Appellant has admitted on three occasions that it could run the plant for one reason or other. Firstly, on 19.8.2005 it informed that Respondent that it has terminated fuel transportation agreement as no power was being purchased by the Respondent. Secondly, on 18.1.2009, the appellant, admitted that its stock of HSD used for keeping the engines in running condition was about to exhaust and that it was not in a position to replenish the same. Again on 20.6.2011 it refused to generate the scheduled power on the ground that the State Commission has directed to maintain the Status Quo as per the State Commission's Oder dated 22.1.2010.

48 From the above it is clear that the plant was not in position to generate power due to non-availability of fuel or otherwise. However, the Appellant continued to declare availability in terms of Schedule 6 to the PPA. Such an action on part of the Appellant cannot be said to be in good faith. Accordingly we do not find any ground to interfere with the decision of the State Commission on this issue.

49 Next **issue for consideration is related to metering**. According to the Appellant, the Respondent had deducted certain amounts on the basis of faulty meter installed by the Appellant. While the State Commission accepted the claims of the Appellant on this account, however it did not award any interest on the deductions made by the Respondent on this account.

50 Learned Counsel for the Appellant submitted that the logic employed by the State Commission for denied interest is not just flawed but is also in contravention of the established principles of

both law and the terms of the PPA. The Appellant is entitled to interest at the rate of 11.73% on this account.

51 On the other hand the Learned Senior Counsel for the Respondent submitted that 10% deductions from the energy bills were made as the meters installed by the Respondent were defective. After certain negotiations, the Respondent refunded the 5% of deductions made and it was agreed between the Appellant and Respondent that a correction factor will be worked out to find out the correct meter reading and the payment was to be adjusted in accordance therewith. However, the State Commission has ignored the understanding arrived at between the parties directed refund of balance 5% on the premise that the matter has been stretched too long between the parties.

52 The findings of the State Commission on this issue read as under:

> *"The State Commission has observed that the default and defect lies on both the sides although the check and main meters were accurate but due to inaccuracy in some of the CT and PT which feeds current and voltage signals to the meters, the readings of main and check meter did not tally. The matter has already been over stretched and in the circumstance of the case, the commission decides the with-held amount by the respondent may be released to the petitioner as even IIT Delhi may not have any correction factor in such cases at such a belated stage. No interest is allowed on this amount as the parties were frequently holding dialogue on the subject with the intention of settling the issue."*

53 The Appellant has claimed that since the meters installed by it were found to be accurate, the Appellant was entitled for full payment of the energy supplied by it. The Respondent had wrongly deducted 10% of the bill and therefore it is entitled for

interest on the amount. Perusal of the State Commission's impugned order would indicate that though the main and check meters installed by the Appellant and the Respondent respectively were accurate, the error in CTs and PTs installed by both the parties was found to be beyond the permissible limit. Under the circumstance the question would arise as to what constitute the 'Meter'. Whether error in CT or PT can be attributed to the meter? The answer would lie in the definition of Meter in Central Electricity Authority (Installation and Operation of meters) Regulations 2006 issued in accordance with Section 55 of the Electricity Act 2003. Regulation 2(p) of CEA's Regulation has defined the meter as under:

> *"2 (p) 'Meter' means a device suitable for measuring, indicating and recording consumption of electricity or any other quantity related with electrical system and shall include, wherever applicable, other equipment such as Current Transformer (CT), Voltage Transformer (VT) or Capacitor Voltage Transformer (CVT) necessary for such purpose;"*

54 Bare reading of definition of meter, reproduced above, would indicate that meter includes CT and PT. Therefore, any error on account of these equipments would be considered as the error of the meter. The claim of the Appellant that the meters installed by him were accurate is, therefore, not correct. Thus We do not find any ground to interfere with the decision of the State Commission on this issue.

55 The next issue relates to the **conversion of fuel quantity from** kiloliter **(KL) to Metric Ton (MT)** for purpose of Billing. As a rule all oil companies bill furnace oil in KL. However, As per PPA variable charges for the energy supplied is to be determined as per

quantity of fuel consumed in MT, KL had to be converted into MT. According to the Appellant, Conversion was required to be carried out from 15°C density to the density at 55°C using ASTM tables and use this density for conversion of KL to MT. However, the Respondent converted the density to the monthly average ambient temperature gathered from the Metrological Department instead of 55°C. As a result, the Respondent withheld an amount of Rs. 3,23,31,394/. The State Commission in the Impugned Order has allowed only 25 lacs on this account.

56 According to the Respondent the State Commission has rightly rejected the claim of the Appellant with regard to oil density as the same has been settled between the parties and payments for the same upto March 2003 to the tune of Rs. 2,25,56,299/- have been made in accordance with the understanding arrived at in the meeting dated 13.8.2002 and which had been admittedly received by the Appellant on the understanding arrived at in the meeting dated 13.8.2002 without any protest or demur. On the same basis the payment for the period from April 2003 to March 2004 was settled at Rs.25,00,000/-. The Respondent further submitted that the Appellant cannot be permitted to reopen payments for the period which it has already received in 2002.

57 The finding of the State Commission on this issue is reproduced below:

> *"The Commission has examined the case in detail. As per schedule 4 of PPA, the tariff is based on a formula using the cost of fuel by weight in metric tonnes and not by volume in kilo litre. The oil companies had been sending bills to the petitioner in Kilo Litre as a result the quantity of fuel in KL is required to be converted into MT for determination of*

variable part of tariff. The contention of the petitioner is that furnace oil is received by them at site at high temperature of 55°C to 70°C. Higher the temperature and lower is its weight because the density is lower at higher temperature. The standard density is given at 15^{0}C and therefore the density should be converted to 55°C by the respondents using ASTM tables. The respondent was converting KL to MT by converting density at 15°C at room temperature as per data collected from the MET Department. ***Both the parties discussed the matter with M/s Indian Oil Corporation who vide their letter dated 13.7.2000 and conveyed that conversation should be done at ambient temperature.*** *The petitioner agreed to this suggestion and the respondent also consented and has accepted a claim of Rs. 25.00 lacs as against a claims sent by the petitioner is Rs. 3,23,31,394/. This issue has already been settled and the Commission would not like to interfere in the matter."*

58 The claim of the Appellant is related to conversion of density of oil. According to the Appellant conversion should be done from 15°C to 55°C. However, the Respondent carried out conversion from 15°C to average monthly ambient temperature as per data gathered from the Indian Meteorological Department. In view of categorical opinion given by M/s Indian Oil Corporation vide their letter dated 1.3.2000 that the conversion should be done at ambient temperature, the methodology adopted by the Respondent for conversion of oil density appears to be correct and as such the claim of the Appellant is without any merit and is rejected.

59 The next issue relating to **<u>Local Area Development Tax</u>**

The Appellant has submitted that in terms of Article 6.4 of the PPA provides that any rents, taxes, cesses, fees on fuel and lubricant shall be considered as part of the landed cost and hence recovered through variable portion of the tariff. This includes Local

Area Development Tax (LADT) – state tax levied on entry of goods i.e. oil, coal etc. from other states into Haryana. The Appellant has contracted fuel Indian Oil Corporation's Refinery situated at Mathura in Uttar Pradesh. Therefore, LADT was a liability of the Respondent as per Article 6.4 of the PPA and the Respondent was bound to reimburse to the Appellant all amounts paid as LADT. Based on Respondent's instructions, the Appellant did not deposit the said tax on which the department claimed interest on delayed payment from the Appellant which the Appellant claimed for. Interest claimed by the Department is Rs.40,32,061/- paid by the Appellant. The State Commission in respect of this claim of the Appellant has not passed any order as according to the State Commission the matter is *sub-judice*.

60 Learned Senior Counsel for the Respondent submitted that the amount due towards LADT had already been paid by the Respondent to the Appellant. The only issue is about payment of interest for delay in making payment towards LADT. The issue of payment of interest is sub-judice before the Hon'ble High Court therefore, the Hon'ble Commission rightly did not decide the issue.

61 While adjudicating on the issue the State Commission has observed that the respondent had reimbursed the amount towards LADT to the Respondent, however, the claim of interest thereon was still pending. The State Commission observed that since the case is under litigation at present before the Hon'ble Supreme Court and the matter being subjudice, the Commission would not pass any order on this issue.

62 In view of the fact that the matter being subjudice in the higher court we are of the view that the State Commission has taken correct decision in not to pass any order.

63 This issue relate to **Interest on Delayed Payments** made by the Respondent. The Appellant had claimed interest at 11.73% on the delayed payments and the State Commission has ordered that interest will be paid as per provisions of PPA instead of 11.73 % as claimed by the Appellant.

64 The Learned Counsel for the Appellant submitted that the State Commission has completely ignored the fact that the rate of 11.73% has been adopted from the affidavit submitted by the Account officer of the Respondent before the Arbitral Tribunal which discloses the rate at which the Respondent has been borrowing from commercial banks.

65 The findings of the State Commission with regard to this issue are reproduced below:

> *"As per article 11.2(b)(ii) of the PPA, that if the parties do not resolve a dispute arising under clause 11.2(b)(i), within 10 days with the receipt of notice, either party may initiate procedure as set forth in article 16. Upon the resolution of dispute the amount if any shall be paid within 30 days together with interest at a rate charged by HSEB banks on working capital loans calculated from the due date of payment. The Commission orders that interest as per provisions of PPA may be paid by the respondents instead of 11.73% as claimed by the petitioner."*

66 Perusal of State Commission's finding and the contention of the Appellant would indicate that in fact there is no conflict. The State Commission has ordered that interest as per provisions of PPA may be paid. The PPA provide for payment of interest on LADF at

a rate charged by the banks from the Respondent on working capital. The Appellant has submitted that the rate of 11.73% has been adopted from the affidavit submitted by the Account officer of the Respondent before the Arbitral Tribunal which discloses the rate at which the Respondent has been borrowing from commercial banks. If so, there is no variance between the Appellant's claim and the State Commission's Order. Accordingly, we do not find any reason to interfere with the decision of the State Commission.

67 The next issue is relating to the **Return of Bank guarantee.** About this the Appellant has mentioned that at the time of signing of Memorandum of Understanding (MOU) with HSEB dated 20.8.1995 they had submitted a bank guarantee in favour of HSEB. On signing of the Power Purchase Agreement (PPA) the bank guarantee should have been returned to them as there is no provision in the PPA with regard to extension of bank guarantee submitted by the petitioner at the time of execution of MOU. After signing of the PPA the terms of MOU come to an end, hence, the respondent was not entitled to retain the bank guarantee anymore.

68 The State Commission after having examined the issue and checked up the records, has observed that the bank guarantee was not renewed after July 22, 2005 and hence the issue has lost its significance. Consequently, the State Commission refrained from passing any order or direction on this issue.

69 The grievance of the Appellant is that the Bank Guarantee in the present case was only issued upon providing margin money for the same to the bank by the Appellant and thus the margin money

can only be released by the Bank on submission of original bank guarantee.

70 In view of the submission of the Appellant that its margin money deposited with the bank can only be released upon return of Original Bank Guarantee and also in view of the admitted fact that the said Bank Guarantee has lost its significance, the Respondent is directed to return the original Bank Guarantee to the Appellant within thirty days from issue of this judgment.

71 In regard to the issue of **Miscellaneous Deductions.** The Appellant's case is that the Respondent has illegally deducted certain sums on account of miscellaneous deductions amounting to Rs. 1,44,73,434/-**.** The State Commission has curiously left the matter of miscellaneous deductions to be decided by the parties whereas the Appellant has already submitted complete details in respect of the same.

72 The State Commission has made the following findings on the issue

> *"The petitioner under this head has claimed a sum of Rs.1,44,73,434/- on account of illegal deduction and short supplies. The claim falls under quite a few heads relating to shortage in fuel supply, short supply of material by the third party to the power station, deduction of units from monthly bills, transportation charges, non release of LADT and not reimbursing the expenditure incurred on maintaining the standing equipments etc. the respondent while replying the charges have rejected the entire claim after giving their version of the case in respect of each claim. The Commission has tried to find out the details in this case on the basis of the material available in the file. However, it is felt that the documents are too sketchy and no detailed evidence are available on any of the claims from either side.*

Hence, the Commission finds it prudent to leave it to the parties to sort it out among themselves."

73 In view of the observations of the State Commission that the data related to the issue was inadequate and insufficient. The State Commission refrained from addressing the issue. We feel that the State Commission should have ordered the parties to submit the requisite data and addressed the data in correct perspective. We accordingly direct both the Appellant and Respondent to submit the full requisite data as required by the State Commission. The State Commission may then adjudicate upon the issue and give its final decision in the matter.

74 Now we will deal with the Appeal No. 13 of 2011. As mentioned earlier, during the pendency of Appeal No. 118 of 2010, the Appellant was directed to approach the State Commission to decide the quantum of the amount payable to the Appellant as compensation against the deemed generation. The State Commission in its' 2nd impugned Order dated 13.1.2011 held that since the Appellant could not generate the Scheduled power as required of it in terms of the State Commission's earlier Order dated 23.3.2010, the Appellant is not entitled for any compensation against deemed generation. Aggrieved by this order of the State Commission the Appellant has filed the present appeal no. 13 of 2011.

75 The learned Counsel for the Appellant submitted that the State Commission has wrongly held that the Appellant cannot be held entitled to any deemed generation if the actual generation is not equivalent to the generation schedule given by Respondent No. 2. He submitted the following grounds in support of his claim:

a. The Appellant had generated closer to 98%-99% of the generation schedule and this has not been disputed by the Respondent.

b. There is no provision in the PPA to the effect that if the actual generation is less than the generation schedule (marginally or otherwise), deemed generation will not be available.

c. The machine operates on 24 hour basis. It is not possible to maintain constant generation at 100% of schedule all the time. Some deviation from the Scheduled generation is bound to happen. The Respondent would not pay even the variable charges for any excess generation done by the Appellant over and above the Schedule.

d. Clause 5.2 (a) of Schedule 6 provides that the level of active power which the power plant is required to provide shall be within minus 10% of the declared availability of the scheduled day. It is also relevant to note that Clause 5.2 (a) has nothing to do with the right of the Respondent No. 2 to take quantum of declared availability by less than 10%. The obligation of the Respondent No. 2 to take 75% of the declared availability or pay constant component of capacity charges is absolute.

76 It would be important to examine the observations made by the Commission in its Orders dated 23.3.2010 and 13.1.2011. The relevant portion of State Commission order dated 23.3.2010 is reproduced below:

> *"Whatever is the shortfall between the two would be treated as deemed generation charges which the respondent will have to pay.* ***This is subject to the condition that actual generation achieved from 2002-03 onwards on year to***

year basis upto 2005-06 was <u>atleast</u> equal to the generation schedule given by the respondent.

77 The findings of the State Commission in its Order 13.1.2011 red as under:

> *"After considering the arguments put forward by MPGL and HPCC and after examining the various connected documents and keeping in view the terms and conditions of PPA, the Commission has come to the conclusion that the Commission's order dated 23.03.2010 is amply clear and elaborate based on sound reason. Any deviation from our earlier order brings about subjectivity element. Moreover, the request of the applicant to ignore the fractional deficit in the generation made by them as compared to the generation schedule given by HVPNL on year to year basis will amount to discretion. This will result in shifting from the technical parameters so elaborately discussed in our order. Hence, keeping in view the facts and circumstances of the case and after going through the remand order of the Hon'ble Appellate Tribunal dated 19.11.2010, the Commission is of the considered view that our earlier order on the subject is reasonable and does not lack clarity. Hence, no further clarification/modification is considered necessary."*

78 Perusal of the directions of the State Commission in the Impugned Order Dated 23.3.2010 would indicate that actual generation achieved during 2002-03 onwards had to be atleast equal to the generation schedule given by the Respondent. This direction of the State Commission has not been challenged by the Appellant in the Appeal No. 118 of 2010 before this Tribunal and, therefore, has attained finality.

79 There is no doubt that in real time, generation cannot be maintained at 100% of the desired level. Some deviation is bound to happen. Meters installed to record energy are of 0.2 class and

CTs & PTs installed are of 0.5 class which means that meter accuracy could be +/- 0.7%. Further, meter characteristics can vary from various system conditions such system frequency, voltage and in particular ambient temperature. However, in the present case we are not dealing with the generation in real time. The Commission has examined issue and concluded that the Appellant could generate power at 100% of Generation Schedule for the whole year. Even the Appellant, while claiming that it has generated power between 98% - 99% of scheduled generation, has submitted records on yearly basis.

80 Therefore, the question before us is as to whether it is possible to generate power at 100% of the desired level on yearly basis. Our answer would be affirmative. There would be no difficulty to maintain generation at 100% of desired level on yearly basis. More so when we could reconcile the generation data on daily basis. Any short fall in generation on particular period can be compensated by equivalent over generation during net period. The contention of the Appellant that any generation over and above the schedule would not be paid by the Respondent has no basis. Records submitted by the Appellant show that there were large number of days when the Appellant has generated more than 100% of the scheduled power. The daily generation data for 120 days of year 2003-04 submitted by the Appellant revealed that the Appellant has generated more than 100% of scheduled power on 85 days. The daily generation data also disclose that on 4.2.2002 the plant generated more than 130% of the scheduled power and 118% &110% on 1.1.2003 and 11.3.2003 respectively. The plant generated more than 2.95 lac units during the month of May, 2002.

These are only few examples of excess generation extracted from the data submitted by the Appellant himself. The Appellant could not substantiate his claim that he had not been paid for excess generation on these days. However, the Appellant could provide only one instance when the Appellant was not paid variable charges for excess generation pertains to 16.1.2004. The Learned Counsel for the Respondent explained that on that particular the Appellant was specifically directed not to generate any power as system demand had crashed and additional power was not required. There was no other occasion when the Respondent has deducted any amount on account of excess generation.

81 The contention of the Appellant that as per clause 5.2 of Schedule 6 of the PPA, he was entitled to generate upto -10% of scheduled power is totally misplaced. Clause 1 & 2 of Schedule 6 deals with declaration by the Appellant and clause 5 deals with Scheduling by the Respondent. Let us re-examine Clause 5 of the Schedule 6 to the PPA.

5 Generation Schedule

HSEB shall issue to the Company a schedule of its energy requirement with respect to the generation by the Power Plant during each Schedule day by 17:00 hrs on the preceding Day, provided that the Company had submitted an Availability Declaration containing all the necessary information by 10:00 hrs on such preceding Schedule Day. However, if HSEB is unable to furnish its energy requirements by the stipulated time of 17:00 hours on preceding day, the energy generated as per the availability declaration shall be deemed to be the energy requirement.

5.2 Each Generation Schedule will contain the following information in respect of each relevant Schedule day:

(a) The level of Active Power which the Power Plant is required to produce way of base load generation:
The level of 'Active Power shall be within (-) 10% (minus ten per cent) of the Declared Availability of that Schedule Day: subject to minimum of 75% of the contracted energy.

(b) HSEB shall ensure that the Power Station is dispatched as per the Generation Schedule given to the Company for the Schedule Day.

82 Perusal of the above clause would indicate that it was the duty the Respondent to give the Schedule of generation for next day. Such Schedule would contain information about 'Active Power' to be generated during the scheduled day and such 'Active Generation' can be minus 10% of declared availability. As a matter of fact Clause 5 of the Schedule 6 deals with the duty of the procurer (the Respondent) to give generation schedule and this clause has nothing to do with the Appellant.

83 In view of above, we find no ground to interfere with the conclusion of the State Commission.

84 Summary of Our Findings

a. Under provisions of the PPA, the Appellant was under obligation to declare annual availability of the plant to atleast 75% so as to obtain an annual PLF of 75% for getting compensation towards deemed generation. But one thing is for sure, the claim of the Appellant of higher availability cannot be brushed aside as aberration. We, therefore, direct the Appellant to submit the daily generation data for the full year 2003-04 to the State Commission and State Commission to carry out detailed

analysis of the data to arrive at correct conclusion. The question is answered in favour of the Appellant.

b. **The Appellant has admitted on three occasions that it could run the plant for one reason or other. However, the Appellant continued to declare availability in terms of Schedule 6 to the PPA. Such an action on part of the Appellant cannot be said to be in good faith. Accordingly we do not find any ground to interfere with the decision of the State Commission on this issue.**

c. **By definition CTs and PTs are part of meter. Therefore, any error on account of these equipments would be considered as the error of the meter. The claim of the Appellant that the meters installed by him were accurate is, therefore, incorrect. Thus we do not find any ground to interfere with the decision of the State Commission on this issue.**

d. **In view of categorical opinion given by M/s Indian Oil Corporation vide their letter dated 1.3.2000 that the conversion should be done at ambient temperature, the methodology adopted by the Respondent for conversion of oil density appears to be correct and the claim of the Appellant is without any merit and is liable to be rejected.**

e. **In view of the fact that the matter being subjudice in the higher court we are of the view that the State Commission has taken correct decision in not to pass any order.**

f. **There is no variance between the Appellant's claim and the State Commission's Order. Accordingly, we do not**

find any reason to interfere with the decision of the State Commission.

g. **The 2nd Respondent is directed to return the original Bank Guarantee to the Appellant within thirty days from issue of this judgment.**

h. **The parties are directed to submit the full requisite data relating to Miscellaneous Charges as required by the State Commission. The State Commission to adjudicate upon the issue and give its final decision in the matter.**

i. **There would be no difficulty to maintain generation at 100% of desired level on yearly basis. The contention of the Appellant that any generation over and above the schedule would not be paid, had not been substantiated by the Appellant.**

85 In view of our above conclusion the Appeal No. 118 of 2010 is partly allowed to the extent mentioned above. Appeal No. 13 of 2011 is dismissed as devoid of merits.

86 However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Date 23rd March 2012

Reportable/ ~~Not Reportable~~